19 c 5.

A

General Abridgment

OF

LAW and EQUITY

Alphabetically digeſted under proper TITLES

WITH

NOTES and REFERENCES

to the WHOLE.

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Favente Deo.

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G.R. III.

TO THE HONOURABLE

Sir WILLIAM CHAPPLE Knight,

ONE OF THE

Juſtices of the Court of King's Bench.

MY Work itſelf would reproach me, ſhould I let ſlip the Opportunity of addreſſing this Volume to You, to whom the Publication of it is in ſo great a Meaſure owing. I am with the Higheſt Senſe of Gratitude, and with the greateſt Reſpect,

Your moſt Oblig'd,

and moſt Obedient Servant,

Charles Viner.

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STOCKS.

(A) Caſes relating to Stocks in Companies.

1. *Adminiſtrator durante Minore Ætate ſells the Infant's Stock* in the East-India Company to B. and C. two Members of the ſaid Company, who had Notice that it was not the Adminiſtrator's Eſtate, as appears by the Entries in the Company's Books; Decreed, that it was *fraudulent*, and an *Account* to be taken. Fin. R. 298. Paſch. 29 Car. 2. Munn & Brown v. East-India Company, Dunkin & al'.

2. A. having got *Letters of Adminiſtration upon a falſe Suggeſtion*, was admitted to certain Stock of the Inteſtate's in the East-India Company; but upon an Appeal the Adminiſtration was *repealed* and avoided ab Initio: *One, who was privy to the Fraud* in getting the Adminiſtration granted to A. *purchaſed* a Transfer of the *Stock* from A. and an Entry was made thereof in the Company's Books. On a Bill brought by the rightful Executor, the Court decreed the ſaid Stock to be transferr'd back to the Plaintiff, and the Adminiſtrator of the Purchaſor to account for Dividends received by him, ſo far as he has Aſſets, Niſi Cauſa &c. Fin.Rep. 430. Mich. 31 Car. 2. Johnſon v. the East-India Company and Cheſter.

3. A Man *ſold* another ſo many *Shares* in East-India Stock, *if the other approved of his Bargain, and demanded it Ore tenus, or by Note in Writing left at the Eaſt-India Houſe before ſuch a Day*, and pleads that licet he demanded it Ore tenus, and by Note in Writing at the East-India Houſe, the Defendant had not transferr'd it &c. Upon which the Defendant demurr'd, and objected, that licet the Note in Writing ought to be left at the East-India Houſe, yet the *Demand Ore tenus could not be left there*; and therefore the Demand Ore tenus is not reſtrained to the East-India Houſe, but *ought to be perſonal*, and the Words (left at the East-India Houſe) ſhall be applied to that which might be left there, which is the Demand by Note in Writing: But after being twice moved, it was adjudged for the Plaintiff, the *conſtant Practice* being an Expoſition of theſe Words. Skin. 391. Mich. 5 W. & M. B. R. Hall and Cupper. Carth. 268. S. C.

4. By 8 & 9 *W.* 3. *cap.* 30. *Every Policy, Contract &c. made, or to be made, and which by the Tenor thereof is to be performed after 1ſt May* 1697, *upon which any Premium already is, or hereafter ſhall be given or paid for Liberty to put upon, deliver, receive, accept, or refuſe any Share or Intereſt in any Joint Stock, Tallies &c. or Bank Bills whatſoever, other than ſuch Contracts &c. as are to be perform'd within* 3 *Days from the Time of the Making, ſhall be utterly null and void to all Intents.*

A. in Conſideration of 20 l. paid him by B. *aſſum'd* on the 29*th October* 1696, *to aſſign* 500 l. in *Bank Stock* to B. for the Sum of 365 l. *at any Time when requeſted before the* 10*th Day of May then next enſuing.* The Queſtion was, Whether this Contract made 29 Oct. 1696, by which B had Time to requeſt the Aſſignment of the Bank Stock till 10 May 1697, was within the Statute, and made void thereby. The Court delivered no Opinion, but Northey argued that it was not; for this is not a Contract, which by the Tenor of it is to be performed after the 10th Day of May 1697; For altho' the Plaintiff had Liberty to perform the Requeſt of the Aſſignment of the Bank-Stock to him until the 10th Day of May 1697, which was 9 Days after the Act took Place, yet ſuch Requeſt might be made before the 1ſt of May, and ſo the Contract, by the Tenor of it, was not to be performed after the 1ſt Day of May; for a Contract to be performed after the 1ſt Day of May, is intendable of ſuch a Contract which of Neceſſity ought to be performed after that Day, and cannot be performed before; but a Contract performable as well before as after that Day, at the Election of the Party, is not within the Act of Parliament, but is Caſus omiſſus; and he compared it to a Caſe upon the Statute of 29 Car. 2. cap. 3. of Frauds and Perjuries, by which it is enacted, That no Action ſhall be brought &c. whereby to charge any Perſon &c. upon any Agreement which is not to be performed within a Year from the making thereof, unleſs

leſs the Agreement be in Writing; and an Action was brought, upon an Agreement by the Defendant to pay ſo much upon his Marriage, but without any Writing or Memorandum of the Agreement; and the Defendant did not marry within the Year: Upon the Trial at Guildhall before Holt Ch. J. he was in Doubt whether that Agreement was within the Statute, and whether it ought not to have been by Writing? And ordered that the Opinion of the Judges of the Court ſhould be taken. And by the major Part of the Judges in B R. it was reſolved, That this was Caſus omiſſus; for that the Defendant might have married within the Year; and ſo it was not an Agreement which was not to be performed within a Year, and by Conſequence was not ſuch an Agreement as was intended by the Act of Parliament: And he ſaid he did not ſee any Diverſity between the Caſes. Comyns's Rep. 49, 50. pl. 32. Hill. 9 W. 3. in B. R. Anon. ——Ld. Raym. Rep. 316, 317. Smith v. Weſtall, S. C. And Holt Ch. J. was of Opinion, That if the Requeſt had been before the 1ſt of May, and the Contract perform'd, it had been good; but if *no Requeſt was made before the 1ſt of May*, the Contract being performable afterwards, was within the Intent of the Act. And in Fact no Reqneſt appeared to have been made before the 1ſt of May. And therefore Judgment was for the Defendant, who had pleaded the Act of Parliament.

In Aſſumpſit, upon a ſpecial *Promiſe* to transfer Stock in the Plaintiff declared upon an Agreement *in Writing*, by which the Defendant agreed in 1692, in Conſideration of *to transfer* ſo much *Stock* to the Plaintiff, or Order, *upon Requeſt*; and he ſhew'd a Requeſt &c. and averr'd that the Defendant had not transferr'd The Defendant pleaded the Act of 8 & 9 of this King, cap. 32. againſt Stockjobbing; the Plaintiff demurr'd. And it was urg'd, that this Contract was within the ſaid Act, becauſe, it may be, the Transfer was not to be made before the Day of But per Holt, The ſaid Act ſhall be taken ſtrictly, becauſe it deſtroys Bargains; and therefore if the Requeſt was before the ſaid Day, it is well enough. Judgment niſi &c. for the Plaintiff. Ld Raym. Rep. 673, 674. Eaſter 13 W. 3. Mitchell v. Broughton.

5. In *Covenant* by A. againſt B. upon Articles of Agreement A. declares, *that* it was covenanted and agreed between him and B. that in Conſideration of 20 Guineas by B. to him then paid, *A. ſhould transfer to B. before, or upon the 19th of November* 1695, 1000 *l. Bank Stock*; *and* that *B. covenanted with A. to accept it upon Notice of* 3 *Days, and to pay to A. for it* 940 *l.* and then *A. avers, that no Bank Stock is transferrable by Law but in the Office of the Bank of England in the Preſence of both the Parties*; *and that he gave* 3 *Days Notice* to B. that he would transfer to him the Bank Stock in the Office of the Bank, the 19th of November; *and* that he *attended there the whole Day* to have transferr'd it, *but* that *B. did not come* to accept it, for which A. brings this Action for the 940 l. &c. *B.* after Oyer of the Articles, *pleads that A. nor none of his Aſſigns, had any Intereſt in any Bank Stock upon the 18th of November* &c. A. demurs. And the whole Court was of Opinion, that the Plea was ill, becauſe tho' A. had not any Bank Stock upon the 18th of November, yet if he had it the 19th, he might have perform'd the Contract within the Time; for the Covenant was not, that he ſhould transfer any particular 1000 l. of Bank Stock, which he had at the Time of the Covenant, but any 1000 l. of Stock. But then the whole Court held, 1ſt. That this Action will not lie for the Plaintiff in this Caſe, becauſe it appears that he has not transferr'd; and without Transfer B. is not bound to pay the Money; for the Money was to be paid upon the Transfer: And therefore no Transfer, no Money. And cited Co. Litt. 304 Dyer 371. 2 Mod. 266. **Otway v. Holdips.** But the Matter in the Declaration might have been a good Excuſe for the Plaintiff, if the Defendant had ſued him for not transferring the Bank Stock; or the Plaintiff might have aſſign'd his Breach in the Non-acceptance of the Stock by the Defendant. Ld. Raym. Rep. 440. Paſch. 11 W. 3. Shales v. Seignoret.

6. The Court held alſo, That it did *not appear* to them *but* that *the Bank Stock was transferrable at another Place than at the Office of the Bank*; for tho' the *Act ſays, That no Transfer ſhall be but as the King ſhall appoint, and the King has appointed it to be at the Office of the Bank, and not in any other Place*, yet that *ought to have been pleaded*, or otherwiſe the Court cannot take Notice of it; and therefore, notwithſtanding any Thing that appears here to the contrary, the Transfer might have been in any other Place, and then a Tender ought to have been made to the Perſon. Ld. Raym. Rep. 441. Shales v. Seignoret.

2 Salk. 623. pl. 3. S.C. but S. P. does not appear.—— 7. It is to be admitted, That when *Money* was *to be paid upon* the *transferring* of the *Stock*, *or doing any other Thing*, if he that is to make the Transfer,

Transfer, or do ſuch other Thing, makes Tender, and the other refuſes, then he is as much intitled to the Money as if the Transfer or other Thing had been actually done; for tho' the Words be, *That the Money ſhall be paid upon the Transfer*, yet if the Party does all that lies in him, he is thereupon as much intitled to the Money, as if he had done all effectually; Per Holt Ch. J. in delivering the Opinion of the Court. 12 Mod. 530. Trin. 13 W. 3. in Caſe of Lancaſhire v. Killingworth.

Ld. Raym. Rep. 686. S. C. and S. P. by Holt Ch. J. who delivered the Reaſons of the Judgment.

8. Defendant gave *Bond to transfer* 300 l. Eaſt-India Stock, *on or before* 30th September next. The Stock was much riſen in Value ſince the Agreement, yet Defendant was decreed to transfer 300 l. Stock in Specie in a Fortnight, and to account for all Dividends made ſince the Time when he ought to have transferr'd, and to pay Coſts at Law and here, or diſmiſs the Bill with Coſts. 2 Vern. 394. pl. 365. Mich. 1700. Gardner v. Pullen.

9. An Agreement by Note *under Hand*, in Conſideration of 2 Guineas paid down, to transfer South-Sea Stock at a fix'd Price, at the End of 3 Weeks, was *decreed* at the Rolls *to be executed in Specie*; but on Appeal Lord Parker *reverſed* this Decree, and ſaid that a Court of *Equity ought not to execute any of theſe Contracts*, but to leave them to the Law, where the Party is to recover Damages, and with the Money may buy a like Quantity of another Perſon, and which will be all one. Wms's Rep. 570. Mich. 1719. Cud v. Rutter.

10. 7 *Geo.* 1. *St.* 2. *S.* 6. *Such Perſons (Brokers excepted) as ſince the 25th of March* 1720, *have borrowed Money of the Company upon Stock, who ſhall pay to the Caſhier of the Company* 10 *per Cent. upon the Sums ſo borrowed, by the 25th of June* 1722, *ſhall be diſcharged from all further Demands of the Company, and the Stock ſo pledged ſhall be abſolutely veſted in the Company.*

The like Clauſe for Money borrowed on Subſcription Receipts.

Truſtee of 1000 *l. S. S. Stock, borrowed* 400 *l upon it of the Company, at the Deſire of Ceſty que Truſt, who received the Money.* Afterwards this Act of Parliament enacted as above. The Truſtee paid the 10 l. tho' Ceſty que Truſt forbid his doing it. On a Bill by the Truſtee to be repaid this 10 l. per Cent. Ld. C. King decreed it accordingly, with Intereſt and Coſts. 2 Wms's Rep. 453. Paſch. 1728. Balſh v. Hyham.

But if the Ceſty que Truſt had not only forbid the Payment, but *had alſo offered Security to indemnify the Truſtee*, it had been material; but the Truſtee had good Reaſon to think he was liable to pay the whole Money borrowed. Per Ld. C. King. Ibid. 455. S. C.

11. *By* 7 *Geo.* 1. *Stat.* 2. *Par.* 8. *Every Contract for the Sale or Purchaſe of Subſcriptions or Stock of the South Sea Company &c. which ſhall not be compounded by the Parties thereto, or intereſted therein, on or before the* 29*th of September* 1721, *or an Abſtract or Memorial thereof, ſigned by the Party intereſted therein, and who ſhall be minded to take Advantage of the ſame, ſhall be entered and regiſtered in Books, which are thereby required to be provided for that Purpoſe by the reſpective Companies, to whoſe Capital ſuch Stock &c. do, or ſhall relate, before the* 1*ſt of November* 1721. *And in Default of ſuch Entry and Regiſter, every ſuch Contract, as to ſo much as ſhall remain unperform'd and not compounded, on or before the* 29*th of September* 1721, *ſhall be void: And ſuch Entries ſhall expreſs the Name of the Parties, or Perſons for whoſe Uſe or Benefit ſuch Contracts were made &c.*

The Condition of a Bond was, Whereas P. B. as Executor of F. B. being poſſeſs'd of 4000 l. Lottery Annuities 6th July, agreed to ſell them for 4600 l. to be aſſign'd and paid for before 6th Auguſt next; and whereas ſoon after, the ſaid P. B. at the Requeſt of the Plaintiff and Defendant, tranſcribed them in his own Name into the South-Sea; Now if the Defendant, in Conſideration of a valuable Conſideration, ſhall transfer to the Plaintiff a Moiety of the ſaid Stock allowed by the S. S. Company for the ſame, then &c. And then *pleaded*, *That the Contract* between the Plaintiff and Defendant was *for Sale* of S. S. Stock, which *was neither perform'd nor compounded before the* 29*th September* 1721, and that neither the Bond, with the Condition and Contract therein contained, or any Abſtract *or* Memorial thereof, was *regiſter'd* before 1ſt November 1721 &c. The Plaintiff replied, That he, by Deed dated 27 October 1720, aſſign'd the Bond, and all Benefits of the Stock &c. in the Condition mentioned, to William King for his own proper Uſe, who regiſter'd it &c. and Iſſue was joined upon the Regiſtering. And *on the Trial* at Guild-hall, November 27. 1722. before Ld. Ch. J. Pratt, *it appeared* upon the Regiſter of the Aſſignment produced, *that the Aſſignment was regiſtered, and not the Bond*; and the Ch. J. ſaid, That the Bond and Condition which contained the Contract, ought to have been regiſtered: Then a Regiſter of the Bond and Condition was produced, but it did not appear to whoſe Uſe the Contract was made; and it is not enough, that it is ſaid in the Aſſignment, that

it was to the Uſe of the Plaintiff, tho' the Aſſignment was alſo regiſter'd; for that is only a Recital in the Deed of Aſſignment, but by the Statute, *it muſt appear by the Regiſter itſelf to whoſe Uſe the Contract was made.* And to this Opinion the Ch. J. adhered, but on the Plaintiff's Importunity permitted a Caſe to be made, which was never argued; but the Plaintiff commenced a new Action in C. B. upon which a ſpecial Verdict was found. Comyns's Rep. 365, 366. pl. 182. Mich. 9 Geo. B. R. Rogers v. Wilſon.

Covenant upon an Indenture, dated the 19th Auguſt 1720, made between the Plaintiff of the one Part, and the Defendant of the other, whereby the *Plaintiff*, in Conſideration of 1436 l. 10s. to be paid to him, as therein after mentioned by the Defendant, *covenanted* for himſelf &c. that he, his Executors &c. ſhould, *on or before the 25th of March next enſuing transfer* &c. *to the Defendant*, his Executors, Adminiſtrators, and Aſſigns, *all ſuch Stock*, Bonds, Notes, Bills, and Money, *as the S. S. Company ſhould allow*, deliver, and pay, *to the Proprietors of Lottery Annuities, for 1277 l. 1 s. 6 d. Capital Stock in the Lottery Annuities at 5 per Cent. then already ſubſcribed into the ſaid Company by, or in the Name of the ſaid Plaintiff*, with all Dividends, Profits &c. And the *Defendant*, in Conſideration of the Premiſes, for himſelf &c. *covenanted* with the Plaintiff, *that he* &c. *ſhould*, within the Time aforeſaid, *accept* all the ſaid Stock, Bonds &c. which ſhould be given by the S. S. Company for the 1277 l. 1 s. 6 d. Lottery Annuities &c. *and would pay 1436 l. 10 s. for the ſame*; and for Non-payment the Action was brought. After Oyer the *Defendant pleaded, That neither the Contract* in the Declaration mentioned, *nor any Abſtract* or Memorial *thereof, was entered in the S. S. Company's Books*, as is required by this Statute. Plaintiff took Iſſue, which being tried before Ld. Ch. J. Pratt, the *Plaintiff produced the Regiſter-Book of the S. S. Company, wherein a Copy* of the Contract *was entered verbatim*, under which was *ſubſcribed*, "*This is for my proper Uſe and Benefit*," which was *ſubſcribed by the Plaintiff with his own Name*, viz. "Philip Wilkinſon." It was inſiſted for the Defendant, That the Words of the Act were plain, that the Name of the Perſon for whoſe Uſe or Benefit the Contract was made, muſt be expreſs'd, which refers to the Time of making the Contract; and the Act intended ſo, becauſe it deſigned to diſcover what Contracts were made for any of the Directors, who were ſo cunning, that they made none in their own Names: But yet, as this Regiſter is, this Contract might be made for the Benefit of a Director, who after might releaſe his Equity, or Right, to the Plaintiff; and yet the Regiſter will be true. But for the Plaintiff it was argued, That the Preamble to this Clauſe ſhew'd what the Deſign of the Parliament was, viz. for preventing a Multiplicity of vexatious and doubtful Suits concerning theſe Contracts, in Law or Equity; therefore it directed, that the Name of the Perſon for whoſe Uſe or Benefit ſuch Contracts were made, ſhould be expreſs'd in the Entry and Regiſter, that the Defendant might know who had a Demand upon him; which in this Caſe the Defendant did, the intire Contract being regiſter'd; and by the Import of the Deed it appears to be for the Plaintiff's Benefit. And of that Opinion was the Court; and Raymond J. ſaid, that this Act being *Ex poſt facto*, the Conſtruction of the *Words ought not to be ſtrained*, in order *to defeat a Contract*, to the Benefit whereof the Party was well intitled at the Time the Contract was made. Judgment was given for the Plaintiff. 2 Ld. Raym. Rep. 1350 &c. Eaſter 10 Geo. Wilkinſon v. Sir Peter Meyer.——S. C. 8 Mod. 232. ſays, That by 3 Judges againſt the Ch. Juſtice, this was held to be a good Contract, and well entered in the S. S. Books; for the whole Agreement was regiſter'd, and by Conſequence it muſt be ſhew'd who had a Right to demand the Money; That the *Intent of the Legiſlature was only to ſhew, that there was a good and ſolemn Contract*, ſo that People might not be troubled with every trifling Bargain made at that Time, but only upon legal Contracts, which were to be regiſtered; and what was done by the Plaintiff, ſhews that this Contract was for his Benefit, and that he is the Perſon that had the Right. Judgment for the Plaintiff.

In this Caſe was cited by Serjeant Comyns, Arg. the Caſe of Nunns v. Scipio, Hill. 8 Feb. 1715. in Chancery, in which he ſaid, it was expreſsly declared by Lord C. Cowper, That a Plea of the Statute to a Bill for Performance of a Contract for 4000 l. S. S. Stock, ought to be allowed. Ibid. 536, 537.

12. In *Aſſumpſit for* 580 l. *for* 10 *Shares in* the Stock of the Company of *Copper-mines*, the Defendant pleaded Non aſſumpſit. Upon the Trial there was Proof of a Contract, according to the Declaration, but there was *no Memorandum in Writing, nor any Earneſt paid*, ſo that the Queſtion was upon the Statute 29 *Car.* 2. *of Frauds* &c. whether this Contract, being for more than 10 l. be good? King Ch. J. before whom this was tried, doubting, it was made a Caſe, and argued before the Court of C. B. and afterwards at Serjeant's-Inn before all the Judges of England. And upon Argument there, the Judges being divided in Opinion, it was adjourn'd. Comyns's Rep. 354 &c. pl. 178. Mich. 7 Geo. 1. Pickering v. Appleby.

13. A. *by Deed poll covenanted to aſſign* S. S. Stock to Defendant, *as ſoon as the Books* of that Company *were open*; and Defendant covenanted, *in Conſideration thereof*, to accept the Receipts, and *to pay* 950 l. to A. *on the 10th of November following*; afterwards by Act of Parliament the Company were prohibited to give any Receipts for ſo long Time. The Time expires for the Payment, and A. brings Covenant for the Money: But adjudged, that it being only a *Deed poll*, it is for that Reaſon the Deed

Deed of the Defendant only; and therefore the Covenants cannot be mutual: And it would be hard that A. ſhould maintain this Action for the Money, before he transfers, or tenders to transfer, the Stock, when Defendant has no Remedy to recover it at Law, but only a Right to have it decreed to him in Equity; and Judgment for Defendant. 8 Mod. 41. Paſch. 7 Geo. 1722. Lock v. Wright.

14. A. by Articles of Agreement, covenants *on ſuch a Day to transfer* ſo much Stock, *on Payment of* 1638 l. and the *Defendant covenants to accept* the ſame, *and then to pay the Money at or before the Shutting up the Books* for the Chriſtmas Dividend; and agreed further, that if Defendant did not accept it, the Plaintiff might ſell it, and the Loſs or Profit to be accounted for; Bond was given for Performance. Per 3 Juſt. againſt Eyre, Theſe are independent Covenants, and not mutual, and Plaintiff need not ſet forth any Tender to transfer, becauſe it was to be transferr'd on Payment, and ſo Defendant made himſelf the 1ſt Agent; and ſo revers'd a Judgment in C. B. 8 Mod. 68. Paſch. 8 Geo. 1723. Wivel v. Stapleton.

8 Mod. 292. Trin. 10 Geo. 1725. S. P. And ſuch another Judgment in C. B. revers'd, Shelburn v. Stapleton.—This Reverſal was revers'd in Dom. Proc. becauſe the Reſidue of the Money was not due till he made a legal Tender of the Stock, and Defendant made Default; and for not ſhewing this, the Breach was not ſufficiently laid. Ibid. 381. Trin. 11 Geo. 1726. Wivel v. Stapleton.

15. *Caſhier* of S. S. Company *received Money for a Subſcription*, but did *not enter* Reſpondents *Names* in the Book; the Reſpondents recovered the Money againſt the Company. MS. Tab. Tit. Stocks, pl. 1. cites March 6. 1722. S. S. Company v. Curſon.

16. Chancery will compel, or ſupply the Want of a *Transfer of Stock*. Per Parker C. 10 Mod. 498. Trin. 8 Geo. 1. Cock v. Goodfellow.

17. Plaintiff covenanted by Indenture *to transfer* S. S. Stock to Defendant, *on or before September* 21. and the *Defendant covenanted to pay* the Plaintiff 8500 l. *on or before the ſaid Day*, and gave *Bond for Performance* of the ſaid Covenant: In Debt on the Bond the Plaintiff ſet forth all this Matter, and that *Pro & in conſideratione Præmiſſorum*, the Defendant covenanted to pay the Money, and that he was ready at the Time and Place agreed &c. and that Defendant, or any for him, was not there to receive. On a Demurrer it was adjudged, That theſe were *mutual Covenants*, the Transfer being to be made on a *certain Day and Place*; and tho' in ſome Caſes the Word *(Pro)* makes a Condition precedent, ſo that the Plaintiff muſt aver Performance, yet it is not ſo here; for Pro here makes the Covenants mutual, viz. The Plaintiff is to *transfer* (*Pro*) *the Money*, and the Defendant is to *pay Pro the Transfer*, and this reduces it to mutual Covenants, for which each has a proper Remedy for Non-performance. 8 Mod. 105. Mich. 9 Geo. 1723. Blackwell v. Naſh.

Judgment affirm'd in Cam. Scacc. Ibid. 106.—This Caſe was compared to 2 Salk. 623. Lancaſhire v. Killingworth.

A. by Indenture covenants *to transfer* S. S. Stock *before the 25th March, or within* 4 *Days after*, and *Defendant covenants to accept and pay Infra Tempus prædict.* Per Cur. It is a mutual Covenant, and Plaintiff need not to lay any Requeſt, or plead himſelf ready &c. For the *Time is not indefinite*, as ſuggeſted, becauſe Defendant was to accept and pay Infra Tempus prædict. which muſt be within 4 Days; and therefore no Occaſion to aver a Requeſt: It is the ſame Caſe with that of Blackwell v. Naſh, only in that Caſe One Day was appointed, and here are 4 Days. 8 Mod. 173. Trin. 9 Geo. 1724. Wilkinſon v. Meyer.

18. *Purchaſe of Refuſal* of Stock in the Year 1720, good. MS. Tab. Tit. Stocks, pl. 2. cites Feb. 10. 1723.

19. A. by *Deed poll covenants to pay* 15000 l. *for* ſo much Stock in S. S. Company, which *Plaintiff covenanted to transfer on Sept.* 21, and at ſuch a *Place*, when and where Defendant *covenanted to receive* the Stock. Per Cur. There muſt be a Tender to transfer, tho' an actual Transfer is not neceſſary, unleſs Defendant had been ready at the Time and Place to receive it; and if ſo, then the Tender muſt be the laſt Hour of the Day on which, and that Time muſt be laid in the Declaration. 8 Mod. 218. Hill. 10 Geo. 1724. Mordant v. Small.

20. Articles were drawn for Stock in the Luſtring Company at 58 l. a Share, and the *Money to be paid, and Transfer to be made on the next opening of the Company's Books.* But at a Meeting for ſealing the Articles, the *Seller inſiſted that the Money ſhould be paid at a Day certain, whether the Books opened or not*; and an *Indorſement was made accordingly, and both executed.* Afterwards *a Stop was put by Parliament to any further Transfers* or Dealings with thoſe Bubbles. The Books were never opened afterwards. The Vendor in an Action at Law recovered; but on the Vendee's bringing a Bill in Chancery, an Injunction was granted; and upon hearing the Cauſe, the Maſter of the Rolls ſaid it was againſt natural Juſtice, that any one ſhould pay for a Bargain which he cannot have; that there ought to be Quid pro Quo, whereas in this Caſe Defendant had ſold the Plaintiff a Bubble or Moonſhine; that the Defendant was the chief Actor, that he went to Market with this Bubble; and that ſince no Transfer can be made, he granted a perpetual Injunction, and ordered the Defendant, at the Plaintiff's Charge, to enter Satisfaction on the Judgment. And afterwards the Cauſe came on to be re-heard by Lord C. King, who made no Decree, but ſaid he could not divide the Loſs, and recommended an Agreement, and to ſhare the Difference. 2 Wms's Rep. 217. Paſch. 1724. Stent v. Baylis.

21. *Mortgagee* of S. S. Stock *ſells Part*; he was liable to Account. MS. Tab. Tit. Stocks, pl. 3. cites May 10. 1727. Harriſon v. Franks.

Comyns's Rep. 393. pl. 193. Harriſon, and Hart, and Franks, S C. in the Exchequer, Mich. 13 Geo. 1. an Account was directed for all Monies received on the Sale, notwithſtanding the Day of Redemption was paſt.

22. In an Action upon a S. S. Contract the Declaration ſet forth, that the Plaintiff was bound to transfer 800 l. Stock, and the Defendant to pay 5800 l. That 2 *reciprocal Notes were given* for that Purpoſe; and that the Plaintiff was ready to make a Tender of it at the Day, but that the Defendant was not there; and therefore demands the Money. Two Things were moved in Arreſt of Judgment; one was, that the *Contract was not regiſtered*, purſuant to the Statute of 7 Geo. 1. *but only the Promiſſory Note of* 5800 l. and *not the Note, which the Plaintiff gave for transferring*; ſo that the full Contract was not regiſter'd. And as to what the other Side might ſay, That it was not in their Power to regiſter more than what was in their own Hands, they anſwered, That they might at leaſt have regiſter'd a Memorial, or Abſtract of the whole; and the Act gives them a Power to regiſter the Contract itſelf, or a Memorial of it, at their Election. Now that the whole Contract was not regiſtered by regiſtering this Note only, they ſaid was plain; for the Words of the Note are, *I promiſe to accept of* 800 *l. S. S. Stock, and to pay* 5800 *l. for the ſame*; and ſo nothing was regiſtered that imported any Contract on the Part of the Plaintiff; and therefore the whole was not regiſtered: That the Words *(for the ſame)* did not import a reciprocal Covenant; for if it did, then in an Action brought upon ſuch Note, you need not aver the tendering of the Stock, which it is evident in this Caſe you muſt. And took a Difference between Inſtruments, which contain reciprocal Covenants, or only a Covenant of one of the Parties; and cited 7 Rep. 10. and the Caſe of **Pordrige and Cole**, and of **Peters and Dpey** 2 Saund. But per tot. Cur. *The Contract was well regiſtered*; *for* it appeared by the Regiſter, that *each Party was under mutual Covenants*, inaſmuch as it appeared, that the Party regiſtering had accepted the Note, by which Acceptance he was neceſſarily bound; and ſaid, that this very Point was ruled thus at Niſi Prius, in the Caſe of **Hardey and Paterſon.** Barnard. Rep. in B. R. 28, 29. Mich. 1 Geo. 2. Dorvill v. Ayneſworth.

23. In 1720, H. the Defendant gave a *Promiſſory Note to A.* the Plaintiff's Father, *to pay him* 11000 *l. in caſe he would transfer to him* 1000 *l. Capital S. S. Stock, at or before the ſhutting up the Books for the then next Chriſtmas Dividend.* A. accordingly *ſent a Notice in Writing* to H. *that he*

he would transfer this Stock to him *on the Friday or Saturday next, being the Day for the ſhutting up the Books.* The Plaintiff avers in his Declaration, That *A. was at the S. S. Houſe on the Day to make a Tender, but* that *neither H. nor any for him, was there* to receive the Transfer: Upon which the Plaintiff, as Executor to A. brings this Action. The Plaintiff gave in *Evidence, that the uſual and only Time for making theſe Tenders was between the Hours of Nine and One; and that not ſo much as the transferring any Stock can be made but between theſe Hours, unleſs in theſe particular Days juſt before the ſhutting up the Books for the making of their Dividends. That A. had a Perſon ready to make this Tender all the Time between thoſe Hours; that 3 Calls accordingly were made, but that no Body came for H. to accept it.* The Court ſaid, That this Matter was now brought to one ſingle Point of Law, whether upon the Face of the Plaintiff's own Evidence, it does not appear that the Tender was not good, inaſmuch as his Witneſſes admit, that the Time for transferring Stock in theſe Days continues after the uſual Hours; and in Fact this Time continued till late in the Evening? Upon this Queſtion they were all of Opinion, That the Tender was not good; for they ſaid, in all theſe Caſes the Tender of the Act muſt be made at the laſt Point in which the Act itſelf can be done. And this they ſaid was held in the Caſe of **Lancaſhire and Killingworth**; ſo that this differs from the Tender of Rent: And therefore as the Law has appointed the Time for this Tender, no Uſage to the contrary for a few Years can alter it; for this ſame Reaſon too is it, that Notice was wholly unneceſſary: Whereupon the Plaintiff was nonſuited. Barnard. Rep. in B. R. 95, 96. Mich. 2 Geo. 2. The Duke of Rutland v. Hodgſon.

24. A. in Conſideration that B. would transfer to him ſo much Stock in the *York-Buildings Company*, promiſed *to pay* him after the Rate of 11 l. 7 s. per Cent. *upon transferring the ſame immediately after the opening the Books.* In Aſſumpſit by B he ſet forth that the 29 Feb. was the firſt Day for transferring after the Opening; That York-Buildings Houſe was the uſual Place of transferring; and that from 3 o'Clock to 4 was the uſual Time; and avers that he was there all the Time between 3 and 5 ready to transfer, but that none was there for A. to receive it; and that A. has not paid the Money. Upon Demurrer *Exception* was taken, *that the Tender ought to have been laid in that Part of the Houſe particularly where the Books for Transfers are kept*, that being the moſt notorious Place. The Court agreed that the Tender ought to be made there, but upon this Declaration they would not intend that there were any other Parts of it; That a Houſe, Ex Vi Termini, ſignifies only ſome Building, which may conſiſt of one Room only, as well as of more. The Chief J. obſerved, that if Defendant had pleaded the General Iſſue, the Plaintiff muſt have proved his Tender in that very particular Part of the Houſe where the Books are kept. Adjornatur. Barnard. Rep. in B. R. 156. Trin. 5 Geo. 2. Jacobs v. Croſley.

Ibid. 179. Mich. 6 Geo. 2. 1732. the ſame Exception being argued again, the Court overruled it for the ſame Reaſons given before. And notwithſtanding another Exception was taken to the Count, Judgment was given for the Plaintiff.

25. E. H. *purchaſed* 1000 *l. S. S. Stock, and accepted the ſame* in the S. S. Books ſoon after his buying it. Afterwards *another of the ſame Name*, but known by another Deſcription, *got*, by ſome Means or other, *the* 1000 *l. Stock* belonging to the firſt E. H. *placed to his Account in the S. S. Books, and* ſome Years afterwards *transferr'd the ſame to R.* his Broker, in order *to ſell the ſame for him, which R. accordingly did.* Both the E. H.'s died. On a Bill brought by the Repreſentative of the firſt E. H. the Court was of Opinion, That the Repreſentative might *elect either to have this ſpecifick Quantity of Stock bought* for her, *or a Satisfaction* for it as it was at the Time it was ſold out, at which Time a Converſion was made of it; and likewiſe ſeemed to incline, that the *Company* might be *liable, in caſe the Repreſentative of the laſt E. H. has not ſufficient Aſſets*, becauſe they muſt be conſidered as Truſtees for the firſt E. H. at the Time he purchaſed this Stock; and as the ſame was transferr'd without his

his Privity, they must be considered as continuing his Trustees; but that it would be soon enough to determine this Point when an Account is taken of the Assets. Barnard. Chan. Rep. 324. Hill. 1740. Harrison v. Pryse.

26. If Stock belonging to a Testator is *given by* his *Will, subject to a Contingency*, the Court does not presume that the Stock will always remain in the same Plight; and if it is converted into other Stock, *the Stock into which it is so converted, shall be subject to the same Contingency.* Barnard. Chan. Rep. 422. Hill. 1740. Batten v. Whorewood.

For more of Stock in General, See **Devise, Fraud**, (U) pl. 1. Whitacre v. Whitacre, **Purchaser** (B) pl. 17. Monk v. Graham, **South Sea**, and other Proper Titles.

Stopping Lights.

(A) By one who has *Land adjoining*.

S.C. cited Yelv. 216. as the Case of Mosely v. Ball.——S. C. cited Hutt. 136. in Case of Jones v. Powell.—Bulst. 116. S. C. cited in Case of Hughes v. Kemish.

1. CASE was brought for Stopping Lights; the Defendant *pleaded in Bar a Custom* within the Place where &c. *Time out of Mind* for any Neighbour, that had Land lying before the Windows of another Neighbour, *to obstruct* the Sight, by doing any Thing on his own Land. But resolved, That when a Man has a lawful Easement or Profit, by Prescription Time out of Mind, another Custom, which is also Time out of Mind, cannot take it away; for the one Custom is as ancient as the other. And it may be that before Time of Memory, the Owner of the Land had granted to the Owner of the House to have the said Windows, without any Stopping of them; and so the Prescription may have a lawful Beginning; cited in Aldred's Case, 9 Rep. 58. as Trin. 29 Eliz. B. R. the Case of Bland v. Mosely.

Le. 168. pl. 234. Bowry v. Pope, S C. accordingly.

2. If 2 Men be Owners of 2 Parcels of Land adjoining, and one of them does build an House upon his Land, and makes Windows and Lights looking into the others Lands, and this House and the Lights have *continued by the Space of* 30 *or* 40 *Years*, yet the other may, upon his own Land and Soil, lawfully erect an House or other Thing against the said Lights and Windows, and the other can have no Action; for it was his Folly to build his House so near to the other's Land. It was agreed by all the Justices, and adjudg'd accordingly. Nota, Cujus est solum, ejus est summitas usque ad Cœlum. Temp. E. 1. Cro. E. 118. pl. 3. Mich. 30 & 31 Eliz. B. R. Bury v. Pope.

Raym. 87. Palmer v. Fleshees, Mich. 14 Car. 2. B. R.

3. If A. builds a *new House on Part of his Lands*, and then sells the House to B. and the Lands to C. neither A. nor C. can obstruct the Lights. Lev. 122. Mich. 15 Car. 2. B. R. Palmer v. Fletcher.

S. C. and there held by Twisden and Windham, that the Vendee may build upon it; but Keyling contra.——Sid. 167. pl. 26. S. C. and Judgment accordingly for the Plaintiff, Keeling dubitante, and the Ch. J. absent. ——Ibid. 227. pl. 22. S. C. but S. P. does not appear.

If A. *sells the vacant Ground*, and keeps the House without reserving the Benefit of the Lights, the Court doubted that Vendee might build so as to stop A.'s Lights, because he parted with the Ground *with-*

without reserving the Benefits of Lights; for this differs from Palmer and Fletcher's Case. Per Cur. 6 Mod. 314. Mich. 3 Ann. B. R. in Case of Tenant v. Golding.——S. P. by Keeling accordingly, in the Case of Fletcher v. Palmer, ut supra; but Twisden contra.——S. P. accordingly Le. 168. in Case of Bowry v. Pope.

4. A *Stranger* having Land adjoining to a *House newly erected*, may obstruct the Lights. Agreed by all; for the building a House upon his Lands, cannot hinder his Neighbour from doing what he will with his own Lands. Lev. 122. Mich. 15 Car. B. R. Palmer v. Fletcher. Sid. 167. pl. 26. S.C. and S. P. by Twisden and Windham. ——If a Man builds a House upon his own Ground, he that has the *contiguous Ground* may build upon it also, tho' he does thereby stop the Lights of the other House; for Cujus est Solum ejus est usque ad Cœlum; and this holds, unless there be a Custom to the contrary, as in London. Per Hale Ch. J. Vent. 239. Hill. 24 & 25 Car. 2. B.R. in Case of Cox v. Matthews.

5. *But if the House be ancient*, so that he has gained Right in the Lights by Prescription, it is otherwise. Lev. 122. Palmer v. Fletcher. Sid 167. pl. 26. S.C. and S. P. by Twisden and Windham J.——Ibid. 227. pl. 22. S.C. but not S. P.

(B) After *Unity of Possession.*

1. TWO *Houses came into one Hand*, and Windows &c. are altered, and then the Houses are divided; the Lights cannot be *restored* by Law, but must be taken as they were at the Time of the last Division and Conveyance. Hob. 131. pl. 173. Hill. 13 Jac. C. B. in the Case of Robins v. Barnes. Mo. 866. pl. 1195, S. C. resolved that the Vendee shall never abate the Nusance.

2. If I have an ancient House and Lights, and I *purchase the next House or Ground*, where no Nusance is done to my former House, my Privilege against what I have purchased ceaseth; for I may use my own as I will. Now if I lease my former House, I may build upon the latter; or if I lease my latter, he may build against me, as it may seem. Hob. 131. Robins v. Barns.

(C) Stopping Lights in *London.*

1. BY the Custom of London a Man may build upon his *old Foundation*; and if there be *no Agreement* to the contrary, may stop up his Neighbour's Windows: By this Custom, if he make New Windows higher, the other may build up his House higher, to destroy those New Windows. Godb. 183. pl. 262. Mich. 9 Jac. B.R. Hughes v. Keene. Yelv. 215, 216. Hill. 9 Jac. B. R. S. C. accordingly.—— Bulst. 115. Pasch. 9 Jac. Hughes v. Keymish, S.C. accordingly ——But in this Case Judgment was given against the Defendant, because he did not set forth by Way of Pleading, *that he erected this his new Building upon the old Foundation*, as he ought to have done; and for this Omission the Plea is not good, and so the Defendant has failed in his Justification. Bulst. 116 S. C.——Yelv. 216. S. C. says, that Judgment was given against the Defendant, because he *did not answer the Offence laid to his Charge, which was the Building upon the void Piece of Land*, and thereby stopping the Plaintiff's Lights, whereas Defendant justified only by building upon the old Foundation, and thereby stopping the Plaintiff's Lights, which is not the Matter he was charg'd with, but quite different; and so the Point of the Action not answer'd. Quod Nota. Per tot. Cur. Yelverton was Counsel with the Defendant.

2. *A. and B.* were *Owners of* 2 *contiguous Houses*; B. had Lights in his House towards A.'s Yard, and *A. made up Blinds.* The Court of Aldermen. upon 19 Car. 2. cap. 3. ordered they should be abated; but

a Prohibition was granted in B. R. for whatever they may do in their Inner Court by Quod Permittat, where they have Power to determine real Actions, it is plain that the Court of Aldermen have no Power in this ſummary Way, unleſs by 19 *Car.* 2. *cap.* 3. and that *gave* them *only a temporary Power* during the Re-building of the City. While the City was re-building they had Power to aſſign *Lights*, but by *being once aſſign'd, the Party gain'd a legal Title to them*, and may maintain an Action at Common Law for the Obſtruction, and the Court of Aldermen have no farther Power. 2 Salk. 425. Mich. 7 W. 3. B. R. Arnot v. Brown.

(D) *Actions* at Law, *or Suits* in Equity.

1. A. *WAS ſeiſed of a Houſe* and a narrow Slip of Land, *and B.* was poſſeſs'd *of an Orchard adjoining, and* there *erected a Wood-pile, which darken'd the Plaintiff's Lights* of his Hall and Chambers; whereupon A. brought Action on the Caſe; and it was reſolved that the Action lies, and ſays that the ancient Form of the Action was ſignificant, viz. Quod Meſuagium horrida Tenebritate obſcuratum fuit; and cites 7 E. 3. 50. b. 22 H. 6. 14. (a) Per Markham. 11 H. 4. 47. 9 Rep. 57. b. 58. Mich. 8 Jac. C. B. Aldred's Caſe.

Roll Rep. 221. pl. 27. S. C. ſays the Plaintiff did not allege any Requeſt to remove the ſaid Shed; and that Coke thought the Action did not lie, becauſe no Act was done by the Leſſee, but a *Continuance*, and that he could not remove it without being ſubject to an Action of Waſte to the Leſſor; Quod fuit conceſſum per Dodderidge; but they ſaid the Plaintiff might have an Aſſiſe of Nuſance againſt the Leſſor in this Caſe.——S. P. and S.C. cited, and the Action being brought againſt the Leſſor, it was much debated whether it would lie againſt him, or not: And Judgment was given for the Plaintiff; for admitting that the Action would lie againſt the Defendant, or againſt his Leſſee, then the Court held that the Plaintiff ſhall have his Election, and a Recovery againſt the one would be a Bar in an Action brought againſt the other. And it is very reaſonable that the Action ſhould lie againſt the Defendant, becauſe he erected it and for ſome Time continued the Enjoyment of it, and then demiſed it to the Leſſee rendring Rent; ſo that he has made an Agreement with the Leſſee that it ſhould continue, and he has a Rent for it. And Judgment was given for the Plaintiff. Ld. Raym. Rep. 713. Hill. 13 W. 3. B. R. in Caſe of Roſewell v. Prior.——2 Salk. 460. S. C.

2. In Caſe the Plaintiff declared, that he was ſeiſed of a Houſe and Chamber in N. and that A. was poſſeſs'd of a Shed adjoining to the ſaid Houſe, and 1 Sept. 40 Eliz. and Time whereof &c. there was a *Window in the* ſaid *Houſe looking towards the* ſaid *Shed, by which Window*, and by no other Means, *the Light came into the Chamber of the Houſe*, and the ſaid A. 30 Sept. 40 Eliz. *erected a Building upon the Shed* ſo near to the Houſe, that it ſtopp'd all the Light of the ſaid Window, ſo as he loſt all his Light, and that the Defendant poſſeſs'd of the ſaid new Building, had continued and not removed the ſaid new Erection. A. leas'd this Shed to B. who now dwelt in the ſaid Shed, and the *Action* being brought againſt B. it was agreed by all the Court, that this Action lay *againſt* him who erected it: But it was objected, That it lay not againſt the Deſeudant, who only is *Leſſee for Years*, and Inhabitant there; and that if the Plaintiff had any Remedy, it ſhould be a Quod Permittat againſt the Tenant of the Freehold. And to that Opinion Coke Ch. J. ſeemed to incline, but the other Juſtices doubted therein. But afterwards it appearing that the Plaintiff had procured Judgment to be entered without Motion to the Court, the Defendant was put to his Writ of Error. Cro. J. 373. pl. 3. Trin. 13 Jac. B. R. Ryppon v. Bowles.

3. If a Man has a vacant Piece of Ground, and builds thereupon, and that Houſe has very good Lights, and he *lets* this *Houſe to another, and after he builds upon a contiguous Piece* of Ground, *or lets the Ground contiguous to another, who builds* thereupon to the Nuſance of the Lights of the firſt Houſe, the Leſſee of the firſt Houſe ſhall have an Action upon his Caſe againſt ſuch Builder &c. For the firſt Houſe was granted to him with

with all the Eaſements and Delights then belonging to it. Per Holt Ch. J. 6 Mod. 116. Hill. 2 Ann. B. R. in Caſe of Roſewell v. Prior.

4. *Bill in Chancery* charged, that Plaintiff being poſſeſs'd of a Meſſuage and Ground adjoining incloſed with a Wall, the Defendant proceeded to pull down the Wall, and build upon the Ground ſo near the Plaintiff's Houſe as to ſtop his Lighs; Defendant inſiſted that the Ground and Wall was his, and the raiſing the Building could not obſtruct Plaintiff's Lights. And upon Affidavits ſupporting the Allegations of the Bill, an *Injunction* was prayed to ſtay Defendant's Building &c. But denied by King C. becauſe it would be a determining the Right upon Motion; but ordered that Defendant receive a *Declaration in Treſpaſs* or *Ejectment*, as ſoon as Plaintiff thinks proper that the Matter may receive Trial. Gibb. 106. pl. 6. Mich. 3 Geo. 2. Bateman v. Johnſon.

(E) Pleadings.

See (A) pl. 1.

1. WHERE *one* preſcribes *to have Lights* to his Houſe, *and the other* preſcribes *to ſtop them* up; this is not good. Per Coke Ch. J. Godb. 183. pl. 262. Mich. 9 Jac. B. R. in Caſe of Hughes v. Keenes.

S. P. Per Cur. Freem. Rep. 210. pl. 27. Mich. 1676. in Caſe of Hickman v. Thorny.

2. In *Treſpaſs of Taking, Breaking, and Carrying away* 12 *Boards* of the Plaintiff's. The *Defendant as to the* Taking and Carrying away pleaded Not guilty, and as to the *Breaking* he *juſtified, becauſe the Plaintiff had fixed them to his Houſe, and* that *they hindered his Light*, and he broke them, as lawfully he might. The Plaintiff *replied*, That *he did not fix them to the Houſe* of the Defendant; and upon this they were at Iſſue, and found that they were fixed, but not by the Plaintiff, viz. that the Plaintiff did not fix them to the Houſe of the Defendant. It was mov'd in Arreſt of Judgment, becauſe it is not material who fix'd them; for the fixing to the Houſe is the chief Point. But the Court ſaid that he ought to have avoided it in Pleading; but when upon this ſpecial collateral Iſſue, it is found for the Plaintiff, he ought to have Judgment, tho' it was not a good Iſſue. 2 Roll. R. 241. Mich. 20 Jac. B. R. Gwin v. Damport.

S. C cited 2 Roll. R. 238. in Caſe of Abbot v. Blafield.

3. Caſe &c. in which the Plaintiff declared that he was poſſeſſed of an Houſe &c. which had 3 Windows on the North Side, & adhuc poſſeſſionatus exiſtit, *and that the Defendant was poſſeſſed of an Houſe, and a void Piece of Ground adjoining* to his Houſe on the North Side, & adhuc poſſeſſionatus exiſtit, and avers that they were ancient Lights Time out of Mind, and *that the Defendant had built ſuper vacuam peciam terræ, and thereby ſtopped his Lights*; Upon not guilty pleaded the Plaintiff had a Verdict. It was moved in Arreſt of Judgment, that the Declaration was repugnant, for the Ground, being declared to be built upon, cannot be ſaid to be Vacua. And of this Opinion was Barkeley, but the other Juſtices e contra; for this is Surpluſage; For it might be that he built upon the ſaid Vacuam peciam Terræ, and yet it might be ſtill Vacua, and that he built upon part only; And Judgment for the Plaintiff. Jo. 326. pl. 6 Mich. 9 Car. B. R. Nerrers v. Seaborne.

Cro. C. 325, 326. pl. 8. S C. by the Name of Symonds v. Seaborne, accordingly.

4. In an Action for a Nuſance in ſtopping of the Lights of his Houſe, Exception was taken to the Declaration, for that he did *not ſay Antiquum Meſſuagium*; and yet it was ruled to be good enough; for perhaps the Houſe was new built; And the Truth of this Caſe was ſaid to be, That the *Defendant had built the Houſe and let it to the Plaintiff*, and would

In an Action for ſtopping his Lights a Man need not declare of an *Ancient*

Houſe; for if a Man ſhould build a Houſe on his own Ground, and then grant the Houſe to A and grant certain Lands adjoining to B. B. can't build to the ſtopping A's Lights; Per Hale. Vent. 239. in Caſe of Cox v. Matthewes.

would now go to ſtop up the Lights. Vent. 237. Hill. 24, & 25 Car. 2. in B. R. Cox v. Matthews.

5. In an Action upon the Caſe for ſtopping of his Lights, the Plaintiff declared, *that he was poſſeſſed for divers Years* (and did *not ſay how many*) and *that Time out of Mind the Light came in at the Windows*; This was allowed a good Form of alledging the the Preſcription. Vent. 248. Mich. 25 Car. 2. B. R. Anon.

6. Treſpaſs on the Caſe for ſtopping up ancient Lights by the Erection of a Wall; Preſcription in *Quodam Meſuagio ſive Tenemento antiquo* is good enough, tho' an Ejectment will *not* lie *De uno Meſuagio ſive Tenemento*, becauſe the Sheriff will not know what to deliver Poſſeſſion of. Judgment for Plaintiff. 2 Show. 96. Pl. 94. Paſch. 32. Car. 2. B. R. —— v. Fetherſton.

*Cro. C. 573. pl. 18. Hill. 15 Car. B. R.

7. In Caſe for ſtopping Lights the Plaintiff declared only *Quod poſſeſſionatus fuit of ſuch an Houſe* in which *habuit & habere debuit ſuch and ſuch Lights*. Exception was taken on Demurrer becauſe he did *not ſay Time out of Mind*, *nor* ſo much as *that it was an ancient Houſe and that the Lights were ancient*; but it was held well enough upon the Caſe of * Sands v. Treſuſis. Show. 7. Paſch. 1. W. & M. Villers v. Ball & al.

1 Salk. 10. pl. 3. S. C. accordingly.

8. Plea of a *former Action* for ſtopping his Lights, *and a Recovery therein* is a *Bar* to any new Action *for ſuch Erection*; But not to another Action wherein he declares of the *Continuance of the Nuſance*. Carth. 456. Trin. 10. W. 3. B. R. Johnſon v. Long.

Comb. 481. S. C. accordingly, but that it would have been naught upon Demurrer; for the Defendant might not be a wrong Doer, erecting upon his own Ground &c. --Carth. 454. S. C. accordingly —— 6 Mod. 116. S. C Mich. 13. W. 3.

9. In Caſe for erecting a Shed upon the Defendant's Ground, ſo near the Plantiffs Houſe that it ſtopped his Lights, the Plaintiff *declared*, that he *was poſſeſſed of a Houſe which had Windows*, *Per quas lumen inferebatur & inferri conſuevit*; After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Houſe was *not ſaid to be an Ancient Meſſuage*, and the Defendant appeared not to be a Wrong-doer; For one may erect a Shed on his own Ground againſt another's Windows, if they are not Ancient Lights. 3 Cro. 118. And all the Precedents of ſtopping Lights have it, either *Antiquum Meſſuagium* or *Antiqua Lumina*. 1 Cro. 325. Pop. 170. 2 Cro. 373 Yelv. 215. ſed per Cur. The word (*conſuevit*) *imports Uſage* Time out of Mind, and we muſt intend, after Verdict, that Uſage Time out of Mind was proved; And ſo indeed it was in this Caſe, for otherwiſe the Jury could not have found for the Plaintiff. The Court ſeemed to think this Declaration would not have been good upon Demurrer. 2 Salk. 459. pl. 4. Mich. 10 Will. 3. B. R. Roſewell v. Prior.

mentions the Words of the Declaration to be *habuit & habere debuit*, and ſays it was agreed that formerly the Way was to declare of Ancient Lights and Ancient Meſſuage; But that now that was altered. —— Ld. Raym. Rep 392. S. C. accordingly; But Holt and Turton ſaid it would have been ill on Demurer; But Rookby Contra.

For more of Stopping Lights in General, See **Actions, Nuſances,** and other Proper Titles.

(A) Stranger.

Stranger.

(A) Of what Things a Stranger may take Advantage.

1. HE who is a *Stranger to the Iſſue* ſhall not have *Advantage of the Verdict or Trial tho' he was Party to the Original.* Br. Record pl. 3. cites 33 H. 6. Br. Trials pl. 2. 3. cites 33 H. 6. 1. S. C. — Br. Verdict pl. 6. cites S. C.

2. *As in Debt againſt two of D. by ſeveral Præcipes* and *both were outlawed*, and the *one taken by Capias Utlagatum, and pleaded* that *No ſuch Vill, and found for him, and he went quit*, and after *the other was taken by Capias Utlagatum, and would have taken Advantage of the firſt Verdict* and Judgment, and could not by the beſt Opinion, by which the Attorney of the King confeſſed the Exception, and thereupon he was diſmiſſed. Br. Eſtranger al fait. pl. 3. cites 33 H. 6. 51, 52.

3. *Remainder, Rent, Condition* nor *Re-entry* can't be *reſerved* to a Stranger, but to the Donor, Feoffor, Leſſor, or their Heirs, and a Gift in Tail upon Condition that if he alien in Fee, then the Land ſhall remain to a Stranger is a void Remainder, tho' he does alien in Fee; per Frowike, Vaviſour, and Kingſmil, J. For a Remainder cannot be appointed to commence in a Stranger by Matter Ex poſt facto, but muſt be in the Party by the firſt Livery, and otherwiſe it is void; quod nota. Br. Done &c. pl. 18. cites 21 H. 7. 11. Br. Condition pl. 83. cites S. C.

4. Of *Choſes in Action* no Stranger ſhall take Advantage. Fin. Law. 8vo. 106, 107.

5. If a *Seigniory is granted in Fee* to the Tenant of the Land and a Stranger, they are not Jointenants but the one Moity is extinct &c. Arg. D. 140. b. pl. 41. Hill. 3 & 4 P. & M. in Caſe of Butts v. Ld. North.

6. A Stranger ſhall take Advantage of a *Limitation.* 10 Rep. 40. b. by the Reporter in Mary Portington's Caſe.

7. Where by a *Condition* a thing is *to be perform'd by or to* a Stranger by this Undertaking there ought to be a punctual Performance; Arg. cites 4 H. 7. 3, 4. 27 H. 8. 1. Perk. Condition S. 756. 35 H. 8. D. 56. But if it be that I. S. a Stranger ſhall inſeoff the Obligee, and the *Obligee refuſes* to take it, he ſhan't take Advantage of it. Per Coke Ch. J. 3 Bulſt. 30. Paſch. 13 Jac. in Caſe of Quick v. Ludborrow. Roll's Rep. 196. pl. 38. S. C.

8. If A. *inſeoffs D. his 2d Son upon Condition* that *if he pay 500 l. to D.* then *E his 3d Son ſhould have Fee*, This is a Condition the Right of performing which deſcends to the Heir of A. and he may take Advantage of it; for the Limitation of the Fee over to E. is void by a particular Maxim of the Common Law which will not allow a Fee to be limited upon a Fee or by that other Maxim by which *a Stranger cannot take Advantage of a Condition.* Per Parker C. 10 Mod. 423. Mich. 5 Geo. 1. in Canc. in Caſe of Marks v. Marks.

For more of Stranger in General, See **Arbitrement, Conditions, Faits, Fines,** (F. 4) and other proper Titles.

Stricti Juris.

(A) What Things are.

1. QUÆ *Communi Legi derogant*, ſtricte interpretari debent. See Maxims.

2. *The Law reſpecteth Matters of* Profit and Intereſt *largely*; *but of* Pleaſure, Skill, Eaſe, Truſt, Authority, and Limitation *ſtrictly*. Fin. Law 8. b.

3. Every *Preſcription* is Stricti Juris. 4 Le. 224. pl. 360. Mich. 10. Eliz. C. B. Anon.—3 Le. 13. pl. 31. S. R.——4 Le. 167. pl. 273. S. R.

4. *Notice to avoid* a Leaſe was to be given by the Leſſor, his Wife, or his *Heirs*. This extends not to give a *Power* to *Aſſigns to avoid* the Leaſe by Notice. Godb. 3. pl. 3. Paſch. 20 Eliz. C. B. Anon.

5. *Conditions* ſhall not be taken ſo ſtrictly, that the Breach ſhall be according to the preciſe Words; But if the Meaning be broken, it is a Breach of the Condition, as where the Condition was *Not to demiſe* the Land, and *he deviſed it*, this is a Breach. Cro. E. 331. pl. 8. Trin. 36 Eliz. B. R. Berry v. Taunton.

S. C. Goldsb. 184. pl. 142. by the Name of Cole v. Taunton. — Poph. 106.

S. C. by the Name of Taunton v. Barrey.——Owen 14. Taunton's Caſe, S. C. ſays that ſome Doubt was made; but afterwards it was adjudged as here.

All Conditions ſhall be taken ſtrictly; and no Words ſhall be ſupplied by Intendment, to make a Condition to deveſt or deſtroy an Eſtate. See Cro. E 414. pl. 5. Mich. 37, & 38 Eliz. B. R. Hardy v. Seyer.

6. A *Diſpenſation* of a Condition in part is a Diſpenſation in all. See Cro. E. 816. Paſch. 43 Eliz. B. R. Dumper v. Symms.——4 Rep. 120. a. Hill. 45 Eliz. S. P. in S. C.

7. *Cuſtoms to barr Eſtates* ſhall be taken ſtrictly. See Yelv. 1. Paſch. 44 Eliz. B. R. Baſpole v. Long.

S. P. But per Popham, a Cuſtom which is *in Maintenance*, and making of a Copyhold Eſtate, ſhall be taken favourably. Cro. E 879. pl. 10. Paſch. 44 Eliz. B. R. S. C.——Where it is to bar the Heir at Law, As Borough Engliſh, it ſhall be taken ſtrictly. Cro. C. 411. Trin. 11 Car. 12. B. R. Caſe of Reeve v. Malſter.

8. *Reſtitutions* have favourable Conſtructions more than *Grants*. Advowſons, without expreſs Words, paſs in caſe of Reſtitutions, but not in caſe of a Grant. Arg. Lat. 255. in Caſe of Surry v. Cole, cites 41 E. 3. 5 M. 3 Jac. C. B. Barker and Barret.

9. *Things, that go in Abridgment of the Common Law*, ſhall be taken ſtrictly, and ſhall have no Favour in Conſtruction. See Yelv. 92. Trin. 4 Jac. in Caſe of Armiger v. Browne.

10. A Claim of *Diſcharge of Tithes* is contrary to common Right, and therefore ſhall be ſtrict. Noy. 97. Hill. 15 Jac. C. B. in Caſe of Slade and Drake.

11. *Inhibitions &c.* are Stricti Juris. 2 Bulſ.

12. *Forfeitures* are odious in Law, and ſhall be taken ſtrictly. Per Cur. See Hutt. 103. Paſch. 5 Car. Paſton v. Utber.

13. *Eſtoppels* are to be taken ſtrictly; for they neither give nor take away any Right. No man is bound by them, but the Parties and their Privies. Arg. Show. 27. Trin. 1 W. & M. in Caſe of Incledon v. Burgeſs.

14. *Remitters* are favoured in Law. Arg. See Show. 420. Trin. 6 W. & M. in Caſe of the King v. the Biſhop of London and Dr. Birch.

15. A. deviſes to B. and C. his Wife's Children, (as he call'd them, not owning them to be his) 10 s. a-piece, and no more; and gave the Children that he owned conſiderable Legacies. B. and C. ſhall come in for a Share of the undiſpoſed Surplus; for the *Words of Excluſion of the Children* muſt be taken ſtrictly. Chan. Prec. 169. pl. 140. Trin. 1701. Vachell v. Jeffereys.

16. *Removal of a Member* of a Corporation being an Act of an odious Nature, all Clauſes in the Charter concerning it muſt receive a ſtrict Interpretation; and therefore the Word Majority, mentioned in the Charter for that Purpoſe, ſhould be underſtood of the *Majority* of the whole Corporation. Per tot. Cur. 10 Mod. 76. Hill. 10 Annæ, B. R. the Queen v. Sutton.

17. *Powers* are to be ſtrictly purſued, becauſe created by the Owner of the Land; in which Caſe, Stat pro Ratione Voluntas, 10 Mod. 471. Arg. in the Caſe of Lady Coventry v. Lord Coventry, ſays this was ſtrongly inſiſted upon by Holt, Ch. J. in his Argument in the Caſe of Bath v. Mountagu, as a fix'd and ſettled Point in Law.

See Powers, (A) pl. 6. and the Notes there. —— But *Powers of Revocation* are favoured in Law, and for that is cited the Caſe in 1 Inſt. 273. 1 Rep. 173, 174. and that there are many other Caſes; for ſince the 27 H. 8. 10. of Uſes, they are advantagious in the ſettling Eſtates in Families, and as they are uſeful, the Law doth expound them favourably. Skin. 72. Arg. in Caſe of Herring and Brown.

18. All ſuch *Laws* as have been made *to reſtrain the natural Dominion*, have been very reſtrictively conſtrued. G. Equ. R. 171. Paſch. 8 Geo. 1. in Chancery, in Caſe of the Counteſs of Coventry v. the Earl of Coventry.

For more of Stricti Juris in General, ſee **Conditions, Eſtoppels,** and other Proper Titles.

Striking.

(A) Striking &c. *in* privileg'd Places. *Church*, or Church-Yard.

1. 5 & 6 Edw. 6. cap. 4. S. 1. ENacts, That, *if any Perſon ſhall, by Words only, quarrel, chide, or brawl, in any Church or Church-yard, it ſhall be lawful for the Ordinary to ſuſpend him if he be a Layman, ab Ingreſſu Eccleſiæ; and if a Clerk, from the Miniſtration of his Office.*

D. was indicted upon the Statute of 5 Ed. 6. for ſtriking in St. Paul's Church-yard; and it was moved, that it being a Church-yard of a Cathedral-church, it is not within the Statute; but Curia contra. Cro. E. 224. pl. 7. Paſch. 33. Eliz. B. R. Dethick's Caſe. —— Le. 248. pl. 337. S. C. Accordingly Prohibition was pray'd, upon the Statute of 5 Ed. 6. cap. 4. for brawling in the Church-yard; becauſe Coſts were there given, &c. and it was denied per Curiam; The Coſts being there pro Expenſis litis; otherwiſe, if it had been pro Damnis. Cro. J. 462. pl. 7. Hill. 15 Jac. in B. R. Large v. Alton.

S. 2. *If any Perſon ſhall ſmite, or lay violent Hands upon another, in Church or Church-yard, he ſhall be deemed excommunicate* ipſo facto.

Whether the offender, by the offence committed, immediately without any Proof made, or Trial had, by force of this Act, and without any

any Sentence given, or Proof of Witneſſes made before the Ordinary, ſhall by thoſe Words (ipſo Facto) be deemed excommunicate, was much doubted, by reaſon of the Words in the laſt Clauſe of the Statute, viz (And further, that he ſhall ſtand, ipſo Facto, excommunicated as is aforeſaid) and Curia adviſare vult to the next Term; but the Offender, who was Plaintiff in an Action of falſe Imprisonment, died in the mean time. D. 275. b. pl. 48. Paſch. 10 Eliz. Forman v. Mounſon.——Cro. E. 680. Trin. 41 Eliz. B. R in Caſe of Barker v. Robinſon cites D. 275. 10 Eliz. that, ipſo Facto, he ſhall be excommunicated, is to be intended, He ſhall be excommunicated after Sentence, or due Trial and Conviction, and not before.——In Treſpaſs of Battery, the Defendant pleaded Excommengement in the Plaintiff ipſo Facto; for that he had ſtricken in the Church-yard, by the Statute of 5 E. 6 without ſhewing an Excommengement by the Ordinary, or under his Seal, and for this Cauſe it was ruled to be ill. For altho' the Statute ſaith, that he ſhall be excommunicated ipſo facto, yet that is to be intended after a Sentence declaratory, or Conviction; for, otherwiſe, there were not any Means for his Abſolution. Wherefore the whole Court reſolved it to be no Plea, (Popham abſent) and gave Rule, that it ſhould not be received; But that a Nihil Dicit be entered, unleſs other ſufficient Plea be pleaded by ſuch a Day. Cro. Eliz. 919 pl. 13. Hill. 45 Eliz. B. R. Sonham v. Trundle——Litt. Rep. 149. Paſch. 4 Car. C. B. Vinyer v. Eaton, that there ought to be a Sentence declaratory in the Court Chriſtian.——Het. 86. S. C. but ſeems to be only a bad Tranſlation of Litt. Rep. 149.

Where by the Statute of Ed. 6. it is ordained, That ſtriking in the Church-yard ſhall be Excommunication ipſo Facto; this tho' it takes away the Neceſſity of any Sentence of Excommunication, yet he that ſtrikes does not ſtand excommunicated, until he be thereof convicted at Law, and this tranſmitted to the Ordinary. 1 Vent. 146. Trin. 23 Car 2. in B. R. Dyer v. Eaſt.——Sid. 425. pl. 10. Dyer v. Eaſt, is not the S. C.——Mod. 9. pl. 27. Dyer v. Eaſt is a quite different Point, and ſo is 2 Keb. 554.

If one be aſſaulted in the * Church, or within a Church-yard, he may not beat the other, or draw a Weapon (altho' it be in his own defence) there; for it is a ſanctified Place, and he may be puniſh'd for that by 2 Ed 6. and ſo if in any of the King's Courts, or within View of the Courts of Juſtice; becauſe a Force in that Caſe is not juſtifiable, tho' in his own Defence. Noy. 104. The 5th Reſolution in the Caſe of Day v. Beddingfield, & al'.—— S. P. Lev. 106. Trin. 15. Car. 2. B. R. in Bokenham's Caſe.

*S. 3. *If any ſhall maliciouſly ſtrike any Perſon with a Weapon in Church or Church-yard, or ſhall draw any Weapon in Church or Church-yard, with Intent to ſtrike another; every Perſon ſo offending, and convict by Verdict, his own Confeſſion, or 2 Witneſſes, before the Juſtices of Aſſize, of Oyer and Terminer, or Juſtices of Peace in their Seſſions, ſhall have one of his Ears cut off; and if he have no Ears, he ſhall be burned in the Cheek with the Letter F. and ſhall ſtand excommunicated ipſo facto, as aforeſaid.*

* S. P. Cro. J. 367. Hill. 12 Jac. in the Star-chamber, in the Caſe of Frances v. Lee, the 5th Reſolution. But ſays, ſee the Statute of 5 E. 6.——S. P. Hawk. Pl. C. 57. cap. 21. S. 4.

P. was indicted upon the Statute of 5 E. 6. cap. 4. for drawing his Dagger in the Church of B. againſt J. S. and does not ſay (according to the Statute) to the Intent to ſtrike him; and for this Cauſe it was void. But then it was moved, if this were not good as for an Aſſault, that he might be fined upon it. But, per Cur. it is void in all; for being † indicted upon the Statute, it is void as to an Offence at the Common Law. Cro. E. 231. pl. 23. Paſch. 33 Eliz. in B. R. Penhallo's Caſe.——S. C. 2 Le. 183. pl. 234. by the Name of Perchall's Caſe, accordingly per Sands, Clerk of the Crown, and the whole Court. For the Concluſion of the Indictment is Contra formam Statuti, and therefore the Jury cannot inquire at the Common Law.——4 Le. 49. pl. 127. Penhall's Caſe. S. C. accordingly, and in almoſt the ſame words.

† S. P. accordingly, by all the Juſtices contra Jones, that being laid Contra formam Statuti, it cannot be good as for a Battery at the Common Law. Cro. C. 465. pl. 2. Trin. 12 Car. B. R. Cholmley's Caſe.

(B) Striking &c. in privileg'd Places. *King's Palace, Courts* &c.

Where a Man *ſtruck a Juror at Weſtminſter*, which paſs'd againſt him, he was thereof indicted and arraign'd at the Suit of the King, and attainted, and Judgment was given that he ſhould go to the Tower of London, and there remain in Priſon all his Life, and that his Right Hand ſhould be cut off, and his Land ſeiſed into the Hands of the King, and the King anſwer'd of the Iſſues. Br. Fines for Contempts, pl. 35. cites 41. Aſſ. 25.——Br. Contempts, pl 11. cites S. C.——Br. Charters de pardon, pl. 70. cites S. C.——Br. Forfeitures de terre, pl. 41. cites S. C.

1. IN Aſſiſe. R. T. *ſtruck a Juror in Weſtminſter-Hall, who had paſs'd in Inqueſt againſt one of his Friends*; and it was awarded by all the Council, that his Hand ſhould be cut off, and his Land, and his Chattels forfeited to the King. And the King immediately gave his Land to one of his Varlets, and of his Free Will pardoned the cutting off of his Hand. Br. Contempts, pl. 9. cites * 39. Aſſ. 1.

Striking a Man in Weſtminſter-Hall, or a Juror in preſence of the Juſtices, is *Forfeiture of Lands and Chattels.* Finch. 75. b.

* S. C. cited in Ld. C. Elleſmere's Poſt-nati. pag. 50, 51.——S. P. And ſo, if in any other Place ſitting the Courts there, or before Juſtices of Aſſize, or Oyer and Terminer, and within the View of the ſame, a Man doth ſtrike a Juror, or any other, with Weapon, Hand, Shoulder, Elbow, or Foot, he ſhall have the like Puniſhment; but in that Caſe, if he make an Aſſault, and ſtrike not, the Offender ſhall not have the like Puniſhment. 3 Inſt. 140.

2. A Man who *beat a Feme in Weſtminſter-Hall*, was compell'd to *find three Mainpernors of his good Behaviour to the Feme*, who ſued againſt him by Bill, *and was bound to the King in* 100 *l. de ſe bene gerendo.* Br. Contempts, pl. 20. cites 42. Aſſ. 18.

S. P. per Knivet, Ch. J. But Brook ſays Quære; for it ſeems that he ſhall not be compell'd; But, *if he will not be bound, he ſhall be awarded to the Marſhalſea, there to remain till he find Security de ſe bene gerendo.* Br. Dureſs, pl. 22. cites S. C.

3. A. B. *beat a Feme*, and ſhe brought a Bill againſt him in B. R. inaſmuch as he beat her *when ſhe was purſuing her Buſineſs in Curia Regis.* And *Panel was made* by the Marſhal *of People who had Stalls of Merchandize in the Hall*, and this per Mandatum Juſticiariorum. Br. Bille, pl. 44. cites † 43. Aſſ. 18.

† This is miſ-printed in all the Editions, and ſhould be 42 Aſſ. 18.

4. If any Man in Weſtminſter-Hall, or in any other Place, ſitting the Courts of Chancery, the Exchequer, B. R. C. B. or before Juſtices of Aſſiſe, or Juſtices of Oyer and Terminer, (which Courts are mentioned in the Statute of 25 E. 3. De proditionibus) ſhall *draw a Weapon upon any Judge*, or Juſtice, *though he ſtrike not*, this is as great Miſpriſion, for the which he ſhall loſe his Right Hand, and forfeit his Lands and Goods, and his Body to perpetual Impriſonment. The Reaſon hereof is, becauſe it *tends ad Impedimentum Legis terræ.* 3 Inſt. 140.

5. If any ſtrike *in the King's Palace, where the King's Royal Perſon reſides*, he ſhall not loſe his Right Hand, unleſs he draw Blood; but if he draw Blood, then his Right Hand ſhall be ſtrucken off, be perpetually impriſon'd, and fined, and ranſomed. 3 Inſt. 140.

Note, the Law makes a great *Difference between* Stroke or Blow, in or *before* any of the ſaid *Courts of Juſtice*, where the King is repreſentatively preſent, *and the King's Court*, where his Royal Perſon reſides. For in the King's Houſe (as has been ſaid) Blood muſt be drawn; which needs not in or before the Courts of Juſtice, but a Stroke only ſuffices. Again, the Puniſhment is more ſevere in the one Caſe than in the other; ſuch Honour the Law attributes to Courts of Juſtice, when the Judges or Juſtices are doing of that which to Juſtice appertains; and the Reaſon is, Quia Juſtitia firmatur ſolium. 3 Inſt. 140.———S. P. Hawk. Pl. C. 57. cap. 21. S. 3.

6. By the *ancient Laws* of this Realm, *Striking* only, *in the King's Court*, was *puniſh'd by Death.* See Lambert, inter Leges Inæ, ca. 6. Si quis in Regia pugnarit, rebus ſuis omnibus mulctator, & ſitne morte etiam plectendus, Regis arbitrium & jus eſto. Inter leges Canuti, cap. 56. Si quis in Regia dimicarit, capitale eſto, &c. Inter leges Alveredi, cap. 7. Qui in Regia dimicarit, ferrumve diſtrinxerit, capitor, & Regem penes arbitrium vitæ neciſque ejus eſto &c. 3 Inſt. 140.

7. Peter **Burchet**, *Priſoner in the Tower, ſtruck*, within the Tower, John **Langworth** *his Keeper*, (who ſtood in a Window reading of the Bible) with a Billet on the Head behind, *whereby* Blood was ſhed, and *Death inſtantly enſued.* This being without any Provocation, was adjudged Murder, for which he was attainted; and before his Execution, (which was in the Strand, over-againſt Somerſet-Houſe) *his Right Hand was* firſt *ſtrucken off*, by force of the Statute of 33 H. 8. [cap. 12.] for that the *Tower was one of the Queen's ſtanding Houſes or Palaces.* 3 Inſt. 140.

S. C. cited 6 Mod. 75. Mich. 2 Ann. B. R. in the Caſe of Elderton, Porter, &c. and Powel, J. ſaid, that the Privilege of a Palace is not confin'd to actual Reſidence; and inſiſted on this Caſe of Burchet, and the other 2 Judges ſeemed of his Opinion. But at the End of the Caſe, there is added a Nota, that the Chief Juſtice, upon this Occaſion, ordered the Record of Burchet's Attainder to be brought into Court, and it is Mich. 15, & 16. Eliz. Rot. 2. and there is no Judgment there that his Hand ſhould be cut off, tho' the Ch. J. ſaid his Hand had been in Truth cut off; and ſo is my Ld. Coke and Stowell's Hiſtory.—Hawk. Pl. C. 57. cap. 21. S. 2. ſays, it ſeems queſtionable, from the Conſtruction of this whole Act, and the General Tenor of the

Law Books, whether Striking in a Palace, wherein the King is not at the Time actually reſident, be within the Statute; and it is ſaid, that the Inſtance which is given in the 3d Inſtitute, of a Perſon's Hand being cut off, for Striking in the Tower, is not warranted by the Record.

Dal. 23. pl. 6. in Anno 4 & 5. P. & M. cites 4 E. 3. Corone 6. and ſays, Quære, what Law is there for the Forfeiture of his Lands; but it is, that they are forfeited only for his Life. ——In Cary's Caſe, Cro. E. 405. pl. 14. Trin. 37. Eliz. B. R. Popham ſaid, that if the Indictment had laid the Offence as done Coram Domina Regina, he had forfeited all his Lands &c.——Ow. 120. S. C. accordingly. ——S. P. Hawk. Pl. C. 57. cap. 21. S. 3.

8. Where ſome of the Books aboveſaid ſay, that the Offender ſhall forfeit his Lands, and ſome, that he ſhall be diſherited, yet the *Forfeiture of* his *Lands is only for Term of his Life*; for, being no Felony, the *Blood is not corrupted*, nor the Heir diſinabled to inherit. And this ſevere Puniſhment is at the Suit of the King, and the Party may have his Action, and it ſhall be tried by the Officers and Criers. And for ſuch a Stroke, Thomas of Whitteſly recover'd 500 *l.* Trin. 9 E. 3. Rot. 154. Midd. 3 Inſt. 141.

So if one ſmite one in the Court of the Dutchy, &c. But if one ſmite another before the Juſtices of Aſſize, there his Right Hand ſhall be cut off, as it appears, 22 Ed. 3. fol 13. & 19 Ed. 3. Title Judgment, 12 Rep. 71. in Oldfield's Caſe.

9. One R. G. ſmote one Whitehall, ſitting in the Court of Requeſts, and was but fined and ranſomed. 12 Rep. 71. in Oldfield's Caſe, cites 9 Eliz. B. R. Robert Girling's Caſe.

10. One B. in the Hall of *Weſtminſter*, *Sedentibus Curiis*, with his Elbow and Shoulder out of Malice juſtled Anthony Dyer of the Inner Temple, ſo that he overthrew him, and with his Feet ſpurned him upon his Legs, but did not ſmite him neither with his Hand, nor with any Weapon, and yet it was held that his Right Hand ſhould be cut off &c. upon which B. was indicted in *B. R.* and after obtained his Pardon. 12 Rep. 71. Oldfield's Caſe cites 2 Jac. Billingham's Caſe.

11. One O. came out of the Court of the Dutchy, and before he came into *Weſtminſter* Hall, with a Knife ſtabbed one Ferrar a Juſtice of Peace, of which he died, and if O. ſhould have his Right Hand cut off was the Queſtion before the two Chief Juſtices, Chief Baron, Walmſley, Warberton, Foſter, and divers other Juſtices; And it was reſolved, no; For it ought to be in the Hall of *Weſtminſter*, *Sedentibus Curiis*, as it appears in 3 Eliz. Dyer. 188. 41 Ed. 3. Tit. Coron. 280. 12 Rep. 71. Trin. 8 Jac. Thomas Oldfield's Caſe.

12. Sir Tho. Savill was indicted for Breach of the Peace within the Palace, to wit, for aſſaulting Sir Francis Wortley, and he pleaded his Pardon, and Doderidge ſaid, that to *ſtrike in the Palace* was the Loſs of the Right Hand by the Law, and in this Point our Law agrees with the Laws of France and Spain, and all other Nations; For as the Perſon of the King, ſo his Palace and Courts of Juſtice are ſo ſacred, that ſuch Contempts and Affronts are judged worthy of ſuch Puniſhments, and ſaid that the Book of 24 E. 3. 33. Fitzh. Forfeiture 22. (of which he would have Students to take Notice) is that where *one came into the Palace armed*, and being brought to the Bar in his Compleat Armor; The Cauſe was demanded, *and he ſaid that it was in his own Defence, being in fear of a great Man then in Court*; And he was committed to Priſon by the Court during the King's Pleaſure, and his Lands forfeited during his Life. (Vide for the like Matter 41 Eliz. 3. Fitzh. Coron. 280. Dy. 188. 22. E. 3. 13.) Poph. 207. Trin. 2 Car. B. R. Anon.

13. A Felon condemned flung *a Brickbat at the Judge*, for which he was immediately indicted, his Right *Hand cut off*, and fixed to a Gibbet, on which himſelf was *immediately hanged* in Preſence of the Court. D. 188. b. pl. 10. Marg. cites it as done at Salisbury 1631, in the Summer Aſſizes againſt Richardſon Ch. J. of C. B.

14. C. was bound to his Good Behaviour for *giving the Lye* in *Weſtminſter-Hall*, ——and the other for giving Provocation. Lev. 107. Trin. 15 Car. 2. B. R. Collins v. Man.

(C) Indictment and Pleadings.

1. A Man was indicted upon the Statute of E. 6. that in the Church Yard, ſuch a Day, *Extraxit gladium* againſt I. L. & *ipſum percuſſit*; and becauſe the Statute was, if any Perſon maliciouſly ſtrike another, or ſhall draw any Weapon with an Intent to ſtrike any Perſon and the Indictment was *Quod extraxit*, but does *not ſay*, *Ad percutiendum*; And becauſe it is *Quod percuſſit*, without ſaying *Malitioſe*; The party was diſcharged upon Judgment. Noy. 171, 172. Anon.

2. Indictment againſt the Defendants for that they *Inſultum fecerunt upon J. C. of H. in Eccleſia de Shoreditch præd' & prædict. J. H.* then and there in the ſaid Church, did beat and wound & contra formam Statuti &c. the Defendant was found guilty. It was objected, that the Indictment being *Contra formam Statuti*, is ill and this Offence is not puniſhable by the Statute unleſs he ſmote with *or drew a Weapon* in the Church or Church-yard *with an Intent to ſtrike there*, which is not mentioned in the Indictment, and by the 2d Clauſe in the Statute ſmiting and laying violent Hands is Excommunication ipſo facto. The Juſtices doubted. But becauſe of the Words (Shoreditch prædict.) whereas Shoreditch was not mentioned before; All the Court held the Indictment void. Cro. C. 464. pl. 2. Trin. 12 Car. B. R. Cholmley's Caſe.

3. Information for Striking *in the King's Court* &c. The Defendant *pleaded Privilege of Parliament*; And urged for himſelf, that a *Peer* could not be impleaded during the Privilege of Parliament, either in a civil or criminal Cauſe, unleſs it was capital, and cited the Caſe of the Lord **Arundel** and **Lovelace**. It was inſiſted for the Defendant, that the Caſe of the Lord Arundel was a great Miſdemeanor; and yet it was adjudged, that he could be proſecuted only in Parliament during the Sitting of Parliament. But it was anſwered that Privilege of Parliament does not extend to High Treaſon, Felony, Breach of the Peace, or Surety of the Peace, and cited 4 Inſt. E. 6. **Hugh Spencer's** Caſe and Prinn's Survey of Parliament Writs, 4th Part 701, 702. And the Court held that the Defendant ought to plead in chief; But notwithſtanding this, the Defendant put in his Plea of Privilege, to which there was a Demurrer, and afterwards the Plea was over-ruled by the Court; And he was fined 30,000 l. Trin. 3 Jac. 2. Comb. 49, 50. Paſch. 3 Jac. 2. The King v. the Earl of Devonſhire.

For more of Striking in General, See **Indictment.** (D) and other proper Titles.

(A) Subornation.

1. SUbornation is *derived of Sub & orno*; and ornare in one of his Significations is to prepare, ſo as Subornare is as much as to ſay, *to prepare ſecretly*, or under-hand. Eſt autem ſubornare quaſi ſubtus in aure ipſum male ornare, unde ſubornatio *dicitur de falſi Expreſſione, aut de veri Suppreſſione.* And here is to be noted, that in the Judgment of the Parliament *Plus peccat* Author quam *Actor*; For the *Suborner forfeits* 40 *l. and he that is ſuborned but* 20 *l.* 3 Inſt. 167.

2. 32 H. 8. 9. Enacts, That *no Perſon ſhall ſuborn any Witneſs by Letters, Rewards, Promiſes, or other Means to maintain any Matter or Cauſe to the Diſturbance or Hindrance of Juſtice or to the Procurement of any Manner of Perjury by falſe Verdict, or otherwiſe, in any of the King's Courts on Pain of forfeiting* 10. *l. for every Offence, one Moiety to the Crown, the other to the Proſecutor.*

But the Reporter ſays, he had

3. A Man *cannot be guilty* of Subornation of Perjury, *unleſs a Perjury be actually committed.* Comb. 450. Trin. 9 W. 3. B. R. Anon.

known one ſet in the Pillory for *endeavouring to ſuborn*, it being a great Offence. Ibid. cites 2 Show. 1, 2. —— 2 Show. 4. Paſch. 30 Car. 2. B. R. in Caſe of the King v. Johnſon, ſays there was a Fine of 500 Marks for attempting a Subornation, in order to prove a Deed forged; And that ſome Years afterwards, in another Cauſe, the Deed was proved forg'd.

The Court held, That 'tis not enough to ſay a Man ſuborned another to commit a Perjury, but he *muſt ſhew what Perjury it is, which cannot be without an Oath*; For an Indictment cannot be framed for ſuch an Offence, unleſs it appear that the Thing was falſe which he was perſuaded to ſwear. The Queſtion therefore is, If the Perſon had ſworn what the Defendants had perſuaded him to do, whether that had been Perjury. There is a Difference, when a Man ſwears a Thing which is true in Fact, and yet he does not know it to be ſo, and to ſwear a Thing to be true which is really falſe; The firſt is Perjury before God, and the other is an Offence of which the Law takes Notice. But the *Indictment* was *quaſhed becauſe* the Words *Per Sacramentum duodecim proborum & legalium Hominum were left out.* They held that if the Return had been right upon the File, the Record ſhould be amended by it. 3 Mod. 122. Hill. 2 & 3 Jac. 2. B. R. The King v. Hinton & Brown.

Hawk. Pl. C. 177. cap. 69. S. 10. Says that Subornation of Perjury by the Common Law, ſeems to be an Offence in procuring a Man to take a falſe Oath amounting to Perjury, who actually takes ſuch Oath; but it ſeems clear, that if the *Perſon incited* to take ſuch an oath, *does not actually take it*, the Perſon by whom he was ſo incited is not guilty of Subornation of Perjury; yet it is certain, That he is liable to be puniſhed not only by Fine, but alſo by infamous corporeal Puniſhment.

7 Mod. 100. S. C. And ſays, That upon the Doubt Time was given to the next day, and it was agreed, that if ſo be it

4. D. was *convicted* on an Information for Subornation of Perjury, and *Judgment entered Quod capiatur pro fine*, and a Capias iſſued; Whereupon he was taken and brought into Court, where he *offered to move in Arreſt of Judgment*; But the *Court was of Opinion it was* out of Time; for that the Judgment Quod capiatur was *a final Judgment*, and a ſubſequent Entry is only for the certainty of the Time. 1 Salk. 78. pl. 3. Mich. 1 Ann. B. R. The Queen v. Darby.

could not be moved in Arreſt of Judgment, it might very well be urged in Mitigation of the Fine,— and the *Exceptions* taken (in Mitigation of the Fine at leaſt) were 1ſt that the Information ſets forth, that there was a Cauſe in Chancery between A and B. and that a Commiſſion did iſſue out of that Court to examine Witneſſes in the Cauſe, and *that I. S. was ſworn a Witneſs before* the ſaid *Commiſſioners*, (*without ſaying in that Cauſe, or what he had ſworn.*) That the Defendant did ſolicit him to forſwear what he had ſworn before; And it not appearing that the Oath was in any Cauſe pending, or that it was in any material Point, were two Exceptions; For that ought to be ſet forth, that the Court might judge whether it was a Point material or not; For it could not be Perjury if it were not, and then Solicitation could not be a Subornation. 7 Mod. 100. Mich. 1 Ann. B. R. The Queen v. Darby.

For more Subornation in General, See **Perjury**, and other proper Titles.

Subpœna.

(A) Of the ſerving a Subpœna.

1. AN Attachment was awarded againſt the Defendant for his Non-appearance upon Oath that he was ſerved with a Subpœna, who now appeared gratis, and would have excuſed himſelf, that he had no Notice of the Subpœna; But he that ſerved the Subpœna *depoſed*, that he did *hang the ſame upon the Defendant's Door, and within half an Hour after ſaw him abroad with a Writ in his Hand*, which he *ſuppoſed to be the Subpœna*, therefore he was committed to the Fleet. Cary's Rep. 57. cites 1 Eliz. fol. 249. Richers v. Stilman.

2. The Defendant was ſerved wtth a Subpœna *the Day of the Return*, and for his Non-appearance an Attachment was awarded againſt him, and upon Oath that he was ſerved *ſix Score Miles off*, ſo as he could by no Poſſibility appear, therefore a Commiſſion is awarded to take their Anſwers in the Country, paying the Plaintiff 6 s. 8 d. for his Coſts. Cary's Rep. 58. George v. Bolington & Deane.

So where the Defendant made Oath, the Plaintiff cauſed him to be *ſerved* with a Subpœna the *Saturday before the End of the Term, returnable the Thurſday following*, being *but two Days before the End of the Term, he* the Defendant *dwelling in Devonſhire* 140 Miles diſtant from London; Wherefore the Defendant could not conveniently appear, and make Anſwer by the Return of the ſaid Subpœna; And yet nevertheleſs, the Plaintant had procured an Attachment againſt the Defendant; Therefore, and for that, the Plaintant's *Bill was but for Evidences*, It is ordered the Defendant be diſcharged of the Attachment, putting in his Anſwer. Cary's Rep. 126. cites 21 & 22 Eliz. Smith v. Weare.

3. Upon Oath made of a Delivery of a Subpœna *to the Defendant's Wife*, being *in the Defendant's Houſe*, who has not appeared, an Attachment was awarded. Cary's Rep. 76. cites 18 & 19 Eliz. Barlow v. Baker.

S. P. Cary's Rep. 111. cites 21 & 22 Eliz. Pilgrime v. Read.

4. Walter Jeames made Oath, that he *hang'd a Subpœna on the Door* of one Stacy Barry Widow, *whither the Defendant uſed to reſort*, as he heard reported before that Time, who has not appeared; therefore an Attachment was awarded. Cary's Rep. 79. cites 18 & 19 Eliz. Jeames v. Morgan.

5. Goodwine made Oath, that at ſuch a Time as he came to the Houſe of the Defendant, to ſerve a Subpœna upon him, according to an Order of the 10th of May laſt, one of his *Servants* came forth, and *told him he was within*, who thereupon *delivered the Writ to be delivered to* the Defendant *his Maſter*. Cary's Rep. 91. cites 19 Eliz. Goodwine v. Sullyard.

6. Upon Oath, that he ſaw one Lewis *leave a Subpœna in the Hall of the Defendant, and* that the *Defendant was at home at the ſame Time*, who has not appeared, therefore an Attachment is awarded againſt the Defendant. Cary's Rep. 130. cites 22 Eliz.

7. Upon Oath, that he *did ſhew and offer to deliver to the Defendant a Subpœna, which he would not accept*, and has not appeared, therefore an Attachment. Cary's Rep. 134. cites 22 Eliz. Peris v. Thomas.

8. The Defendant made Oath, that the Plaintiff *ſhew'd* him *a Subpœna, holding it in his own Hand, and ſaid it was againſt him, but would not let him have it, or ſee it*, ſo *that he might read it*; *neither would* he *deliver* him *any Note of his Appearance, nor tell him the ſame*, but took Witneſs that he had ſerv'd the Subpœna, and *about an Hour after* came again to the Defendant, ſaying, You were deſirous to ſee the Subpœna, here it is; and thereupon *ſhewed the Label* to the Defendant, *but in ſuch Sort as he could not ſee the Return*; whereupon the *Defendant appearing, found no Bill*; therefore Attachment againſt the Plaintiff for Miſdemeanor. Cary's Rep. 137. cites 22 Eliz. Mead v. Croſs.

Nelſ. Chan. Rep. 103. S. C.

9. The *Defendants brought* a Joint *Action at Leghorn againſt the Plaintiffs, and* had *there arreſted the Plaintiff's Goods*; the *Defendant Baker being here*, and the other Defendants at Leghorn, Baker *anſwered here, and by Order a Subpœna left with him was to be good Service for the other Defendants*; and thereupon an Attachment for Want of an Anſwer. Chan. Caſes 67. Paſch. 17 Car. 2. Love & al'. v. Baker, Roll, & al'.

Chan. Prec. 99 pl. 87. S. C. ſays, that at the Place where the Subpœna was left, the ſaid Defendant had lodg'd but once, and that was above 2 Years before the Service.

10. One of the Defendants, a neceſſary Party, having been a *Lodger in London*, and *not now to be found*, the Plaintiff obtained an Order that Service of Proceſs to appear and anſwer at his laſt Place of Abode, ſhould be deemed good Service, and left the ſame at the Houſe where he ſo lodged, and carried on the Proceſs to a Sequeſtration, and then brought on the Cauſe againſt B. the other Defendant, who inſiſted that if the Plaintiff ought to be relieved againſt him, he ought to have a Decree over againſt the other Defendant; and therefore he was concerned to ſee the Proceeding was regular, and inſiſted that it being *above* 12 *Months ſince the other Defendant had left that Lodging*, the Service was not good; and the Court was of that Opinion. 2 Vern. 369. pl. 332. Mich. 1699. Parker v. Blackbourne.

11. 4 *Ann. cap.* 16. *S.* 22. Enacts, That *no Subpœna, or Proceſs for Appearance, ſhall iſſue out of any Court of Equity till the Bill is filed, (except in Caſes of Bills for Injunctions) and a Certificate thereof brought to the Subpœna Office, under the Hand of the Six Clerk, or other Officer who uſually files Bills; for which Certificate he ſhall receive no Fee.*

12. 5 *Geo.* 2. *cap.* 25. *S.* 1. Enacts, That if *in any Suit in Equity, any Defendant againſt whom Proceſs ſhall iſſue, ſhall not cauſe his Appearance to be entered, according to the Rules of the Court, in caſe ſuch Proceſs had been ſerved, and Affidavit ſhall be made that ſuch Defendant is beyond the Seas, or that upon Inquiry at his uſual Place of Abode, he could not be found, ſo as to be ſerved; and that there is juſt Ground to believe that ſuch Defendant is gone out of the Realm, or abſconds, to avoid being ſerved, the Court may make an Order, appointing ſuch Defendant to appear at a Day therein to be named, and a Copy of ſuch Order ſhall within* 14 *Days be inſerted in the London Gazette, and publiſhed on ſome Lord's Day after Divine Service, in the Pariſh Church where ſuch Defendant made his uſual Abode, within* 30 *Days next before his abſenting; and a Copy of ſuch Order ſhall be poſted up, viz. a Copy of ſuch Order made in Chancery, Exchequer, or Dutchy Chamber, ſhall be poſted up at the Royal Exchange; and a Copy of every ſuch Order made in any of the Courts of Equity of the Counties Palatine, or of the great Seſſions in Wales, ſhall be poſted up in ſome Market Town within the Juriſdiction of the Court, neareſt to the Place where ſuch Defendant made his uſual Abode, ſuch Place of Abode being alſo within the Juriſdiction of the Court; and if the Defendant do not appear within ſuch Time as the Court ſhall appoint, then on Proof made of ſuch Publication of ſuch Order as aforeſaid, the Court may order the Plaintiff's Bill to be taken Pro confeſſo, and make ſuch Decree thereupon as ſhall be juſt; and the Court may order ſuch Plaintiff to be paid his Demands out of the Eſtate ſequeſtered, according to the Decree, ſuch Plaintiff giving Security to abide ſuch Order touching the Reſtitution of ſuch Eſtate, as the Court ſhall make upon the Defendant's Appearance; but in caſe ſuch Plaintiff ſhall refuſe to give Security, then the Court ſhall order the Effects ſequeſtered to remain under the Direction of the Court, until the Appearance of the Defendant to defend ſuch Suit.*

For more of Subpœna in general, ſee **Bill of Revivor, Coſts,** and other Proper Titles.

Succeſſor.

(A) *Bound.* In what Caſes.

1. A *Prior granted an Annuity, and reſign'd*, and yet the Annuity remained good; Per Judicium; quod nota. Brooke ſays this ſeems to be *for Life of the Prior who granted it.* And per Wood, Vaviſor, and Davers, The Tender is good by the Succeſſor; contra Brian. Br. Annuity, pl. 22. cites Fitzh. Tit. * Grants 99. And 15 H. 7. 1. agrees with Brian in this, and puts the *Difference*, where the Writing is, that *R. Prior of D. or* J. Mayor of C. ſhall make the Tender, and where it is that *the Prior of D.* or Mayor of C. without Name of Baptiſm. Br. Annuity, pl. 22.

So if an *Abbot grants an Annuity, and reſigns*, the Abbot his *Succeſſor ſhall be charg'd* during the Life of the Predeceſſor who charg'd.

Br. Surrender, pl. 53. cites 32 H. 8. and Fitzh. Grants 99. accordingly.——* Br. Grants, pl. 140. cites S. C. and 29 E. 3. 16 and Fitzh. Tit. Abbe 27.——*But* if a Parſon grants an Annuity, and reſigns, the Grant is void; quod fuit conceſſum. Br. Grants, pl. 56. cites 21 H. 7. 1.——Br. Dean and Chapter, pl. 10. cites S. C.——S. P. Per Butler, tho' the Ordinary confirm it; for the Annuity was determined before by the Reſignation. Br. Charge, pl. 54. cites 21 H. 7. 1.

2. A *Prior recovered an Annuity againſt a Parſon*, and *after Judgment the Parſon permutes*; And there per Cur. Execution ſhall be againſt the new Parſon, and not againſt him who has reſign'd; for *the Church is thereof charg'd.* Br. Arrearages, pl. 12. cites 34 E. 3.

3. If an *Abbot confeſſes Action, or a Deed with Warranty*, this ſhall bind his Succeſſor for ever; Per opinionem Curiæ. But Brooke ſays, Quære of Confeſſion of an *Annuity*; for of this the Succeſſor has no Remedy. *But* if he confeſſes the Action *in Præcipe quod reddat*, the Succeſſor may have Writ of Right. But in the Caſe of the Annuity the Perſon is charged only. Br. Abbe, pl. 28. cites 34 Aſſ. 7.

If an *Abbot confeſſes the Action in Writ of Annuity*, the Succeſſor cannot avoid it, but ſhall be bound for ever; Quod nota. Br. Abbe &c. pl. 1. cites 9 H. 6. 3.

4. If an *Abbot comes by Proceſs, and has Day in Court, and acknowledges a Fine* &c. this ſhall bind his Succeſſor without the Covent. *Contra* if it be *without Original, and Day in Court*, unleſs in the Caſe of a *Recognizance of Debt.* Br. Abbe, pl. 29. cites 37 Aſſ. 17.

5. If the Prior or *Abbot releaſes to the Tenant for Life all Actions*; this is no Bar againſt the Succeſſor; becauſe it was not by the Abbot or Prior and their Covent. Br. Releaſes, pl. 64. cites 42 E. 3. 22.

6. Land is *demiſed to an Abbot and his Succeſſors by Indenture*, to which the Abbot *without his Covent put his Seal, rendring Rent* to the Donor or Leſſor, and dies; the Succeſſor may waive the Land, and the Poſſeſſion, if it is not worth the Rent; ut Admittitur, and the Aſſiſe awarded upon it. Br. Abbe, pl. 30. cites 43 Aſſ. 23.

Br. Waiver de Choſes, pl. 20. cites S. C.——S. P. Br. Waiver de Choſes, pl. 36. cites S. C.——Br. Diſclaimer, pl. 19. cites S. C.

7. *Debt by an Abbot upon Obligation made to his Predeceſſor*; there a *Defeaſance made by the ſame Predeceſſor, without the Covent*, is a good Bar by Award; and *the ſame Law of his Releaſe or Acquittance*, and the Writ was in the *Debet & Detinet.* Contra by Executors. Br. Abbe, pl. 32. cites 47. E. 3. 26.

S. P. ibid. pl. 3. cites 47 E. 3. 23.

8. Grant

If a Parſon grants an Annuity, and the *Patron and Ordinary confirms it*, and the *Parſon dies*, the Annuity is by this determined. *Contra, if* the Parſon had *granted* it *for him and his Succeſſors*; per Butler. Br. Charge. pl. 54. cites 21 H. 7. 1.

8. *Grant of the Parſon, by Licence of the Patron and Ordinary*, ſhall charge the Succeſſor of the Parſon, per Judicium. Brooke makes a Quære; for the contrary was of a Biſhop in the Time of H. 8. but there was more in that than in this Caſe. Br. Grants, pl. 114. cites 7 H. 4. 10.

If a Parſon, Patron, and Ordinary grant an Annuity in Fee, and do not ſay for the Parſon and his Succeſſors, the Succeſſor ſhall not be charged; for this charges the Parſon only, and not the Glebe. Per Frowicke, Ch. J. Br. Dean and Chapter, pl. 10. cites 21 H. 7. 4.——S. P. Br. Grants, pl. 56. cites 21 H. 7. 1.

So of Annuity, *and Compoſition for Tithes.* Br. Acceptance, pl. 5. cites 9 E. 4. 21. per Bigot, and it was not denied.

9. Where a *Fine* is *levied between 2 Priors, by which the one has Annuity, and the other has an Advowſon*, and he who grants the Annuity is preſentable, and has no Covent nor Common Seal, and he dies; yet if his *Succeſſor accepts the Advowſon*, he ſhall be bound to pay the other; becauſe he has quid pro quo. Br. Acceptance, pl. 2. cites 11 H. 4. 68. & 70.

10. If an *Abbot buys Goods, which come to the Uſe of the Houſe*, ſo that the Houſe may be charged in caſe the Abbot dies; there, if the *Vendor takes Obligation of the Abbot alone* for the Debt, this ſhall diſcharge the Contract, and there, if the Abbot dies, the Action is determined, and the Debt is loſt. Br. Abbe, pl. 20. cites 20 H. 6. 21.

11. In Debt, an *Abbot and Prior, and his Covent, are bound by Obligation*; and after *the Abbot or Prior is created a Biſhop*, the *Succeſſor* ſhall be charged, and not the Predeceſſor. For he *may be bound as Head and Member of the Corporation*; and where this is the Deed of the Corporation at the time of the making, it cannot afterwards become the Deed of another Perſon, who is no Part of the Corporation, quod Nota. Br. Abbe, pl. 8. cites 21 H. 6. 3. & 22 H. 6. 4.

12. If *Iſſues* are *forfeited by an Abbot*, who is after made a Biſhop, the Succeſſor ſhall render the Iſſues; per Pole. And there he *took no Difference*, whether the Abbot be removed in ſuch manner as that he is diſabled, and where not; As *where he is depoſed, and remains a Monk, and after is made an Abbot, or Biſhop; and where* he is *made a Biſhop or Abbot of another Houſe immediately:* For, per Newton clearly, there is a time in the Law between the Tranſlation and Inſtallation &c. Br. Abbe, pl. 8. cites 21 H. 6. 3. & 22 H. 6. 4.

13. *If Damages* are *recover'd in Treſpaſs againſt an Abbot*, the Succeſſor ſhall be charged. Br. Abbe, pl. 9. cites 22 H. 6. 56. per Bingham.

And if the Abbot *borrows* 10 *l. to pay for Bread and Beer for the Houſe, and he buys Bread and Beer with it, and a Stranger takes the Bread and Beer before it comes to the Uſe of the Houſe*, the Succeſſor ſhall be charged. Per Newton, to which Aſcue agreed; and that this ſhall be given in Evidence. Br. Abbe, pl. 6. cites 22 H. 6. 56.

And if an Abbot *borrows* 10 *l. and delivers to the Butler to expend to the Uſe of the Houſe, who gives it to a Stranger*, the Succeſſor ſhall be charged. Br. Abbe, pl. 6. cites 22 H. 6. 56.

14. *And* if an *Abbot borrows* 10 *l. to the Uſe of the Houſe, and after expends it in another Uſe*, or gives it to a Stranger, the Succeſſor ſhall be charged; per Aſcue. Br. Abbe, pl. 9. cites 22 H. 6. 56.

15. *In Detinue of Charters by an Abbot* the *Defendant ſaid, That the Predeceſſor* of the Abbot *borrow'd of him* 100 *s. which came to the Uſe of the Houſe, and put the Charters in Pledge; and if he will pay the* 100 *s. he is ready to deliver the Charters.* And the Juſtices ſaid, that it was never doubted, but that the Succeſſor ſhall be charged by the Contract or Promiſe of the Predeceſſor, if the Thing comes to the Uſe of the Houſe, tho' the *Contract was not by Writing*; quod Nota. Br. Abbe, pl. 16. cites 21 E. 4. 19. & 21 E. 4. 80.

16. It

16. It was preſented for the King, *That an Abbot and his Predeceſſors have uſed to cleanſe ſuch a Gutter, for the Eaſe of the King's Highway, by reaſon of the Tenure of the ſame Land*; the *Defendant ſaid*, That [it was preſented] upon the ſame Matter in another Place; [and] *that after the Preſentment the Predeceſſor cleanſed the Highway, which continued well, and ſufficient in his Time, and yet is*; and a good Plea per Cur. and that the *Succeſſor ſhall not be puniſh'd for an Offence in the Time of the Predeceſſor*; per tot. Cur. And by the Apprentices, the Succeſſor ſhall not be put to anſwer; for by the Death of the Predeceſſor the Offence is determined. Br. Preſentments in Courts, pl. 15. cites 5 H. 7. 3. 4.

17. If a Parſon is charged with *Annuity by Preſcription*, and the *Annuity is Arrear*, and *the Parſon reſigns*, and *a new Parſon is inducted*, he ſhall be charged with the Arrearages, and not the old Parſon; for tho' the Perſon of the Parſon be charged, *yet it is* by reaſon of the Parſonage, and as Parſon; and when he has reſign'd, he is not Parſon. Br. Arrearages, pl. 8. cites 21 H. 7 5.

S P. Br. Dean and Chapter, pl. 10. cites 21 H. 7. 1.—— S. P. per Frowike, Ch. J. Kelw. 64.

18. In *Collateral Conditions*, a Succeſſor is not *included*, unleſs named. Arg. Show. 332. cites 27 H. 8. 28.

19. The Plaintiff ſeeks to compel the Defendants *to make* unto him *a Leaſe, by* reaſon of a *Promiſe made by W. A.* and *A. B. when they were Bailiffs of the ſaid Town*; and ordered, that the Corporation, nor any Perſons which heretofore have been, nor which hereafter ſhall be Bailiffs of the ſaid Town, ſhall in any wiſe be charged as Bailiffs with the ſaid Promiſe; But the Plaintiff, if he will, may take his *Remedy* againſt the ſaid A. & B. *not as Bailiffs, but as common Perſons.* Cary's Rep. 146. cites 21 Eliz. Strainger v. Beynbridge & Turner, Bailiffs of Derby.

20. Per Gawdy, J. Such Acts which the Incumbent, being only a Layman, was not capable to do, ſhall *not bind* the Succeſſor; becauſe, upon the Matter, he was never Incumbent, and cited 4 H. 7. & 28 H. 8. Dyer. But Popham and Fenner, J. contra; for in regard he was *Parſon de Facto*, and ſuch an one whereof the Law takes Cognizance by his Induction, and the People cannot take notice of any other, all Acts done by him, during that Time, ſhall bind as well as if he had been rightful Parſon; for it would be miſchievous, if all the Acts by ſuch Averments ſhould be drawn in Queſtion. And all agreed, that all *Spiritual Acts*, as Marriage, Adminiſtration of the Sacraments &c. by ſuch a one, during the Time that he is Parſon, are good; and therefore a *Leaſe* made by ſuch a one, and confirm'd by the Patron and Ordinary, ſhall well bind the Incumbent Succeſſor; and adjudged accordingly, by Conſent of Gawdy, J. Clench abſente. Cro. E. 775. pl. 5. Mich. 42, & 43 Eliz. B. R. Coſtard v. Winder.

Mo. 606. pl. 836. Coſtard v. Wingate. S. C. ſays, they agreed that the Parſon, being a Layman, ought to be deprived, or otherwiſe all his Acts ſhall be good as lawful Parſon, till Deprivation.—— D. 292. b. Marg. pl. 72. cites S. C. ſays, that Deprivation, after the Leaſe made, ſhall not have ſuch Relation to make him no Parſon, ab Initio, tho' it be declaratory; for the Succeſſor ſhall not have the Meſne Profits, and the Leaſe is good.

21. A. an *Incumbent, made a Leaſe* of a Parſonage to J. S. under whom W. R. claims. Afterward B. was Incumbent, by whoſe Conſent a Decree was made to confirm the ſaid Leaſe. W. R. brings a *Bill againſt* H. *the preſent Incumbent, to compel him to confirm* the ſame; but the Court, ſeeing no Reaſon ſo to do, were clear of Opinion, that the Act of a preſent Incumbent cannot bind his Succeſſor, and ſo diſmiſs'd the Plaintiff's Bill. Chan. Rep. 148. 16 Car. 1. Preſs v. Hinchman.

For more concerning this Diviſion, ſee **Eſtates**, (Q. a 7.) &c.

(B) *Of what* the Succeſſor ſhall *take Advantage.*

1. NOte, that the *Goods of an Abbot* belong to him during his Life, and he has Property in them, and may give them and ſell them; but if he dies, the Property of the Goods not given nor ſold are in the *Succeſſor*, and he *may have Treſpaſs de Averiis Domus & Eccleſiæ* ſuæ captis; and this, it ſeems, by the Common Law; for *Replevin affirms Property.* Contra of Treſpaſs. Br. Property, pl. 36. cites 9 H. 6. 25.

2. If a *Leaſe* be made *to an Abbot during his Life*, and *he is tranſlated* to another Houſe, the Succeſſor ſhall have it during his natural Life. Br. Abbe, pl. 13. cites 3 H. 7. 11. and 5 H. 7. 24. Per Rede.

Otherwiſe it is *if* the Prior or Mayor *are not named by proper Name.*

3. If *J. S. Mayor of London has a Licence to purchaſe to him and his Succeſſors, and to the Commonalty*, his Succeſſors ſhall not enjoy the Licence. Br. Tender, pl. 15. cites 14 H. 7. 31. and 15 H. 7. 1.

Br. Tender, pl. 15. cites 14 H. 7. 31. and 15 H. 7. 1.

4. *Uſurpation by the Maſter does not gain Poſſeſſion to the Succeſſor*; for he does that which is wrong in another Capacity; becauſe a Corporation cannot do wrong but by their Writing under the Common Seal; Per Fitzjames J. Br. Corporations, pl. 34. cites 14 H. 8. 29.

Succeſſors of a Biſhop ſhall not have Action of *Debt on Bond to him and his Succeſſors.*

5. If a *Bond is made to a Biſhop* or *Dean*, and his Succeſſors, the Executors ſhall not have the Benefit of it, but the Succeſſors: But otherwiſe of a Bond *to a Mayor* and his Succeſſors, or to *two Churchwardens* of a Church, and their Succeſſors; for they have not Capacity to take to their Succeſſors; Per Shelly J. D. 48. pl. 15. Trin. 32 H. 8. Anon.

Adjudged. But agreed that the Succeſſor may have *Covenant on Leaſe for Years*, which is in the Realty. D. 48. pl. 15. Marg. cites 41 & 42 Eliz. C. B. Biſhop of Bath and Wells's Caſe.—The Doubt was, becauſe after the Death of ſuch Perſon (a ſole Corporation) the Bond is due to no Body, and ſo ſuſpended; and an Action Perſonal once ſuſpended is gone for ever, but no Rule without an Exception. Ibid.

A Bond may go to Succeſſors as well as Land. Cro. E. 464. Bird v. Wilford, on a Bond to the Chamberlain of London.

6. *Debt* was brought by Succeſſor of a Prebendary *againſt Executors of Leſſee, after Aſſignment* by them, for Rent due after the Aſſignment. Per 3 Juſt. The Action will not lie; but Popham contra; for the Succeſſor is privy to the Contract of the Predeceſſor, and ſo the Executor to the Contract of the Teſtator. Goldsb. 120. pl. 6. Hill. 43 Eliz. Overton v. Syddall.

7. Doctor Langton late *Preſident of the College of Phyſicians*, had recovered for the King and for himſelf, by the Name of Preſidens Collegii 60 l. and dies; and afterwards Doctor Atkins being made Preſident, brought a *Scire facias* upon that Judgment; And by the whole Court adjudg'd well. And it ought not to be brought by the Executor of Dr. Langton. Noy 121. Dr. Atkins v. Dr. Gardiner, cites Dyer 148. a.

(C) *What*

(C) *What ſhall go to* the *Succeſſor, or to the Heirs or Executors* &c. *of* the *Predeceſſor.*

See Corporations (L) pl. 2, 3, 4.

1. THE Biſhop of C. ſued againſt the Executors of his Predeceſſor, viz. A. B. becauſe all the *Ornaments of the Chapel of the Biſhop*, and all the *Goods and Chattles* found *in the Manor belonging to the Biſhop*, at the Time of the Death of a Biſhop, received of the Executors of his Predeceſſor, for which Gree was made, ſhould not be ſeiſed by the Eſcheator, and delivered to the Succeſſor, and ſhew'd certain that ſuch Things came to the Hands of the Executors of his Predeceſſor, and pray'd Writ to warn them to ſay why they ſhould not deliver them to him, and had Scire facias; and the Sheriff return'd the Defendant Nihil in Lay Fee, and that there were Benefices, by which iſſued Scire facias de Bonis Eccleſiaſticis; Whereupon the Biſhop ſequeſter'd certain Goods of the Executors, by which they ſued Audita Querela againſt the Biſhop, ſuppoſing that thoſe Goods did not come to their Hands, nor Gree was never of thoſe Goods, and had Venire facias Epiſcop. who came and demanded Judgment of the Writ, becauſe there are other Executors to the Biſhop not named &c. Per Green, Thoſe are grieved only, and not the others, by which the Biſhop ſaid that the Executors, now Plaintiffs, received the Goods in ſuch a Place, Priſt, and the others econtra, and had Pais thence &c. Br. Chattles, pl. 4. cites 21 E. 3. 48.

2. The *Maſter of an Hoſpital brought Aſſiſe of Rent*, which he *claimed by Preſcription*, and it was found for him, and the *Damages were ſever'd*, viz. *ſo much in the Time of his Predeceſſor, and ſo much in his own Time, becauſe* he was *preſentable* as a Parſon is, and then he ſhall not recover Damages but for his own Time, *but if* he was *Elective*, he ſhould recover Damages as well in the Time of his Predeceſſor as for his own Time; Quod nota, a good Diverſity of ſuch like Incorporations. Br. Garden ou Maſter de Hoſpital, pl. 5. cites 26 Aſſ. 4.

3. It ſeems that if the *Parſon recovers* Annuity, *and dies*, his Executors ſhall have the Arrearages, and not the Succeſſor. Br. Arrearages, pl. 12. cites Fitzh. Scire facias 153.

4. A *Biſhop has Title to preſent to a vacant Church*, and after he *dies*, and his *Temporalties come into the King's Hands*, the King ſhall have the Preſentation, and not the Executor of the Biſhop. Br. Executors, pl. 143. cites 50 E. 3. 26.

5. In Raviſhment of Ward, it was held for clear Law, that if *a Man held of a Biſhop in Chivalry, and died his Heir within Age*, and after *the Biſhop died, and did not ſeiſe the Infant*, that the Succeſſor might ſeiſe him, and ſhould have Writ of Raviſhment of Ward of him. Brooke ſays, Quære if the Executors of the Biſhop who was dead ſhould not have him; for of a *Thing tranſitory* the Law adjudges Poſſeſſion without Seiſure. Br. Chattels, pl. 21. cites 2 H. 4. 19.

6. If an *Abbot purchaſes to himſelf and his Heirs*, it ſhall not ſerve but for Term of his Life. Contra of a Biſhop, Per Martin & Cockain Juſt. Br. Corporations, pl. 20. cites 9 H. 5. 9.

7. An *Abbot is impriſoned*, he may *bring Action* thereof *by Name of the Abbot, without ſaying J. N. Abbot* &c. And if he recovers Damages for a Tort done to his Perſon, the Succeſſor ſhall have Execution, and not his Executors; but Brooke ſays it ſeems that he cannot make Executors; for he has no Capacity but to the Uſe of the Houſe &c. Br. Abbe, pl. 7. cites 7 H. 6. 27.

8. Where the *Maſter of an Hoſpital who has Confreres, recovers in Writ of Annuity, and dies*, the Succeſſor ſhall have the Arrears by Scire

S. P. For he cannot make

Executors, in reſpect of any Thing which belongs to the Corporation. Contra of a Parſon of a Church; for there his Executors ſhall have the Arrearages incurr'd in his Time. Br. Arrearages, pl. 6. cites 19 H. 9. 44. but it ſhould be H. 6. ——S. P. And ſo if a *Dean and Chapter*, or *Guardian of a Houſe*, recovers in *Debt* or Annuity, or other Thing in a Court of Record, as in Right of their Church and Houſe, and die before Execution ſued &c. the Succeſſor may have a Scire facias to execute the ſame Judgment. Perk. S. 499.

Scire facias, and not the Executors. Br. Corporations, pl. 26. cites 19 H. 6. 44.

9. In Treſpaſs it was admitted, That where a *Parſon dies after the 1ſt Day of May, where the Land is ſown*, and after *another Parſon is made*, and after the *Emblements are ſever'd*, the Executor of the firſt Parſon ſhall have the Tithes, and not the now Parſon. Br. Emblements, pl. 9. cites 21 H. 6. 30.

S. P. Br. Encumbent, pl. 1. cites S. C.

10. If a *Parſon dies before the Feaſt of the Conception of our Lady*, the *Succeſſor* ſhall have the Emblements growing, and the Tithes, and not the Executor of the Predeceſſor. Br. Emblements, pl. 2. cites 34 H. 6. 38. and 35 H. 6. 49.

For where a Man is *bound to the Churchwardens and their Succeſſors*, this *Word Succeſſors is void*, and the Executors ſhall have Action; for the Wardens are not incorporated; Per Brian. And Littleton Juſt. to the ſame Purpoſe. A *Bond* made *to the Dean of P. and his Succeſſors*, is not good to the Succeſſors, but the Executors ſhall have the Action. *Contra* of Bond *to the Dean and Chapter of P. and their Succeſſors*, there the Succeſſor ſhall have the Action after the Death of the Predeceſſor. Br. Corporations, pl. 60. cites 20 E. 4. 2. ——*So of a Biſhop*, Per Littleton, to which Choke Juſtice agreed, and agreed the Caſe by Brian, and that *Bond* made *to Abbot or Prior, and their Succeſſors omitting the Covent*, is good to the Succeſſor; for *no other of the Corporation is able to take* the Bond but the Abbot. Br. Corporations, pl. 60. cites 20 E. 4. 2. —— *And* where *Chantry Prieſt* is *founded by ſuch Name, and Succeſſors*, and *Land is given to him and his Succeſſors*, this is good; and the Succeſſor ſhall have it, and not the Heir; Per Choke Juſt. Br. Corporations, pl. 60. cites 20 E. 4. 2. —— *But Bond* made *to him and his Succeſſors* ſhall enure to the Executors, and not to the Succeſſors; by which the Plaintiff prayed Leave to purchaſe a better Writ. Br. Corporations, pl. 60. cites 20 E. 4. 2.

11. *Debt by R. Alderman of the Guild of St. Mary in Boſton*, againſt L. *upon a Bond made to S. N. late Alderman*, which was *to him and his Succeſſors*. And per Littleton Juſt. He ought to *ſhew how the Corporation was made*; Contrary of Abbot and Prior, or Dean and Chapter, but Guild or Fraternity *cannot be made but by Special Incorporation*. Per Brian, It is true; for *Succeſſor cannot take Effect but where there is Succeſſion*; for otherwiſe this Word Succeſſor is void. Br. Corporations, pl. 60. cites 20 E. 4. 2.

12. If a Man *diſſeiſes the Dean and Chapter of P.* and the *Dean dies*, the Succeſſor ſhall have *Aſſiſe*. Contra in Caſe of an Abbot diſſeiſed, and he dies, and another Abbot is made. Note the Diverſity. Br. Corporations, pl. 86. cites 1 E. 5. 4.

13. In an Action of *Covenant by Executor to* G. M. late *Biſhop* of Winchester, and *ſets forth*, *That Brian*, the *Predeceſſor of the ſaid Biſhop, had demiſed* a Rectory and certain Lands to J. S. for 21 Years, who had aſſign'd to the Teſtator of the Defendant, and that the *Leſſee covenanted with Brian and his Succeſſors, to repair the Chancel* of the Church, *and the Barns* &c. and aſſign'd a Breach in the not repairing by the Teſtator of the Defendant in the Life of the ſaid G. M. and that the Leaſe afterwards expired. To this the Defendant demurr'd, for that it was pretended that the Executor of the Biſhop could not bring this Action; for the Covenant was with the Predeceſſor Biſhop and his Succeſſors. But the whole Court gave Judgment for the Plaintiff, and that the Executor is here well intitled to the Action for the Breach in the Teſtator's Time. 2 Vent. 56. Trin. 1 W. & M. in C. B. Morley v. Polhill.

(D) *Relieved*

(D) *Relieved* againſt Frauds of the Predeceſſor.

1. THE Rector of St. Giles's applied to Chancery, to enable him to grant a *Building Leaſe of a Houſe veſted in Truſtees, for the Benefit of the Rector* and his Succeſſors for ever. He ſuggeſted the ruinous Condition of the Houſe, and that no Body would rebuild but on having a Leaſe for a long Term; and pray'd it might be inquired under what Rents and Covenants it was proper to have ſuch Leaſe granted: Accordingly it was ſent to a Maſter, who made his Report. A Leaſe was accordingly granted, and the *Rector privately*, without the taking any Notice thereof to the Court, *contracted for, and took a Fine of* 600 *l. of the Leſſee; but nothing of this appeared upon the Leaſe.* The Rector died. The Succeſſor brought a Bill againſt the Rector's Executor, and the Leſſee, either to avoid the Leaſe, as obtained by *Fraud* upon the Court, and on a Contract injurious to the Succeſſor, or to have the 600 l. with Intereſt from the Rector's Death, for the Succeſſor's Benefit. Ld. C. Talbot thought it too hard to ſet aſide the Leaſe, the Leſſee not appearing to have had a great Bargain, the Repairs having been great, and he had ſold Part, and in the taking it he look'd no further back than to the Decree; but as to the late Rector, he had no Doubt but the 600 *l. ought to be conſidered as a Part of the Truſt*, and to be repaid with Intereſt to the now Rector from the Death of the former; *And decreed* the 600 l. *to be laid out in a Purchaſe* for the Rector and his Succeſſors, and till then to be laid out on Security in Truſtees Names, and the late Rector's Executors to pay Coſts out of his Aſſets; but as againſt the Leſſee diſmiſs'd the Bill, but without Coſts. Caſes in Equ. in Ld. Talbot's Time 199. Trin. 1736. Galley v. Baker.

(E) *Actions* by or againſt Succeſſor. *And Pleadings.*

See Phyſicians (A) pl. 8 — Trial (X. d)

1. By 52 *H.* 3. cap. 28, IT *is provided, That if any Wrongs or Treſpaſſes be done to* * *Abbots, or other Prelates of the Church, and they have ſued their Right for ſuch Wrongs, and be* † *prevented with Death before Judgment given therein,*

There were 2 *Miſchiefs at the Common Law,* (as many did hold) that in the Caſe of Abbots, Priors, and other regular and religious Perſons, if the Goods of the Monaſtery were taken away in the Life of the Predeceſſor, that after his Death his Succeſſor had no Remedy for ſuch Treſpaſſes. The other Miſchief was, That if in Time of Vacation, when there was no Abbot, Prior, or other regular or religious Sovereign, any Intruſion were made, the Succeſſor had no Remedy to recover the Land with Damages, though thereof his Predeceſſor died ſeiſed; and both theſe are remedied by this Act. 2 Inſt. 151.

* This Act *extends only to* Abbots, Priors, and other Prelates that be *Religious and Regular*, and not to Biſhops and other Perſons Eccleſiaſtical, being Secular; for in the 2d Clauſe of this Act, *Hujuſmodi Religioſorum* is mentioned for the Diſtinction between Religious and Secular. (See the firſt Part of the Inſtitutes, Sect. 133.) And the Reaſon of this Diverſity is, that the Abbots, Priors, and other religious and regular Perſons, are dead Perſons in Law, and have Capacity to have Lands and Goods only, for the Uſe and Benefit of the Houſe, and cannot make any Teſtament; and therefore the Church or Religious Houſe is holden always one, in reſpect whereof the ſucceeding Abbot ſhall have an Aſſiſe for a Diſſeiſin done in the Life of the Predeceſſor, and an Action of Waſte for Waſte done in his Predeceſſor's Time; but ſo ſhall not a Biſhop, Archdeacon, Dean, Parſon, or the like, that are Eccleſiaſtical ſecular, becauſe the Church by their Death has an Alteration, and is not always one, and they may make their Teſtament; for that they may have Goods and Chattles to their own Uſe, 2 Inſt. 151.

Alſo the *Biſhop is of an higher Degree* than the Abbots and Priors, with which this Act begins. 2 Inſt. 151.

† See the Note to the next Paragraph.

Some have thought, in reſpect of this Word (Demand) that this muſt be intended of an Action of Detinue, or the like Action, wherein the Thing itſelf is to be recovered; but the Words (out of the Hands of ſuch Treſpaſſors) make it evident, that it muſt be *intended of* a *Treſpaſs quare vi & Armis*; for thereof was the Doubt at the Common Law; for it is holden, that *for Goods taken from the Predeceſſor* of an Abbot or Prior, *no Action was given* to the Succeſſor *at the Common Law* before this Act; for *by the taking the Property was diveſted.* But an Action of *Account*, *Debt*, *Detinue*, *Replevin*, and the like Action, *which affirms the Property to continue*, the Succeſſor ſhall have an Action at the Common Law. 2 Inſt. 152.

Their Succeſſors ſhall have Actions to demand the † *Goods of their* ‡ *Church out of the Hands of ſuch Treſpaſſers;*

† The Prior of S brought Treſpaſs upon this Statute, Quare vi & Armis *Bona & Catalla Domus & Eccleſiæ ipſius Prioris cepit* &c. It was objected, that the Property of the Goods was not the Church's, and demanded Judgment of the Writ: Sed non allocatur. Then it was ſaid that the Statute gives Action ad Bona repetenda, which naturally implies a Writ of Detinue or Replevin, and not a Writ of Treſpaſs, in which Damages only are to be recovered; Sed non Allocatur. Then they pleaded that W. the *Prior*, *in whoſe Time the taking was*, *is in full Life*; Judgment of the Writ; for that the Statute gives the Writ after the Predeceſſor's Death for the Succeſſor The Plaintiff replied, that ¶ *He is depoſed.* Per Roub. J. If one brings a Writ againſt an Abbot, who is depoſed pending the Writ, this does not vitiate the Writ; but if an Abbot brings Writ, and is depoſed pending the Writ, the Writ abates; and therefore the Defendant was ordered to anſwer, and the Writ was awarded good &c. Fitzh. Tit. Treſpaſs, pl. 242. cites it as in the Time of E 1.

¶ If an Abbot or Prior be *depoſed*, the Succeſſor ſhall have an Action upon this Act, altho' the *Predeceſſor* be *alive*, as well as if he had died; for as to that Houſe he *is Civiliter mortuus.* 2 Inſt. 151.

The Succeſſor ſhall have by the Equity of this Statute, an Action of *Treſpaſs of cutting* down of *Trees*, *and carrying them away*, wherein it is to be obſerved, that Acts that give Remedy for Wrongs done, ſhall be taken by Equity. 2 Inſt. 152.

‡ The Action that the Succeſſor ſhall bring upon this Statute, ſhall be *Bona & Catalla Domus & Eccleſiæ ſuæ tempore J. Predeceſſoris ſui*, which without Queſtion a Biſhop, Dean, or other Eccleſiaſtical ſecular, cannot ſay. 2 Inſt. 152.

The Prior of St C. brought Treſpaſs Quare Bona & Catalla *Eccleſiæ Sancti C. & Nicholai Prædeceſſoris nunc Prioris* apud C. cepit &c. and the Writ was awarded good; Quod Nota. Fitzh. Tit. Treſpaſs, pl 205. cites Mich. 47 E. 3. 23. and ſays, Vide 16 E. 3.

Yet if the taking of the Goods were *long before the Death* of the Abbot or Prior, his Succeſſor ſhall have an Action of Treſpaſs by this Statute. 2 Inſt. 152.—Fitzh. Tit. Treſpaſs, pl. 211. cites Trin. 16 E. 3. where a Prior brought Treſpaſs of Goods carried away in Time of his Predeceſſor, an Objection was made that ſuch Writ lies not at Common Law, nor is given by the Statute, unleſs freſhly brought before the Predeceſſor's Death; and that if there was Laches in the Predeceſſor, ſuch Writ lies not: But it was over-ruled, and the Defendant pleaded Not guilty, and ſo to Iſſue.

Moreover, the Succeſſors ſhall have like Action for ſuch Things as were lately withdrawn *by ſuch Violence from their Houſe and Church*, before the Death of their Predeceſſors, *tho' their ſaid Predeceſſors did not purſue their Right during their Lives.*

Abbot brought Treſpaſs for cutting Trees *in Time of Vacation*; it was inſiſted that no Action lay either by the Common Law, or Statute; and that if this Action lies for an Abbot, it would lie for a Biſhop likewiſe for a Treſpaſs done in Time of Vacation: But it was anſwered, That the Caſes are not alike; and a Reſpondeas Ouſter was awarded. Fitzh. Tit. Treſpaſs 237. cites Mich. 18 E. 2.

And if any intrude into the Lands or Tenements of ſuch Religious Perſons in the Time of Vacation, of which Lands their Predeceſſors died ſeiſed, as in the Right of their Church, the Succeſſors ſhall have a Writ to recover their Seiſin; and Damages ſhall be awarded them, as in Aſſiſe of Novel Diſſeiſin is wont to be.

This Branch is *taken by Equity*; for by theſe Words the Succeſſor of an Abbot, Prior, or any other Religious Sovereign, ſhall have an Action of *Treſpaſs for Trees cut* down, and carried away in the Time of Vacation. 2 Inſt. 152.

But a *Biſhop* ſhall not have an Action of Treſpaſs in that Caſe, 1ſt. as has been ſaid; for that this Act extends not to him. 2dly. The King has the Temporalties during the Vacation; and therefore he *cannot have* an Action of *Treſpaſs*; *But* in the Regiſter there is in that Caſe an *Oyer and Terminer* to be granted *to hear the Treſpaſſes done in Time of Vacation* of the Biſhoprick, as thereby appears, which ſeems in Favour of the Church to be granted *by the Common Law*; for it is not grounded upon this Act: And therefore I leave the marginal Notes in the Regiſter that are newly added, and are not warranted by ancient Manuſcripts, to the judicious Reader. 2 Inſt. 152.

But F. N. B. 112. (H) 113. ſays, It ſeems that theſe Words (ſuch Religious Perſons) ſhall *extend to Biſhops*; as much as to ſay the Biſhop ſhall puniſh a Treſpaſs done in Time of Vacation of the Biſhoprick, in cutting down of Trees &c. for of Right the King cannot cut ſuch Trees; but as to Hunting in the Parks, or Fiſhing in the Piſcaries, it ſeems the King ought to have the Action for the Treſpaſs done in the Time of the Vacancy; but if they do deſtroy all the Fiſh within the Fiſheries, or all the Deer in the Parks in the Time of the Vacancy, it ſeems reaſonable, that by the Statute of Marlbridge the Succeſſor ſhall have an Action for ſuch Treſpaſs. Quære the Truth of this Matter.

Writ of Intruſion lies not for the Succeſſor of the Biſhop for an Intruſion in Time of Vacation; for the King's Poſſeſſion (which he has without Office) preſerves the Inheritance of the Biſhop; but it lies by this Statute, where one intrudes after the Deceaſe of an Abbot or Prior. See the 1ſt Part of the Inſtitutes, Sect. 443, for this Manner of Intruſion, while the Freehold and Inheritance is in Conſideration of Law. 2 Inſt. 152.

2. In Treſpaſs by Prior of taking *Vaccam Domus & Eccleſiæ de M. tempore H. prædeceſſoris ejuſdem Prioris &c.* It was objected, that the Writ ought to be Vaccam, quæ fuit H. Prædeceſſoris tempore H. Prædeceſſoris, cepit &c. for that the Cow was H.'s, and that he ſhould not allege her to be Vaccam Domus; but this notwithſtanding the Writ, was awarded good by the Statute. Fitzh. Tit. Brief, pl. 359. cites Trin. 18 E. 3. 23.

3. A Man *recovered Arrears of Annuity againſt a Parſon*, the *Parſon died*, he ſhall have *Scire facias againſt the Succeſſor* of the Parſon, and *not againſt the Executor*, and ſhall have Scire facias of Part and Fieri facias of the reſt; And ſo it ſeems that Part was in the Time of the Parſon, and Part in the Time of his Succeſſor, or Part within the Year, and Part after. Br. Executor, pl. 144. cites 24 E. 3. 23.

4. *Treſpaſs* by a Prior, *Quare* vi & Armis *Bona & Catalla Eccleſiæ ſuæ de S. & Nicholai nuper Prioris ibidem Prædeceſſoris ſui tempore dicti Nicholai & 10 Marc. in Pecuniis numeratis dictæ Domus & Eccleſiæ, apud C. cepit & aſportavit.* Caund. demanded Judgment of the Writ; for he does not ſuppoſe the carrying away of the Money in the Time of the ſaid Nicholas. Et non Allocatur; for the firſt Words amount to as much; Quod nota. Br. Treſpaſs, pl. 64. cites 47 E. 3. 23. Fitzh. Tit. Brief, pl. 623. cites Mich. 47 E. 3. 23. S. C.

5. Note, That if *Obligation* be made *to a Prior*, who dies, his Succeſſor ſhall have Debt in the *Debet & Detinet*, tho' no Word of Succeſſor be in the Obligation. Br. Abbe, pl. 3. cites 47 E. 3. 23. Br. Obligation, pl. 18 cites S. C.—S. P. Br. Abbe, pl. 32. cites 47 E. 3. 26—Br. Dette, pl 44 & 45. cites S. C.—S. P. 2 Inſt. 152.

6. *Treſpaſs of Trees cut, Franktenement broke, and Servant beaten, by a Prior*, it is a good *Plea* to the Writ, *that the Treſpaſs was in the Time of his Predeceſſor* &c. by which the Plaintiff maintained the contrary. Br. Abbe, pl. 5. cites 2 H. 4. 4. Br. Treſpaſs, pl. 69. cites S. C.

7. If an *Abbot had a Ward*, and *J. S. raviſhed him*, and the *Abbot died*, the Succeſſor ſhould puniſh this Treſpaſs; contra of a *Biſhop*. Brooke ſays the Reaſon ſeems to be inaſmuch as the one may have Executors, and ſo cannot the other. Br. Treſpaſs, pl. 380. cites 11 H. 4. 82.

8. *Debt* againſt an Abbot *upon an Obligation of his Predeceſſor* of 20 l. and *counted that* the Abbot *Predeceſſor pledged a Table* Ipſius nuper Abbatis & *Abbathiæ* ſuæ predictæ *to the Plaintiff, for* 40 *l. and* after *repaid him* 20 *l. upon which the Plaintiff re-delivered him the Table, and took an Obligation of him for* 20 *l. Reſidue under his own Seal, without the Convent*, and *averr'd that the Table came to the Uſe of the Houſe*; And the Count was awarded good notwithſtanding that he ſaid, Unam Tabulam auream ipſius nuper Abbatis & Abbathiæ &c. For during the Life of the Abbot, the Property is in the Abbot only, and he may give them; But if he dies or be depoſed, the Property is in the Houſe. Br. Abbe, pl. 2. cites 9 H. 6. 25. Br Replevin. pl. 2. cites S. C.

9. If the *Goods of an Abbot are carried away and he dies*, the Succeſſor ſhall have Action Quare *bona Prædeceſſoris & Abbathiæ* &c. per Babb. But per Marten, in this Caſe the Action ſhall be of Goods *of the Houſe and Church* only, *without ſpeaking of the laſt Abbot*; And this ſeems to be well by the Regiſter, Quod vide ibidem, tit. Treſpaſs &c. And the Statute of Marlb. cap. 29. is, Quod habeat Actionem ad bona eccleſiæ ſuæ recuperand' and not bona Prædeceſſoris. But per Babb. becauſe the Property is in the Abbot and in the Houſe alſo, Anſwer; quod nota. Br. Abbe, pl. 2. cites 9 H. 6. 25.

10. Per

10. Per Fulthorp, *Not the Deed of the Abbot and Covent* is double in Debt againſt Succeſſor upon Obligation. Br. Double, pl. 77. cites 14 H. 6. 17.

Br. Aid. pl. 78. cites 19 H. 6. 39. & 44. And ſays, That the ſame Year 75, it was awarded that the Plaintiff ſhould recover the Annuity; Quod nota.

11. In *Scire Facias againſt a Parſon, upon Recovery of an Annuity againſt his Predeceſſor upon Aid and Joinder of the Patron*, and finding againſt them upon Iſſue *upon Preſcription*, the Succeſſor in Scire Facias ſhall have Aid again; But upon the Joinder they were not ſuffered to traverſe the Preſcription again, tho' they alledg'd that all the Jurors were dead, ſo that they could not have Attaint; For this is the Laches of him and his Predeceſſor, which cannot be reformed. Br. Scire Facias pl. 112. cites 19 H. 6. 39.

12. In *Debt* the *Plaintiff declared againſt a Biſhop late Prior of D.* and the *Deed was in the Name of the Prior and Covent*, and becauſe the Succeſſor ought to be impleaded, and not he who is tranſlated to a Biſhop, Markham *ſaid, that it was made by the Prior and Covent, and the Prior, now Biſhop, is tranſlated in Biſhop of L. and another Prior choſe, and the Money came to the Uſe of the Houſe*, and therefore the Succeſſor ſhall be charged, and not the Predeceſſor; And per Cur. this Plea is double, the one that the *Prior and Covent made an Obligation*, and another, that the *Money came to the Uſe of the Houſe*. Br. Double. pl. 46. cites 21 H. 6. 3.

13. If *Obligation* be made *to an Abbot alone, who is after created a Biſhop*, the Succeſſor ſhall have the Action and not the Biſhop, and ſhall have Action of Detinue of the ſame Obligation. Br. Abbe, pl. 8. cites 21 H. 6. 3. & 22 H. 6. 4 Per Ardern & Pole.

If an Abbot does a Treſpaſs, and is tranſlated, yet the Action remains.

14. *And* per Pole if an *Abbot brings Treſpaſs of Battery and recovers Damages*, and *before Execution is made an Abbot of another Church*; The Succeſſor ſhall have Scire Facias, and Execution, and not he who recovered. Br. Abbe, pl. 8. cites 21 H. 6. 3. & 22 H. 6. 4.

Br. Abbey pl. 13. cites 3 H. 7. 11. & 5 H. 7. 24. per Wood.

15. In Treſpaſs upon the 5 R. 2. If a Man pleads *the dying ſeized of his Predeceſſor, Maſter of the Hoſpital of Dale*, and that he entered; This is no Plea, for he *ought to ſhew how he debite electus & præfectus fuit and then quod intravit*; Quod nota. Br. Pleadings, pl. 11. cites 34 H. 6. 27.

S. P. And 'tis not Debt upon Arrearages of Account; For theſe never lie in Account, for they were always certain; And he was compelled to ſhew in what Place it came to the Uſe of the Uſe of the Houſe. Br. Dette pl. 147. cites 2 E. 4. 14.

16. *Plaint againſt an Abbot upon Deed of* 100 *s. of his Predeceſſor, which came to the Uſe of the Houſe*; And the *Deed* and the *coming to the Uſe of the Houſe* ſhall not be double; For the Deed is not ſufficient, unleſs it come to the Uſe of the Houſe; Quod Nota. Br. Double. pl. 96. cites 2 E. 4. 13.

17. In Writ of *Entry ſur Diſſeiſin* made by the Defendant *of a Rent to to the Predeceſſor of an Abbot Plaintiff*, the *Tenant took the Tenancy and pleaded as Tertenant*, and pleaded Hors de ſon Fee, *Judgment if without Title ſhewn* &c. And per Cur. the Plea is good in this Action; For the *Seiſin nor Diſſeiſin to the Predeceſſor is no Title*; For it may be that the *Predeceſſor was Diſſeiſed*, and *then the Succeſſor is not in by the Predeceſſor*, as the Heir is in in by the Anceſtor; *For* the Succeſſor *is in by the Houſe*, and continues the firſt Tort, therefore no Plea here no more than in Aſſize. Br. Hors de ſon Fee, pl. 9. cites L. 5 E. 4. 80.

18. Treſpaſs by Prior of Quare *Bona & Catalla Domus & Eccleſiæ ſuæ prædictæ tempore Predeceſſoris ſui cepit*, and counted of a *Pipe of Wine*. It was objected that the Writ ſhould be Bona & Catalla ipſius the Prior; for that the Property was his. But per Choke, the Succeſſor can-

cannot have Action of this taking, but in reſpect of the Right which was in the Church; And therefore the Writ is good. And per Danby, the Prior could not have Goods otherwiſe than in the Right of his Church; And he could not deviſe them &c. and they held the Writ good. Fitzh Tit. Brief, pl. 176. cites Trin. 9 E. 4. 33.

19. Scire Facias *againſt Succeſſor of a Parſon* to have Execution of certain *Arrears of Annuity recovered againſt his Predeceſſor*; the *Defendant ſaid, that he at D. in another County, reſigned into the Hands of the Biſhop*, which he accepted &c. *and ſo he was not Parſon the Day of the Writ purchaſed, nor ever after*; And the beſt Opinion was, that this is a good Plea; but by ſome nothing ſhall be enter'd but Not Parſon the Day of the Writ purchaſed nor ever after, and the Reſignation ſhall be given in Evidence; And it ſeem'd to ſome that all ſhould be enter'd for Evidence and Plea. Br. Scire Facias. pl. 133. cites 9 E. 4. 49.

20. If *Mayor and Commonalty are Diſſeiſed* and the *Mayor dies*, the Succeſſor and the Commonalty ſhall have *Aſſize*, and the *Writ ſhall be Diſſeiſivit eos*. Br. Corporations pl. 56. cites 12 E. 4. 9. 10.

21. In *Detinue of Charters by an Abbot* it is a good *Plea that his Predeceſſor pledged them* for 10 l. which is not paid. Br. Chattles, pl. 25. cites 21 E. 4. 19.

For more of Succeſſor in General, See **Confirmation, Corporation, Eſtate,** and other proper Titles.

Suit of Court.

(A) *By whom* it may or muſt be *done.*

See (B)

1. BY 20 *H.* 3. *cap.* 10. *it is provided and granted, that every* * *Free-man, which* ‡ *owes Suit to the County,* † *Tything, Hundred, and* || *Wapentake,*

* This does extend to Freeholders in ancient Demeſne, but not to Copyholder. 2 Inſt. 100.

‡ Nota, There be 2 kinds of Suits, viz. Suit ** *Real*, that is, in reſpect of his Reſiance, to a Leet or Tourn; and Suit *Service*, that is, by reaſon of a Tenure of his Land of the County, Hundred, Wapentake, or Manor, whereunto a Court Baron is incident. Before this Act, every one that held by Suit Service ought to appear in Perſon, becauſe the Suitors were Judges in thoſe Courts; otherwiſe he ſhould be amerced, which was miſchievous; for it might be, that he had Lands within divers of thoſe Seigniories, and that the Courts might be kept in one Day, and he could be but in one Place at one Time. But this Statute *extends not to Suit Real*, becauſe he cannot be within 2 Leets &c. 2 Inſt. 99.

** S. P. per Trem. Br. Suit, pl. 2. cites 45 E. 3. 23.

† Here it *ſignifies a Court which conſiſts of* 3 *or* 4 *Hundreds*, and does not there ſignify a Leet, or View of Frankpledge. 2 Inſt. 99.

|| That, which in ſome Countries is call'd a *Hundred Court*, in ſome Countries *is call'd a Wapentake*. Quod angli vocant Hundredum ſupradicti Comitatus vocant Wapentagium. Now the Reaſon of the Name was this: When any, on a certain Day and Place, took upon him the Government of the Hundred, the Free Suitors met him with Launces, and he deſcending from his Horſe, all roſe up to him; and he holding his Launce upright, all the reſt, in ſign of Obedience, with their Launces touching his Launce or Weapon. For the Saxon Word Wapen, is Weapon, and tac is tactus, or touching; and therefore this Aſſembly was call'd Wapentake, or touching of Weapon. 2 Inſt. 99.

Or to the Court of his Lord, may freely make his Attorney ‡ *to do thoſe Suits for him.*

He muſt make a Letter of Attorney *under his Seal*, which the Steward ought to allow; and if he does not, the *Suitor may have a Writ*

out

out of the Chancery, *for the Allowance of him*; *or*, if he doubted that he ſhould not be allow'd, he might have a Writ before-hand *to receive him* as Attorney. And *ſuch* a *Writ ſhall ſerve during the Life of the Tenant* &c. for the Words of another Writ be, Et quia virtus Brevium noſtrorum de hujus modi Attornato faciendo terminum non capit, nec terminus limitatur durantibus perſonis &c. What ſuch an Attorney may do, and who cannot be Attorney, ſee the Statute of W. 1. 2 Inſt. 100.——S. P. F. N. B. 156. (D)

The *Tenant may make Attorney by his Letters Patent*, to do Suit at the Court of his Lord. F. N. B. 156. (D)——S. P. *without* ſuing forth any *Writ*. *Or* the Party *may make Attorney by the King's Writ, directed unto the Bailiffs*, commanding them for to receive ſuch Perſon for his Attorney. *Or* he may have a Writ out of the Chancery, directed unto the Bailiffs, or *Sheriffs*, to receive any ſuch Perſon for his Attorney, that he will preſent unto the ſaid Bailiffs or Sheriffs to be his Attorney to do his Suit. F. N. B. 157. (C)

And if the *Tenant*, *by* his *Letters Patent under his Seal*, *make Attorney* for him to do Suit for him at the Lord's Court, or at the Hundred, *and the Bailiffs will not admit* of him &c. then *he ſhall have a Writ* unto them. F. N. B. 156. (D)——And the Book ſays, that if the Sheriff or Bailiff of the Court refuſe to admit ſuch for his Attorney, upon that Refuſal, the Party ſhall have an Attachment againſt the Bailiff &c. *altho' he has not ſued forth any Writ* directed to him before; becauſe they do againſt the Statute, which requires, that they admit him for Attorney whom the Tenant will make to be his Attorney. F. N. B. 157. (C)——*So* if a Man *ſues* forth *a Writ to admit one for Attorney*, and the *Bailiffs refuſe* to admit him, the *Party ſhall have an Attachment* againſt them, without ſuing forth an Alias, or a Pluries, directed unto them. F. N. B. 157. (C)

And he ſhall have the *like Writ againſt the Bailiffs of any other Lord*, who refuſe to admit an Attorney to do Suit for the Tenant *in any Court Baron*, and that Writ appears in the Regiſter. F. N. B. 157. (D)

If a Man *makes an Attorney to do Suit* for him at the County, or Hundred, or other Court, and the *Bailiffs will not admit him* for his Attorney; *or* if the Bailiffs do admit him for Attorney, and afterwards *diſcharge him after the Year*, ſuppoſing that he ought not to continue Attorney for the Party above one Year, *or* for any *other unreaſonable Cauſe*, they diſcharge him to be Attorney for the Party; then the Party may have a Special Writ, directed unto the Bailiffs &c. commanding them, that they receive him for his Attorney; and thereupon he may have an Alias, and a Pluries, and an Attachment againſt them returnable in C. B. or in B. R. if they will not admit him for his Attorney, or return Cauſe upon the Pluries, which ſhall be allow'd, wherefore they do not admit him. F. N. B. 157. (A)

‡ So as, by force of this Act, he *may do ſuch Suit as the Freeholder ought to do*. 2 Inſt. 100.

Now albeit he that holds by Suit Service may make an Attorney, yet that *Attorney cannot ſit as Judge*, as the Free Suitor himſelf might do; for he cannot depute another in his judicial Place; and the Words of the Statute be, Libere poſſit facere Attornatum ad ſectas illas, pro eo faciendas, 2 Inſt. 99, 100.

This Act *extends to Juſtices in Eire*. 2 Inſt. 100. cites the Regiſter 19.

2. If one *holds two Acres* by Suit of Court, and *aliens one* Acre, the *Feoffor* and *Feoffee* ſhall make both Suits. Kitch. of Courts, 298. Tit. Suits, cites 43 E. 3. 4. b.

3. One that is *not Reſiant* may be bound to do Suit Real; for it ſhall be intended a Suit Service, *reſerved on creating the Tenure*. 2. Salk. 604. in Caſe of Tomkins v. Crocker, cites 12 H. 7. 18.

4. If the Wife be *Tenant in Dower* of any Land, ſhe ſhall not be diſtrain'd to do Suit for that Land which ſhe holds in Dower, if the *Heir has ſufficient Land* in the ſame County to be diſtrain'd for the ſame. And if ſhe be diſtrain'd, then ſhe ſhall have a Writ Pro Exoneratione ſectæ. F. N. B. 159. (A)

5. Note, That Men or Women who have *entered into Religion*, ought not to come unto the Sheriff's *Torn*, *or* unto the *Leet* of any other, without great Cauſe; and if they be diſtrain'd for to come, they may have a Writ out of the Chancery to diſcharge them. F. N. B. 160. (C)

6. [*So*] *Clerks* who are *not Parſons*, *nor have Benefices*, ſhall not be diſtrain'd, or compell'd to come to Torns or Leets; but they ſhall have a Writ to diſcharge them. F. N. B. 160. (C)

7. [*So*] By the Common Law, *Parſons of Churches* ſhall not be compell'd or diſtrain'd to come to the King's Leets, or to the Leets of other Lords of the Lands annex'd to their Churches; and if they be diſtrain'd ſo to do, they ſhall have a Writ. F. N. B. 160. (C)

A Woman may be a Free Suitor to the Courts of the Lord; but tho' it be generally ſaid, that the Free Suitors be Judges in theſe Courts, it is intended of Men, and not of Women. 2 Inſt. 119.

8. *Women* are not compellable nor diſtrainable to come unto the Sheriff's Torn, nor to Leets; and if they be diſtrain'd, they may ſue ſuch a Writ as a Prieſt may ſue, and thereupon an Alias, Pluries, and Attachment &c. F. N. B. 161. (A)

9. If

9. If the Sheriff will diſtrain the *Tenants in ancient Demeſne*, to come unto the Leet or Sheriff's Torn, they *may have one Writ for them all*, directed unto the Sheriff, commanding him that he do not diſtrain them &c. to do any Suit at the Leet or Torn; and that Writ ſhall be ſued *in all their Names*, if they will, as a Monſtraverunt ſhall be ſued; or any of them may ſue the Writ in his own Name, if he be diſtrain'd to do ſuch Suit. F. N. B. 161. (C)

(B) *How.* By Parceners, Feoffees, &c.

See (C) pl. 5.

1. 52 H. 3. cap. 9. FOR *doing* * *Suits unto Courts of great Lords, or of meaner Perſons, from henceforth this Order ſhall be obſerved*;

* This is underſtood of *Suit Service* to Courts Baron, Hundreds, and the like; and *not* of Suit *Real, in reſpect of Reſiance*, *nor* of Suit *to the Mill*; for the Words be, De ſectis fac' ad Curiam &c. 2 Inſt. 117.——It is ſaid by Tremail, That Suit Real is due, by reaſon of the Body; that is, becauſe the Body is reſident within the Precinct, and not by reaſon of Freehold; and this is due at the Courts Royal, as at the Courts of the King or Queen, as at Leets and Wapentakes, which are the Courts of the King or Queen; and Suit Service is by reaſon of Freehold, that is, by reaſon of their Tenure; that is, for that they hold of their Lord by Suit to his Court Kitch. of Courts, 296. Tit. Suits.—S. C. & S. P. Fitzh. Tit. Barre, pl. 211. cites Mich. 45 E. 3. 23.

That || none *that is* infeoff'd by Deed *from henceforth* ſhall be diſtrain'd *to do ſuch Suit to the Court of his Lord, without he be ſpecially bound thereto by the Form of his Deed*;

|| *At the Common Law*, before the making of this Statute,

if the Lord had made a Feoffment by Deed, and reſerved certain Services, As, for Example, Fealty, and 2 s. Rent, or 2 s. Rent generally, which had imply'd Fealty; in this Caſe, if the Lord had diſtrain'd for Homage, or Suit, or any other Rent or Service than was reſerved in the Deed, not only the Tenant and his Heirs, but his Aſſigns alſo, or any other *Tenant of the Land*, might have *rebutted the Lord*, his Heirs, or Aſſigns, *by the Deed*; and this holds between Party and Party, Privy and Privy, Privy and Stranger, and Stranger and Stranger. But this Act gives the Tenant, or his Heirs, a more ſpeedy Remedy; for hereby is given to the Tenant, againſt the Lord and his Heirs, a Writ of *Contra formam Feoffamenti*. 2 Inſt. 117, 118.

And Lord Coke ſays, that herein are ſeveral things worthy of Obſervation, As,

1. When any Act does prohibit any Wrong or Vexation, though no Action be particularly named in the Act, yet the Party grieved ſhall have an Action grounded upon this Statute; which in this Caſe is a † Prohibition to the Lord or his Bailiffs, and recites this Act; the Form whereof you may read in the Regiſter, & F. N. B. Now where it may be objected, that in Mich. 16 H. 3. reported by F. Tit. Avowry, 243. that upon a Confirmation a Writ of Contra formam Feoffamenti does lie; and by that Book it ſhould ſeem, that a Writ of Contra formam Feoffamenti did lie at the Common Law before this Statute, which was made in 52 H. 3. To this it is anſwer'd, that the ſaid Caſe is miſ-printed; for where it is Mich. 16 H. 3. it ſhould be 56 H. 3. when the Caſe was ſo reſolved, and in which Term, viz. the 16th Day of Novemb. H. 3. died; ſo as that Opinion was after our Statute, and that the Writ was given by this Statute, the Writ does recite it. And where in this Clauſe the Statute ſays, *ſhall be diſtrain'd*, all this Chapter is to be underſtood of Suit Service; becauſe *for Suit Real no Diſtreſs can be taken, but for the Amerciament in Default thereof*. 2 Inſt. 118.

2dly, Where the Statute ſays, Contra formam Feoffamenti, yet if the *Lord confirms the Eſtate* of the Tenant *to hold by certain Services*, upon this Confirmation he ſhall have a Contra formam Feoffamenti, for that it is within one and the ſame Reaſon. 2 Inſt. 118.——Where the Services by the Deed of Confirmation are *leſs than before*. Br. Contra formam Feoffamenti, pl. 3. cites 16 H 3. 1. & Fitzh. Tit. Avowry, 243.——Ibid. pl. 5. cites S. C.——Kitch. of Courts, 299. Tit. Suits, S. P. cites 10 H. 3. Tit. Avowry, 243. & 26 E. 3. Tit. Avowry, 246.——F. N. B. 163. (G) cites Mich. 16 Ed. 3.

3dly, Upon theſe Words (*certain Service*) if one give Land in *Frankalmoigne*, or in *Frank-marriage*, he cannot have a Writ of Contra formam Feoffamenti; becauſe there is no certain Service contained in the Feoffment or Gift, and therefore out of this Act; but he *may rebut*. 2 Inſt. 118.———F. N. B. 163. (F) S. P. cites the Opinion of Parning, Paſch. 10 E. 3.

4thly, If the Lord diſtrains either for Suit, or for any *other Service, or Rent, not* contain'd *in the Deed*, the Tenant ſhall have this Writ of Contra formam Feoffamenti; for the Words of this Act be, ad hujuſmodi ſectam, vel ad aliud &c. 2 Inſt. 118.

5thly, The Statute ſays, Contra formam Feoffamenti; hereupon Expoſition has been made, that this *Writ lies only between Privies*, viz. by the Tenant and his Heirs, againſt the Lord and his Heirs; for they be included in Privity of the Feoffment, but ſo are not the *Aſſigns* on either Side. 2 Inſt. 118.——This Writ

Writ lies only where the Plaintiff claims by his Anceſtor, and not where he claims as Purchaſer; and that ſo it is of Ne injuſte Vexes. Regiſt. Bev. 176. cites Hill. 19 E. 3. the laſt pl. by Willoughby.

† The Writ of Contra formam Feoffamenti is a Prohibition in itſelf, and if the Lord and Bailiffs do contrary to the Writs ſent to them, the Tenant thereupon ſhall have an Attachment and Diſtreſs. F. N. B. 163. (A)——S. P. And if he diſtrain after the Writ delivered to him, the Tenant ſhall have an Attachment againſt him; and thereupon he ſhall recover his Damages, if it be found for him, &c. and the Proceſs is Prohibition, Attachment, and Diſtreſs. F. N. B. 163. (D)

If the *Feoffment* be *without Deed*, the Feoffee is driven to his Writ of *Ne injuſte Vexes*. 2 Inſt. 118. ——*So* if the Feoffment be made *before Time of Memory*, one ſhall not have a Contra formam Feoffamenti, but a Ne injuſte Vexes, for ſuch Feoffment is not pleadable. F. N. B. 162. (E) in the new Notes there, (b) cites 12 H. 4. 24.

The Law does even favour Poſſeſſion as an Argument of Right,

Theſe only except, *whoſe Anceſtors, or they themſelves, have* uſed to do ſuch Suit, *before the firſt Voyage of the ſaid King Henry into Bretaigne; ſince which* 39 *Years and a half are paſſed unto the time that theſe Statutes were enacted.*

and does incline rather to *long Poſſeſſion* without ſhewing any Deed, than to an ancient Deed without Poſſeſſion; and therefore this Act does except long Poſſeſſion: But in reſpect of the great Troubles that did ariſe in this Realm after the Cancellation which H. 3. made of the Charters of Magna Charta, and Charta de Foreſta, in the 11th Year of his Reign, this Act does give Relief againſt any Seiſin ſince his firſt going into Bretaigne, which was in the 14th Year of his Reign; but the Seiſin before thal Time, *when the Times were regular and peaceable*, this Act does except. 2 Inſt. 118.

Here he begins with Feoffments without Deeds; in the next

Likewiſe from henceforth none that is infeoffed without Deed, *from the Time of the Conqueſt, or any other ancient Feoffment, ſhall be diſtrain'd to do ſuch Suits; unleſs that he or his Anceſtors uſed to do it before the ſaid Voyage.*

Branch with Feoffments by Deed; wherein is to be obſerved the great Antiquity of Feoffments by Deed, or without Deed, of ancient Time before the Conqueſt. 2 Inſt. 119.

2dly, The Reaſon in thoſe troubleſome Times, ſince the firſt going over of the King (as has been ſaid) is not allowed of; but a Seiſin is required before that Time, when Times were regular and peaceable. 2 Inſt. 119.

See the Notes at the 2d Paragraph.

And they that are infeoffed by Deed to do * *a certain Service, as, for Service of ſo many Shillings by Year, to be acquitted of all Service; from henceforth ſhall not be bounden to ſuch Suits, or other like, contrary unto the Form of their Feoffment.*

* This is to be underſtood *after Partition*, for before that the Eldeſt has not Enitiam partem,

And if any Inheritance (*whereof but one Suit is due*) deſcend unto *many Heirs, as unto* Parceners, *who ſo has the* * *eldeſt Part of the Inheritance, ſhall do that one Suit for himſelf and his Fellows, and the other Coheirs ſhall be Contributaries, according to their Portion, for doing ſuch Suit.*

and therefore before Partition this Act extends not to it, and before Partition there can be no Contribution, as hereafter ſhall be ſaid; But *in the* † *King's Caſe, all the Co-parceners ſhall do ſuit* as well after Partition as before, *and ſo* ſhall *their ſeveral Feoffees*, for this Act extends not to the King, for the Words be, ad curiam magnatum &c. 2 Inſt. 119. ——— S. P. For the King not being named, is not reſtrained by the Statute. Pl. C. 240. b. in Caſe of Willion v. Ld. Barkley.——Br. Suite &c. pl. 4. cites 24 E. 3. 73. and makes a Quære as to the Caſe of a common Perſon, before partition.

† S. P. F. N. B. 159 (C) ——Kitch. of Courts 297. Tit. Suits cites S. C. & 13 H. 7. 15. ——— But if the Land be holden of another Lord, then that ‡ *Coparcener or* his *Feoffee, who has the Part of the eldeſt Siſter*, ſhall do the Suit alone; And if the Lord will diſtrain the other Coparceners, then they ſhall have a Writ againſt him directed to him or his Bailiffs to diſcharge them of that Suit, and Diſtreſs taken &c. F. N. B. 159. (C)

‡ S. P. Pl. C. 240. b. Arg. in Caſe of Willion v. Ld. Barkley.

If the eldeſt after Partition will not do the Suit, in the Caſe of a common Perſon the Lord may *diſtrain the other Parceners, as well as the Eldeſt* for the Suit, and the other Parceners *may have* upon this Act a *Writ againſt the Eldeſt to compel her to do the Suit*. And if the Eldeſt does the Suit, and the Reſidue refuſe to contribute to her Charges, *ſhe* ſhall have upon this Act *a Writ de Contributione facienda* to compel them to contribute. 2 Inſt. 119. ——— S. P. F. N. B. 159 (E) ——— S. P. F. N. B. 162. (B) ——— So if the *Eldeſt does the Suit* and *the other* Coparceners *agree* with the Eldeſt for a Rate; Now the Writ of Contribution ſhall be brought againſt the others, who would not contribute &c. F. N. B. 162. (B)

And yet this Act *extends to the Feoffee of him that has Enitiam partem*, and ſo it is of the *Tenant by the Courteſy*, 2 Inſt. 119.

And

And if many Feoffees *be ſeiſed of an Inheritance (whereof but one Suit is due) the Lord of the Fee ſhall have but that one Suit, and ſhall not exact of the ſaid Inheritance but that one Suit as has been uſed to be done before.*

This is to be underſtood, either when the Tenant holds by Suits, and *enfeoffs others ſeverally*, one of one Part and another of another Part &c. in certain; There the Lord ſhall have but one Suit, and he that does the Suit ſhall have a Writ De contributione facienda, againſt the others; *Or* where the Tenant that holds by one Suit infeofs *many jointly*, they *ſhall make but one Suit*; as they ſhall deliver but one * *Hawk*, or other intire Services. And if one of them does the Suit, he ſhall not have a Writ De contributione facienda by this Act, for when the Poſſeſſion is individed, and intire, there can be no Contribution; But if *one of the joint Feoffees make a Feoffment in Fee*, the *Feoffee ſhall do a ſeveral Suit*, and the reſt of the joint Feoffees ſhall do but one. And if *one of the* ſeveral *Feoffees does the Suit*, if the other Feoffees be † diſtrained for the Suit, they ſhall have a Writ againſt the Lord to diſcharge them of the Suit, wherein it is to be noted (as before has been obſerved) what Actions are grounded upon this and other the like Statutes, though no mention be made of them in the Acts, all which appear in the Regiſter. 2 Inſt. 119. —— Br. Suite &c. pl. 4. cites 24 E. 3. 73. as to the joint Feoffment, but ſays, Quære if they are ſeverally infeoffed; But Skipwith ſaid, that in ſuch Caſe the Lord might diſtrain which he pleaſed, and if one does the Suit, the other ſhall take Advantage thereof, and ſo the Lord ſhall have only one Suit; Quod nota.

* S. P. 6 Rep. 1. b. in Bruerton's Caſe Hill. 37. Eliz. in the Court of Wards. But if the Tenant makes *Feoffment of a Moiety or 3d Part in Common*, and not in Severalty, this is out of the Purview of this Statute; For when the Poſſeſſion is intire and undivided, there cannot be any Contribution, and with this agrees F. N. B. 162. (D) viz. that Tenant in Common ſhall do a ſevetal Service and ſeveral Suit.

† S. P. F. N. B. 159. (D) —— And if he ſue ſuch Writ, and be diſtrained, then he ſhall have an Attachment againſt the Lord, or the Bailiffs to whom the firſt was directed, to anſwer that Contempt, in which Writ he ſhall recover his Damages &c. F. N. B. 159. (D)

If *ſeveral are infeoffed* of Land, for which one Suit ought to be done &c. Now if *they agree* among themſelves, *that one* of them *ſhall do the Suit, and* that *the others ſhall contribute* unto him, if he do the Suit, and afterwards the others will not allow him for that Suit according to their Rate, then he ſhall have the Writ of Contribution againſt them, and the *Writ ſhall mention the Agreement* &c. and if they cannot agree, then the Lord ſhall *diſtrain them all for all their Suits*, if the Suit be not done; But if one Feoffee of his own will do the Suit for them all, without any Agreement for the ſame made between them, the Lord cannot then diſtrain the others for the Suit; For as to the Lord, it is not material whether there be any Agreement between them or not; But between the Feoffees, *he that did the Suit ſhall not have the Writ of Contribution* againſt his Companions, *without Agreement* thereof made betwixt them. F. N. B. 162 (B.)

If two are ſeverally infeoffed by one Tenant who holds of one Manor of the King, every of them ſhall make Suit. Kitch. of Courts Tit. Suit 298. cites 45 E. 3. Tit. Bar. 211.

And if thoſe Feoffees have no Warrant or Meſne which ought to acquit them, then all the Feoffees according to their Portion, ſhall be Contributaries *for doing the Suits for them.*

That is to ſay, if they have neither one to warrant by ſpecial Grant, nor any Meſne by Tenure which ought to acquit them, Tunc omnes illi Feoffati pro portione ſua contribuant &c. This Clauſe is to be *underſtood of ſeveral Tenants*, as has been ſaid before; And no Proviſion is made by this Act concerning Contribution, where the Parties are provided for by Grant or Tenure. 2 Inſt. 120.

And if it chance that the Lords of the Fee do diſtrain their Tenants for ſuch Suits contrary to this Act, then, at the Complaint of the Tenants, the Lords *be* attached to appear *in the Kings Court at a ſhort Day to make anſwer thereto, and ſhall have but one Eſſoin therein (if they be within the Realm;) And immediately the Beaſts or other Diſtreſſes taken by this Occaſion, ſhall be delivered to the Plaintiff, and ſo ſhall remain until the Plea betwixt them be determined.*

Here is a Remedy given to the Tenant againſt the Lord, if he diſtrain contrary to this Statute. 2 Inſt. 120.

And if the Lords *of the Courts, which took Diſtreſſes,* come not at the Day *that they were attached, or do not keep the Day given to them by Eſſoin, then the Sheriff ſhall be commanded to cauſe them to come at another Day; At which Day if they come not, then he ſhall be commanded to* diſtrain them *by all their Goods and Chattels that they have in the Shire, ſo that the Sheriff ſhall anſwer to the King of the Iſſues of the ſaid Inheritance. And that he have their Bodies before our Juſtices at a certain Day limited, ſo that if they come not at that Day, the Party Plaintiff ſhall go without Day, and his Beaſts or other Diſtreſſes taken by that Colour ſhall remain delivered, * until the ſame Lord have recovered the ſame Suit by Award of the King's Court; And in the mean Time ſuch Diſtreſſes ſhall ceaſe, ſaving to the Lords of the Court their Right to recover theſe Suits in Form of Law, when they will ſue therefore.*

* Nota, the Suit that is paſt cannot recovered, but Damages for the ſame. 2 Inſt. 120. —— S. P. For when the Court-Day is paſt the Suit cannot be made. Br. Suit pl. 7. cites 7 E. 4. 28. —— Br. Avowry, pl. 96. cites S. C.

And when the Lords of the Courts come in to anſwer the Plaintiffs of ſuch Treſpaſſes, and be convict thereupon, then by Award of the King's Court, the Plaintiffs ſhall recover againſt them the Damages *that they have ſuſtained by Occaſion of the ſaid Diſtreſs.*

2. If Lands deſcend to two Parceners, and the *Elder does Homage*, this diſcharges both; And yet if the *elder aliens*, the Lord may diſtrain on the Younger for the Homage. F. N. B. 159. (D) in the new Notes there (b) cites 2 E. 2. Avowry 179.

Br. Suit pl. 1. cites S. C. Brooke ſays the Reaſon ſeems to be in as much as he cannot take the Suit, and be contributary to the Suit which he himſelf takes.——— S. P. Suit pl. 5. cites 34 Aſſ. 15.——— S. P. 2 Inſt. 120.

3. *Suit of Court* is not apportionable, but if the *Part of one of the Jointenants* who holds by Suit *comes to the Lord*, all the others ſhall be diſcharged of the Suit. Br. Apportionment pl. 2. cites 40 E. 3. 40.

4. If one *Jointenant makes a Feoffment* in Fee *of his Part*, his *Feoffee ſhall do a ſeveral Suit* by himſelf. *But the other Jointenants ſhall do but one Suit*, by the Statute of Marlbridge, cap. 9. *But every Tenant in Common ſhall do ſeveral* Services and ſeveral *Suits*. F. N. B. 162. (D)

5. Quære, If *A holds Lands charged with Suit* to the Hundred *by Preſcription, and enfeoffs the King of Parcel*, if all the Suit is gone? F. N. B. 159 (A) in the new Notes there.

(C) *Remedies* for not doing thereof.

1. 52. *H.* 3. cap. 9. *S.* 2. *Enacts, That, if the* Tenants *after this Act* withdraw *from their Lords ſuch* Suits *as they were wont to do, and which they did before the Time of the firſt Voyage of King Henry into Britaign, and hitherto uſed to do, than by like Speedineſs of Juſtice, as be to limiting of Days and awarding of Diſtreſſes, the Lords of the Court* ſhall *obtain Juſtice to* recover their Suits with *their* Damages, *in like Manner as the Tenants ſhould recover theirs.*

And this recovering of Damages muſt be underſtood of withdrawing from ſelves, *and not of withdrawiug from their Anceſtors.*

Nevertheleſs the Lords of the Court ſhall not recover Seiſin *of ſuch Suits againſt their Tenants* by Default, *as they were wont to do.*

And touching Suits withdrawn before the Time aforementioned, let the Common Law run as it were wont beforetime.

2. In Treſpaſs the Defendant juſtified for *Amercement*, in as much as the Plaintiff held of him of his Manor by Fealty, 2 d. of Rent, and *Suit to his Hundred de tribus Septimanis in tres* &c. And per Gaſcoign & Aſcue, *This* Suit *is only Suit Service for which a Man may Diſtrain*, But *otherwiſe* it is *of Suit real*, As to a Leet for Reſiancy of which a Man cannot be his own Judge, and therefore *there he may Diſtrain for the Amercement*. Br. Suit, pl. 9. cites 8 H. 4. 16.

3. In Replevin the Defendant avow'd, becauſe the Plaintiff *held* 20 *Acres* of Land of him, *by Suit to his Leet*, and alleg'd Seiſin of 20 d. for not coming to the Leet. And it was held that the Seiſin of 20 d. is no Seiſin of the Suit, and that Suit to the Leet is *Suit Real, becauſe a Man ſhall be amerc'd, but for Suit Service* the *Lord ſhall diſtrain*, but ſhall not amerce the Tenant. Br. Suit, pl. 6. cites 12 H. 7. 15.

4. Note, That if a Man holds of another to do Suit to his Mill &c. if he does not the Suit, he ſhall have a *Secta ad Molendinum* againſt him; and by the ſame Reaſon, if a Man holds of another Lord, to do Suit at his Court in the Manor of D. if he does not the Suit, the Lord may have a Writ of *Secta ad Curiam* ſuam faciend.' as well as the other Writ. But yet there is no ſuch Writ in the Regiſter, becauſe *he may diſtrain for that Suit, and ſhall* not *have* any other Profit but *only Appearance in his Court. But in* the other Caſe de *Secta ad Molendinum*, he ſhall have *other Profits* by

by the Suit, the Toll of the Grain he ſhall grind there; and for that Profit it ſeems the Action of Secta ad Molendinum was given, and for the Suit of the Court, but only a Diſtreſs; Tamen quære. F. N. B. 158. (D)

5. If there be 2 *Coparceners* of Land, for which one Suit ought to be done, and the *eldeſt Siſter will not do the Suit* at the Lord's Court, then the Lord may diſtrain *the other* * Coparcener, as well as the eldeſt Coparcener for that Suit; and if the Coparceners be diſtrained, then they *ſhall have a Writ againſt the eldeſt* Siſter, to compel her to do the Suit. F. N. B. 159. (E)

Kitch. of Courts 297. Tit. Suit, cites S. C.

* F. N. B. 159. (E) in the new Notes there

(c) ſays he ſhall make Avowry on her only, and not on both, after *a Partition* by Feoffment &c. 24 E. 3. 72. See 2 E. 2. Avowry 184. And ſee the Caſe, 24 E. 3. 34, 73. where the *eldeſt aliens her Part to one*, and the *younger her Part to another*, and the Avowry made on the Alienee of the elder only for Suit &c. And ſo it may be on the Alienee of the younger for other Suit; yet *Suit made by one diſcharges both*. And note per Cur. He cannot avow on both in Fee after ſuch Severance.

(D) *Excuſe* of not doing Suit.

Br. Suits, pl. 14. cites S. C.

1. IF *Lord ſeiſed of* 2 *Courts, viz. P. and C.* and a *Tenant owes Suit to* the Court of *P.* and after the Tenant has done Suit at the Court of P. *the Lord agrees* by Deed, that for the Eaſe of the Tenant, and in Conſideration of 2 s. Rent a Year, *that the Tenant ſhall do Suit at* the Court of *C.* the which he does for 40 Years; and after the Lord inſiſts on the Suit to be done again at P. It ſeems that having been ſeiſed of the Suit at P. the ſame is ſtill due there; for the doing it at C. was only in Allowance of the other Suit that was due at P. See Fitzh. Tit. Action ſur le Statute, pl. 24. cites M. 3 E. 2.

2. If a Man have Lands in diverſe Places in the County, and there are *ſeveral Leets* &c. or Hundreds, and he is diſtrained to come unto the Leet, or the Sheriff's Torn, where he is not dwelling or converſant, but is dwelling within the Precinct of ſome other Leet or Hundred &c. then he ſhall have a *Writ* unto the Sheriff, *to diſcharge him from coming to the Sheriff's Torn, or Hundred, or Leet*, or *other* Place, *than in the Leet or Precinct of the Hundred where he dwells*. F. N. B. 160. (A)

3. And it appears, that if the *Party* be *diſtrained, after* that *he has ſued the Writ directed unto the Sheriff* or Bailiffs, *that they do not diſtrain him*, that he *ſhall have an Attachment* againſt them: But it ſeems reaſonable that firſt he have an Attachment againſt the Sheriff, or againſt the Bailiffs, who diſtrained him to come to the Leet in the Hundred where he is not dwelling, if he be dwelling within the Precinct of another Leet, becauſe the *Statute of Marlbridge is a Prohibition in itſelf*; and he who does contrary to the Statute does Wrong unto the Party upon which he may have an Attachment, without ſuing forth any Writ. F. N. B. 160. (B)

Sid. 361. pl. 5. S. C. and mentions the Cuſtom to be as to ſuch as liv'd 10 Miles from the Court; and that it was held a good Cuſtom, the Court not being a cuſtomary Court, but a Court Baron in which the free Suitors are Judges, and

4. In Replevin the Defendant avowed for Suit to Court; Plaintiff replied, and confeſs'd himſelf Tenant of the Manor, and *ſaid*, that *there are very many Tenants* thereof; *and* that there is *a Cuſtom for thoſe Copyholders who live remote* from the Manor, *to pay* 8 *d. to the Steward* &c. *for the Uſe of the Lord, and* 1 *d. for himſelf for entering it, and then ſhould be excuſed from doing Suit for one Year after the Payment*; and alleg'd that he lives 10 Miles from the Manor, and that he tender'd the 8 d. and the 1 d. but that both were refuſed. And upon Demurrer to this Replication, Hale Ch. J. ſaid, That it is Cuſtom gives the Suit, and conſequently may qualify it. The Doubt ariſes, becauſe the Plaintiff has not alleg'd that there are any Tenants live near or within the Manor, or whether that ought to be ſhewn on the other Side, if it be not ſo, becauſe the Intendment is ſtrong that there are: Therefore a By-law in a Manor binds the Tenants without Notice, becauſe they are ſuppoſed to be within the Manor: Wherefore they gave Judgment for the Plaintiff. Vent. 167. Mich. 23 Car. 2. B. R. Iſaac v. Ledgingham.

v. Porphery, S. P.

ſo not eſſential to the Court. —— Mod. 77. pl. 37. Mich. 22 Car. 2. B. R. Leginham

S. P. exactly, and ſays it was averr'd, that there were 120 Copyholders at leaſt that live near the Manor. And Hale, Ch. J. ſaid, that ſurely Tender and Refuſal is all one with Payment. And Judgment for the † Defendant.——2 Keb. 847. pl. 93. Mich. 23 Car. 2. B. R. Iſaake v. Legingham, adjudg'd for the Plaintiff; and cites the Caſe of Porphery v. Legingham, adjudg'd to be a reaſonable Cuſtom, and the Tender and Refuſal is all one with Payment.——2 Keb. 851. pl. 105. Iſaake v. Legingham, the Attorney General pray'd to ſtay Judgment; but, per Cur. Judgment for the Plaintiff.

[† This ſeems miſ-printed for (Plaintiff)]

(E) *Suſpended or Determined.*

1. IF *Land* be *held by Suit*, and *Parcel of it comes to the Lord*, the intire Suit is extinct and determined; for the Lord cannot make Contribution of Suit to his own Court, nor take it. Kitch. of Courts 299. Tit. Suit, cites 34 Aſſ. 15.

2. If the *Lord purchaſes Parcel*, the whole Suit is extinct. Kitch. of Courts 298. Tit. Suit, cites 40 E. 3. fol. 40. by Mowbray, and ſays, See Litt. fol. 49. for Suit cannot be apportioned, becauſe there cannot be Contribution.

3. *Partition* is *between* 2 *Coparceners of a Manor*, that is, *that one ſhall have the Demeſnes, and the other the Services*; Suit of Court is ſuſpended; but if *one dies without Iſſue*, the Suit is revived. Kitch. of Courts 299. Tit. Suit, cites 12 H. 4. f. 25.

4. If the * *Lands* of any Tenant be *in Ward to the King* for the Nonage of his Heir, becauſe he holds other Lands of him in Capite &c. and his *other Lords will diſtrain for Suit during the Time* the Lands are in the King's Hands, or in the Hands of his Committees; then the King, or his Committees, ſhall have a *ſpecial Writ unto the Bailiffs of the other Lords, that they do not diſtrain the Heir*, nor in the Lands &c. during the Time that he is in the King's Hands, or in the Hands of his Committee; and if he have diſtrained them, that they deliver back the Diſtreſs again; and that Writ appears in the Regiſter. F. N. B. 157. (A)

Kitch. of Courts, Tit. Suit, ſays the 2 E 6. cap. 8. did not alter the Common Law in this Point for Suit to the Court; and cites 20 Aſſ. 17. that the Seigniory is ſuſpended for the Time.——* The Tranſlations are (Lords) but the original French is as here.

5. If the King has any Lands or Tenements in Ward, *during the Nonage* of an Infant, and *the King in Chancery aſſigns Dower unto the Wife of the* Husband, who was *Father to the Ward*, *of Lands holden of other Lordſhips*; now if the other Lords will diſtrain the Tenant in Dower for Suit at their Court, during the Time that the Lands are in the King's Hands, the Wife ſhall have a Writ unto the Bailiffs of the other Lords, commanding them that they do not diſtrain her, and recite in the Writ all the ſpecial Matter; and if they have taken any Diſtreſs, that they deliver it back again. F. N. B. 157. (A)

(F) Suſpended or Determined *by Writ de Exoneratione Sectæ.*

1. THIS Writ lies where the Tenant holds his Land to do Suit at the County Court, Hundred, or other Court Baron, or Wapentake, or Leet, and he who ought to do the Suit is *in Ward unto the King, or his Committee*; and the Lord of whom he holds by ſuch Service, will diſtrain

So if the *Heir and his Lands be in the King's Ward*; *for*

distrain him to do his Suit at his Court during the Time he is in Ward unto the King or his Committee, his *Guardian ſhall ſue this Writ* unto the Sheriff, or Bailiffs of the Court, that they do not diſtrain him &c. to do Suit during the Time, he is in Ward to the King or his Committee. F. N. B. 158. (A)

Lands holden of the King in Capite; and afterwards the other Lords, of whom

the Heir holds Parcel of his Lands, will diſtrain for any Service or Rent to them due, then the King, or his Committee, may ſue a Writ for them to ſurceaſe from ſuch Diſtreſs. F. N. B. 158. (C)

2. And the *like Writ* ſhall be *for Tenant in Dower*, where ſhe is endowed in the Chancery *of Lands* which are *in Ward to the King*, which Lands are *holden of other Lords:* Now if the other Lords will diſtrain the Tenant in Dower to do Suit for thoſe Lands, which ſhe holds in Dower, ſhe ſhall have a Writ to diſcharge her. F. N. B. 158. (B)

Alſo the Tenant in Dower [of Lands holden of the King in Capite] ſhall have

ſuch Writ, if the Bailiff of other Lords will diſtrain her for the Relief of the Heir, or other Services, during the Time that the Heirs Lands are in the King's Cuſtody, or in the Cuſtody of his Committee. And it ſeems, that he may ſue this Writ directed unto the Lord himſelf, as well as to the Bailiffs, or unto them both. F. N. B. 158. (C)

3. If the *Heir* be in *Ward of the King, and alſo his Lands*, and afterwards the *Tenants paravail, who hold of the Heir, are diſtrained by other Lords*, of whom the Heir holds his Lands, to do Suit unto the Lord's Court, thoſe *Tenants ſhall have a Writ* directed unto the Lord's Bailiff, *to diſcharge them* of the Suit. F. N. B. 158. (B)

4. If Lands deſcend unto *divers Coparceners*, for which one Suit ſhall be done at the Lord's Court, if *Parcel of thoſe Lands come into the King's Hands*, then he ſhall have a ſpecial Writ to diſcharge him of the Suit for the Time they ſhall be in the King's Hands. F. N. B. 159. (A)

5. If the King have Lands by Forfeiture or Eſcheat, and leaſes them for Life, at Will, or in Tail; and if the *Lord, of whom* the *Lands are holden*, will *diſtrain the King's Committee or Leſſee for Suit*, or other Services, he ſhall have a ſpecial Writ unto the Lord's Bailiff to ſurceaſe, &c. F. N. B. 159. (A)

(G) Pleadings.

1. IN a *Contra formam Feoffamenti*, the Plaintiff counted upon the Deed, and the Defendant demanded Oyer thereof; but could not have it. F. N. B. 163. (H) cites Mich. 3. E. 2. * Action ſur le Caſe, 5.

* Both the Engliſh Editions cite Actions ſur le Caſe, 5.

But the French Edition cites the Title Actions ſur le Statute 25. where the Caſe is, and is as follows, viz. Contra formam Feoffamenti, againſt B. & E. his Feme, and counted that they diſtrain'd him to do Suit to the Court, in C. againſt the Form of the Feoffment; whereas neither he nor his Anceſtors had uſed to do Suit &c. The Defendant pray'd that Plaintiff ſhew his Deed; but it was ſaid, that he ought not. Then they ſaid, that the Plaintiff held of the ſaid B. and E. as of the Gift of E. and of the Heritage of C. by Suit to the ſaid Court, whereof the Anceſtor of C. was ſeized before the [time of] Limitation. The Plainiff replied, Not ſeized before the [time of] Limitation; Priſt, Whereupon the Defendants pray'd Aid of C. to whom the Reverſion was, and had it.

2. Avowry by the Lord of the Hundred, inaſmuch as in the ſame Hundred the Plaintiff *held a Houſe; by reaſon of which he owed Suit to the Hundred De tribus ſeptimanis in tres* &c. and alledged Seiſin in him and his Anceſtors in [of] the Tenant and his Anceſtors, time out of Mind. And ſo ſee that he did not allege Tenure; for *Suit to the Hundred is without Tenure.* Br. Suit, pl 15. cites 11 E. 3. Fitzh. Avowry 101.

3. Ceſſavit that he held by certain Services and *Suit to his Court at D. held annually at Michaelmas and Eaſter*; and by the Opinion of the

Court this *may be intended Court Baron*, tho' it be not Suit de tribus Septimanis in tres, &c. for *Suit may be as it is reſerved at the Commencement of the Tenure.* Br. Suit, pl. 8. cites 21 E. 4. 25.

For more of Suit of Court in General, ſee **Copyholds, Courts,** and other Proper Titles.

Summary Proceedings.

1 SUmmary Juriſdictions ought to be *held ſtrictly to Form*, and every thing ought to appear *regular* in them; and they ought to make a *Memorandum* that ſuch a Day Complaint had been made, that thereupon *Summons iſſued*, returnable ſuch a Day, and that the Party being ſummoned did or would not appear, or could not be ſummoned. 6 Mod. 41. Mich. 2 Ann. B. R. The Queen v. Dyer.

For more of Summary Proceedings in General, ſee other Proper Titles.

(A) *To the Perſon.* In what Caſes it ſhall be to the Perſon.

The Sheriff might have ſummon'd the Defendant *in the Church in Quare Impedit*; par Marten. But Danby and Cott. contra. Br. Retorn de Briefs, pl. 101. cites 11 H. 6. 3.

1. IN Quare Impedit it ſhall not be to the Perſon. 11 H. 6. 4.

The Summons upon the firſt Writ may either be made at the Church Door, or to the Perſon of the Defendant. Brownl. 158. Anon.

2. Nor in Writ of Debt. 11 H. 6. 4.

3. It was agreed in *Writ of Annuity*, that if the Sheriff *ſummons him, who has nothing, by his Perſon*, and returns him ſummon'd, it is well, tho' he has no Land. And this is the Reaſon, that in ſome Actions, as in Annuity, *Covenant*, &c. at this Day, Summons was the Proceſs, had he Land or not; becauſe if he has not Land where he may be ſummon'd, he may be ſummon'd by his Perſon. Br. Summons in Terra, pl. 1. cites 33 H. 6. 42.

4. Where a Man is *obliged to appear at the next Gaol Deliverance*, or Seſſions of the Peace, *upon reaſonable Garniſhment*, the general Garniſhment

ment of the Gaol or Seſſions is not ſufficient; but he ſhall be ſpecially warned by the Plaintiff. Br. Garniſh, pl. 35. cites 5 E. 4. 126.

5. In *Scire Facias, upon Recovery of Land*, or *upon a Fine*, the Summons ſhall be made to the Perſon of the Tenant; per Brian. But Townſ. J. ſaid, that the Summons ſhall be upon the Land, quod nota. And ſo it ſeems that it is good to the one, or in the other. Br. Summons in Terra, pl. 9. cites 4 H. 7. 7. Br. Scire Facias, pl. 211. cites S. C.

(B) * *In what Place.* In the Place in Demand.

* Cum quis ſummonitus eſſe debeat legitime ſummonitionem, recipere poterit in propria perſona, ſufficit, ſi ad Domicilium fiat, dum tamen alicui de familia ſua ſub teſtimonio fide dignorum manifeſte fuerit relata ſibi cum venerit denunciada. Et ſi plura habeat domicilia tunc fiat ſumm' ad illud in quo magis inhabitaverit [vel ubi majorem habuerit ſubſtantiam] ſi autem manſionem non habuerit, [nec Dominicum] in Com' ſufficit ſi ſuper terram fiat petitam, vel ſuper feodum ſi terram non habuerit in Com' ſed feodum tantum. Seld. Flet. lib. 6. cap. 6. S. 4, 5.——Bract. Lib. 5. cap. 6. S. 3. S. P. and what is confined within the Crotchets is in Bracton, and not in Fleta.

1. In † Præcipe quod reddat, **the Summons ſhall be,** in the Land in Demand, **tho he be not Tenant.** 10 H. 6. 12. b. 11 H. 6. 4. 18 E. 3. 52 b. 25 E. 3. 39. b.

† In *præcipe quod reddat*, the *Sheriff return'd* the firſt Day, *That the Defendant is not Tenant*; and that, Nihil habet, and notwithſtanding this, upon *Teſtatum of the Demandant that he was Tenant*, Summons in Terra petita was awarded. Br. Sommons in Terra, pl. 23. cites 25 Edw. 3. Fitzh. Retorn de Vicont 97.

2. So **in a** Mortdanceſter. 50 Aſſ. 8. **adjudged.** *Mortdanceſtor by* 2, the *one did not come*, by which *Summons ad Sequendum ſimul iſſued*, and the *Sheriff return'd Nihil*; and by Advice of all the Juſtices it was awarded, that he ſhould be ſummon'd in Terra petita, quod nota. Br. Sommons in Terra, pl. 3. cites 44 E. 3. 27.——S. P. Br. ibid. pl. 35. cites 50 Aſſ. 8. and yet another's Franktenement.

3. So **in** Aſſize, **the Summons ſhall be upon the Land in Plaint.** 11 H. 6. 3. b. See (C) pl. 1. cites S. C.

4. So **ſhall it be in** Aſſize of Mortdanceſtor; **yet no Land is demanded thereby.** 11 H. 6. 4. See (C) pl. 2. cites S. C.

5. Same **Law in a** Juris utrum. 11 H. 6. 4.

6. **In** Writ of Error againſt the Heir of the Recoveror, **he ought to be ſummoned in the Land, tho the Heir has nothing in the Land; for he is** privy **to the Recovery, and this Writ is to defeat the Recovery.** 10 H. 6. 12. b.

7. **In** * **Præcipe quod reddat, or** † **other** Action which demands the Land, **if the** Tenant has Aid of him in Reverſion, **he ſhall be ſummon'd in the Land.** 10 H. 6. 12. 11 H. 6. 4. b. 38 Aſſ. 18. **adjudged** 25 E. 3. 37. b. **adjudged.**

* S. P. And Grand Cape ſhall be awarded in Terra Petita. Br. Summon in Terra, pl. 4. cites 12 H. 4. 14. Per Skrene.——† In *Scire facias of Land*, the *Tenant for Life prayed Aid of* him in *Reverſion*, and had it, and Scire facias iſſued to warn him; upon which the Sheriff return'd that he in Reverſion has nothing in this County but the Reverſion of thoſe Tenements in which he has warn'd him: And a good Return per Cur. for he ſhall be warn'd in Terra Petita; quod nota. And it was upon Office found for the King upon which the firſt Scire facias iſſued againſt the Tenant for Life. Br. Summons in Terra, pl. 12. cites 38 Aſſ. 18.—Br. Retorn de Briefs, pl. 111. cites S. C.——S. P. And yet it was another's Franktenement; quod nota; but the Reverſion was to the Prayee; quod nota. Br. Sommons in Terra, pl. 16. cites 45 E. 3.

8. **In** Præcipe quod reddat, **if** Defendant has Aid of another Coparcener by Cauſe of Partition, **ſhe may be ſummon'd** in any other her Land, **as well as in the Land which was parted between them.** 14 H. 6. 3. **Curiam.**

9. **In**

9. In Scire facias to execute a Fine, the Summons ought to be upon the Land in Demand, tho' the Tenant has nothing; for he pretends by his Action to have Right to the Land. Contra 10 H. 6. 12.

Br. Summons in Terra, pl. 13. cites S. C.——

10. So in Writ of Covenant to levy a Fine, the Summons ought to be in the Land of which the Fine is levied, because tho' it be only a Perſonal Action in itſelf, yet ſince it appears that it is to levy a Fine, becauſe it is Teneat Conventionem of ſo much Land, he ought to be ſummoned in the Land. 10 H. 6. 12. b.

Br. Retorn de Brief, pl. 122. cites S. C.

But Brooke ſays, Quod Quære, becauſe it may be that he is not thereof Tenant, and Sicut alias ſhall iſſue without Amercement of the Sheriff.

11. But otherwiſe it is in Writ of Covenant upon Leaſe for Years; for this is perſonal. 10 H. 6. 12. b.

12. The ſame Law in a Per quæ Servitia. 10 H. 6. 12. b.

13. The ſame Law in Per quem Redditum Reddit. 10 H. 6. 12. b.

14. The ſame Law in Warranty of Charters. 10 H. 6. 13.

In *Quid Juris clamat againſt* 2, the *one appeared*, and the Sheriff return'd that the *other is Clericus beneficiatus non habens Laicum feodum*, and Diſtreſs ſhall iſſue into the ſame Land in the Fine. Br. Sommons in Terra, pl. 11. cites 38 E 3. 28.

15. In a Quid Juris clamat the Summons ſhall be in the Land of which the Fine was levied. 38 E. 3. 28. b.

Br. Retorn de Briefs, pl. 101. cites S. C.

16. In a Writ of Right of Advowſon, the Summons ought to be in the Glebe of the Church, tho' the Patron be not ſeiſed of it, becauſe it is in Demand. 11 H. 6. 3. b.

See (A) pl. 1.

17. In Quare Impedit againſt the Patron, he ſhall not be ſummoned in the Church; for this Writ does not demand it. Dubitatur 11 H. 6. 3. b.

In Waſte, if the *Tenant is return'd Nihil*, the Tenant ſhall be diſtrain'd in Terra petita in Waſte, *quas tenet*.

18. In Action of Waſte againſt a Leſſee, if he be not ſeiſed of the Land he ſhall not be ſummoned in the Land; for it is not in Demand. Contra 12 H. 4. 4.

Br. Sommons in Terra, pl. 4. cites 12 H 4. 4. Per Skrene ——*Contra* in Writ of Waſte, *quod tenuit*; for this is Land of another Man, in which the Tenant now has nothing. Br. Sommons in Terra, pl. 4. cites 12 H. 4. 4. Per Skrene.

19. If a Writ be brought in the County of N. and the Tenant vouches J. S. to be ſummoned in the County of K. and after the Entry into the Warranty by J. S. the Parol demurs without Day by Demiſe of the King, and the Demandant ſues the Reſummons in N. and the Vouchee is return'd Nihil, he ſhall be reſummoned in the Land demanded, becauſe the Vouchee is Tenant thereof by the Warranty. 1 E. 3. 13. b.

Upon *Reſummons* the Sheriff returned *that the Defendant is not Tenant*, and that *Nihil habeat*, and the Tenant was re-ſummoned after by another Writ in Terra petita. Br. Re-ſommons pl. 23. cites 8. E. 3. & Fitzh. Return de Vicont 98.

20. If the *Parol* be *put without Day after the Entry into the Warranty* by the Vouchee, and *upon Re-ſummons the Vouchee is returned nihil*, he ſhall be ſummoned in Terra petita. Br. Sommons in Terra, pl. 24 cites 1 E. 3. and Fitz. Re-ſummons 9.

21. *Contra before the Entry into the Warranty*; For before this he is not Tenant in Fact or in Law. Br. Sommons in Terra pl. 24. cites 1 E. 3. & Fitzh. Re-ſummons, pl. 9.

Attaint in the County of N. upon a Plea of Land, but it does not appear upon what it aroſe, and the *Defendant was returned Nihil*, and *Summons in Terra petita was awarded in the County of E. where the Land was*, and therefore it ſeems the Iſſue in the firſt Action aroſe upon *a Foreign Deed*, or the like, in as much as it was tried in a County where the Land is not. Br. Sommons in Terra petita. pl. 2. cites 42 E. 3. 19.

22. In *Attaint* the Tenant was return'd *Nihil*, and it was teſtified, that *he had* [*Aſſets*] *in another County*, by which Summons iſſued there; Quod nota. Br. Summons in Terra pl. 18. cites 21 E. 3. 18.

Upon

23. Upon Voucher the *Tenant prayed that the Vouchee be ſummon'd in this County and two others*, and the *Demandant ſaid, That he had Aſſets in this County, and prayed, that he be ſummoned there only*, Et non Allocatur; But the Prayer of the Tenant was granted. Br. Sommons in Terra, pl. 19. cites 21 E. 3. 37.

24. *Præcipe quod reddat in the County of Wilts*, at the Petit Cape the *the Tenant alledged Impriſonment at D. in the County of M.* and ſo to Iſſue, which paſſed for the Tenant, by which the *Demandant brought Attaint in the County of M.* and the *Sheriffs returned the Tenant Nihil*; By which Summons was awarded in the County of Wilts, where the Land is; and the Inqueſt was not awarded by Default. Br. Sommons in Terra, pl. 20. cites 42. Aſſ. 14.

25. In *Formedon* the *Tenant vouched the Baron & Feme*, who *enter'd into the Warranty and pleaded, and* after *made Default*, and after Petit Cape in Terra petita iſſued. Br. Sommons in Terra, pl. 5. cites 19 H. 6. 51.

26. Tho' in Scire Facias, and in *Habere facias ſeiſinam*, the Summons ſhall be upon the Land; Yet in Debt upon a Recovery of Damages in Writ of Entry ſur Diſſeiſin, the Summons ſhall be to the Perſon. Per Portington. 22 H. 6. 38 a. pl. 7.

27. In *Action againſt one as Heir* the Summons ſhall be *in the Land which deſcended*; But otherwiſe it may be in any Land whatſoever. Fin. Law. 86. a.

28. If it be *to recover the Franktenement of the Land*, the Summons ſhall be in the ſame Land; Otherwiſe if he makes Default, he may at the Cape wage his Law of Non-Summons; But *if he appears*, it is not material in what Land he be ſummoned. Fin. Law. 86. a

S. P. In *Ceſſavit* and that if the *Tenant is ſummoned in other Land than is in Demand*, and appears at the Summons, he ſhall not have it for Plea; For in whatſoever Land he is ſummon'd, ſo that he appears it is ſufficient. Br. Summons in Terra pl. 7. cites 37 H. 6. 26. —— And Brooke ſays it is ſaid elſewhere that Summons to the Perſon is ſufficient, but by this he takes Conuſance of the Land. Ibid.

29. *Judgment* by Default *in Dower*, and upon a Writ of Enquiry the *Sheriff deliver'd Seiſin*, and return'd the Writ. It was objected among other Things, that the *Proclamation* made by the Sheriff appears not to be *where the Land lies*. Nor does the Return mention that the Proclamation was *after the Summons*, as it ought to be, as it is Hob. Rep. in Allen's Caſe; Nor is it ſaid, that he did make Proclamation *upon the Land*. And alſo, that it appears not that the Proclamation was *in the Pariſh where the Summons was*, as the Statute directs. To this it was anſwer'd, That the Lands lie in divers Pariſhes, and Proclamation at the Church of any of the Pariſhes is good enough. It does not appear that there are divers Churches in the Town where the Proclamation was made. That the *Proclamation is ſaid to be made Prout Breve poſtulat*, and that ſhall be ſuppoſed duly made, and implies all requiſite Circumſtances, and he cannot make another Return; and it is impoſſible to be otherways. That it is neceſſary to return the Place of the Summons, and it is *ſaid that it was made Secundum formam Statuti*, which ſupplies the Reſt. And to this the Court ſaid, That the Words Secundum formam Statuti, extend far. And Roll Juſt. ſaid, That *Proclamation in one Place was good in all.* Styl. 67. Mich. 23 Car. Thynn v. Thynn.

(C) Summons. *By what Thing it ought to be.*

1. IN Aſſiſe **Attachment ſhall be made of** any Thing upon the Land. 11 H. 6. 3. b.

2. But not **of** the Land itſelf, **becauſe the Land is not demanded by this Writ.** 11 H. 6. 4. **The** ſame **Law in** Aſſiſe of Mortdanceſtor.

3. In *Præcipe quod reddat*, if the *Tenant vouches the Biſhop to Warranty, part of whoſe Temporalties is in the Hands of the King*, he ſhall not be ſummon'd in his Temporalties, ſo long as any Part of them remain in the Hands of the King, tho' he has ſufficient in his Hands whereof to be ſummon'd. Br. Sommons in Terra pl. 17. cites 38 E. 3. 29.

4. Attachment ſhall be *by a mere Chattel*, which ſhall be forfeited by Default of the Party; but it ſhall *not* be *Chattel Real*, as a Leaſe for Years or Ward of Body, *nor by Apparel*. Br. Attachment pl. 4. cites 7H. 6. 9. per Bab.

5. In Aſſiſe the Defendant pleaded, That Not attached by 15 Days, and the Bailiff was examined, who ſaid that he attach'd him *by Glebe of the Land*, and becauſe the Attachment ought to be made *by Moveables or by Pledges, or by a Thing which may be forfeited by Outlawry*, and *not of Glebe, which is Parcel of the Franktenement*, therefore New Attachment was awarded; Quod nota. Br. Attachment pl. 1. cites 27 H. 6. 2. & 26 H. 6. Fitzh. Aſſiſe 14.

6. In Scire Facias, againſt Patron and Incumbent, upon a Recovery in Quare Impedit, if the Incumbent has no Lay Fee whereby he may be ſummon'd, the Sheriff muſt ſummon him *by his Perſon*, and *not by his Goods*. 32 H. 6. 11. a. b. pl. 19. per Priſot.

Br. Retorn de Brief, pl. 124. cites S. C. —— S. P. Fin. Law, 86. a.

7. A Man cannot be ſummon'd in [by] *Rent Service*, Rent *Charge*, *Common*, *Reverſion*, or the like; for the Soil out of which &c. is another's Franktenement; per Priſot, and the beſt Opinion. Br. Sommons in Terra, pl. 14. cites 32 H. 6. 11.

†(C. 2) Summons. By how many.

† This in Roll ſtands divided, but without any new Letter.

[1.] 3. **IF a Summons be made** by 3 **Summoners, it is ſufficient.** 8. H. 6. 5. b.

But there muſt be * 2 Summoners

[2.] 4. So **if it be** by 2 **Summoners, it is ſufficient.** 8. H. 6. 1. b. **admitted.**

at the leaſt; and if any of them do not that which it is return'd they ought to do, then the Writ is not executed as it ought to be. F. N. B. 97. (C) —— S. P. Fin. Law, 86. a. ——— S. P. 2 Inſt. 253.——And therefore, if one of the Summoners ſays that the Summons was not made, and the other that it was made, the Demandant ſhall recover. F. N. B. 97. (C) in the new Notes there (c) cites 8 H. 6. 2. 50 E 3. 17.——So if one makes the Garniſhment, and the other was on the Land at the ſame time, for the ſame Purpoſe, but ſays nothing, the Demandant ſhall recover. F. N. B. 97. (C) in the new Notes there (c) cites 5 E. 3. 65. 8 E. 3. 6. See 2 E. 3. 21.

* Pl. C. 393. S. P. arg. in Caſe of the Earl of Leyceſter v. Heydon, ſays, there muſt be 2 Summoners in a Præcipe quod reddat againſt the Tenant. ——— A Summons by one only is not ſufficient, unleſs the Perſon be ſummon'd by the Judge himſelf in Court; ſo that there muſt be 2 at the leaſt, that can lawfully teſtify of the Day, Place, and Hour, and other Circumſtances, when they ſhall be examined by the Juſtices. Fleta, Lib. 6. cap. 6. S. 9.———Bract. Lib. 5. cap. 6. S. 5. pag. 333. b. 334. a. accordingly.

(C. 3) Sum-

(C 3.) Summons. *In Real Actions. How.*

1. 28 *E.* 1. cap. 15. IN * *Summons, and* † *Attachments in* || *Plea of Land, the Summons and Attachments from henceforth ſhall contain* ‡ *the Term of* 15 *Days full, at the leaſt, according to the Common Law,*

This Statute was made ‡ *in Affirmance of the Common Law*, as by the expreſs Words of the Statute it appears, contrary to a ſudden and miſconceived Opinion in our Books; for Glanvill ſaith, Summonebitur per intervallum quindecim dierum ad minus. And therewith agreeth Bracton and Britton, Et ſi aſcun ſoit reſonablement ſummon, il doit aver ſpace de 15 jours al Meynes, de ſoy garner de ſon reſpons. And Fleta, [Lib. 6. cap. 6. S. 11.] ſaith, Nec etiam ſufficit quod ſummonitio fiat ad ſtatim Reſpondendum, ſed decet quod quilibet habeat tempus 15 dierum ante diem litis, & ſi ſummonitus minus ſpatium habuerit, pro illegitima debet reputari, niſi in cauſis ſpecialibus; ut ſunt cauſæ mercatorum, & cruce ſignatorum, & hujuſmodi quæ inſtantiam deſiderant & celeritatem, &c And all theſe Authors wrote before the making of our Act. And the Author of the Mirror, that wrote of the ancient Laws of this Realm, ſpeaking of the Time of Summons, ſaith, Et reaſonable reſpit al meyns de 15 jours de purveire reſpons, & de parer en Judgment. And the Cauſe wherefore the Common Law ſet down the certain time of 15 Days was, for that a Day's Journey is accounted in Law 20 Miles, Rationabilis dieta conſtat ex viginti miliaribus; for dieta, both in the Common and Civil Law, ſignifies a Day's Journey, Continet legalis dieta viginti miliaria. And therefore 15 Days was accounted by the Common Law a reaſonable time of Summons or Attachment; within which time, whereſoever the Court of Juſtice ſate in England, the Party ſummon'd or attach'd, whereſoever he dwelt in England, afore the King's Writ did come, might per Predictas dietas computatas, by the ſaid Account of Days Journies, appear in Court, &c. 2 Inſt. 567.

‡ Co. Litt. 134. b. S P.

The Reaſon of theſe long Delays given in real Actions was, (the Recovery being ſo dangerous) that the Tenant might the better provide him both of Anſwer and of Proofs. But, by Conſent, they may take other than common Days. Co. Litt. 134. b.——By Aſſent of the Parties a ſhorter Day was given in Præcipe quod reddat. Fitzh. Tit. Jour. pl. 17. cites Paſch. 41 E. 3.

* In a Writ of *Pone to remove a Replevin* at the Suit of the Defendant, the Writ *ſaith*, Et *dic Præfato querenti, quod ſit coram juſticiariis noſtris apud Weſtm. tali die*; there ought to be a Warning by 15 Days, for that this (dic querenti) is in nature of a Summons, and ſo the Writ of *Venire fac' for returning of a Jury, is in nature of a Summons.* But this Statute *extends not to a Writ of Error, nor to Days of Prefixion, as upon a foreign Voucher in London*, and the like. 2 Inſt. 567.

This Act ſpeaks of a Summons, and *ſo* it is *in a Re-ſummons.* 2 Inſt. 567.

† And *ſo* it is in a *Re-attachment.* 2 Inſt. 567.

In Aſſize the Defendant pleaded, that Not attached by 15 Days, and the Bailiff examined, who ſaid, that he attach'd him *ſuch a Day, which with the Day of Aſſize made* 15 *Days*; and becauſe Attachment *ought to be* 15 *Days before the Aſſize, beſides the Day of Aſſize*, therefore a new Attachment was awarded, quod nota. Br. Attachment, pl. 1. cites 27 H. 6. 2.

|| Upon an *Original Writ in any real Action*, the Tenant muſt be ſummon'd by 15 Days, as is aforeſaid; but if the Original Writ be *returned* †† *tarde*, the *Summoneas ſicut alias muſt have* 9 *Returns*, between the Teſte and the Return; for albeit the Summoneas ſicut alias be in lieu of the Summons in the Original, yet being a judicial Proceſs in a real Action, there muſt be 9 Returns, &c. and the Summons thereupon ought to be made by 15 Days, or more, before the Return. 2 Inſt. 567.

†† D. 252. pl. 94. Trin. 8 Eliz. Anon.——Co. Litt. 134. b. S. P. and ſays, that ſo it is in other judicial Proceſs in real Actions; ſaving, if Conuſance be demanded to be holden within his Manors, there Proceſs ſhall be awarded from 3 Weeks to 3 Weeks.

‡ Theſe 15 Days or more muſt be *before the Day of the Return* of the Writ, and the Day of the Return muſt be accounted none of them. 2 Inſt. 567.

If it be not in Attachment of Aſſizes taken in the King's Preſence, * *or of Pleas before Juſtices in Eyre, during the Eyre.*

In the King's Preſence, is as much as to ſay, *in B. R.* for there all Pleas be *Coram Rege.* It was accorded in 7 E. 2. by Sir Guilliam Inge, Ch. J. of B. R. and the Juſtices, that in Writs of *Attaints upon an Aſſize of Novel Diſſeiſin taken in B. R.* there ſhall be a certain Day given as in the Aſſize; for Example, the Munday, or the Morrow, or in the Utas or Quinden' of Eaſter: But it behoves, that the Tenant has Garniſhment by 15 Days in the Attaint; for *this Statute* of Articuli ſuper Chartas *does not give any leſs Term, but* only *in* an *Aſſize of* ‡‡ *Novel Diſſeiſin in B. R. C. B. or in Eire.* 2 Inſt. 568.

‡‡ Note, that in B. R. they allow'd Attachment in Aſſize of *Novel Diſſeiſin of* 3 *Days and leſs*; quod Nota. Br. Attachment, pl. 13. cites 22 Aſſ. 79.——S. P. F. N. B. 177. (D)

This Branch, as to B. R. ſeems to be *in Affirmance of the Common Law*; for in criminal Cauſes, which concern the Life of Man, if a Man be *indicted of Treaſon or Felony in the County where B. R. doth ſit*, the *Venire fac'* for the returning of the Jury *need not have* 15 *Days* between the Teſte and the Return; nay, the Entry may be Ideo immediate venit inde jurata, &c. *But if* the Indictment be *taken in any other County, and removed into B. R.* there ought to be 15 Days between the Teſte of the Venire fac. and the Return. 2 Inſt 568.

Commiſſioners of Oyer and Terminer may, in caſe of Treaſon, Felony, Miſpriſion, Treſpaſs, &c. *try the Priſoner the ſame Day* they award the Venire fac', as by divers Precedents, ancient and late, do appear:

But

But the Commiſſioners *muſt make a Precept in Parchment, under their Seals, for the returning of a Jury immediately the ſame Day*, if they will, *or any Day after*. And *likewiſe Juſtices of Gaol Delivery*, or Juſtices *of Peace*, may try the Priſoner the ſame Day, or any Day after ; *but need not make any particular Precept*. For the Juſtices of Gaol Delivery, and Juſtices of the Peace, make a general Precept in Parchment under their Seals for the Summons of the Seſſions, and for Return of Juries, &c. and therefore any particular Precept is not requiſite. There was a general Summons made 40 Days before the ſitting of the Juſtices in Eire. 2 Inſt. 568.

* The printed Books leave out (*or before the Juſtices of the Common Bench*) which ought to be added. 2 Inſt. 567.

2. Si *Summonitio* omnino *dedicta* ſit, & petens ſe teneat ad defaltam, vocandi ſunt *Summonitores*, ut teſtificentur Summonitionem, & cum diligentur *examinati concordes* inveniantur ſumm' teſtificantes tunc primo *vadiat ſummonitus legem*, per quam ſe defendat contra ſummonitorum teſtificationem, & non ſolum quod ſummonitus non fuit in propria Perſona, ſed *quod nulla ſummonitio venit ad ipſum nec ad domum neq; ad familiam* per quam inde fuerit præmunitus ante diem litis. Si autem ſummonitores in probatione ſummonitionis diſcordes inveniantur, non habebit ſummonitus neceſſe ulterius defendere ſum' ſed dabitur ei alius dies in Cur. niſi tunc gratis voluerit reſpondere. Fleta, Lib. 6. cap. 6. S. 12 & 13.

3. Summons upon Grand Cape, and other Summons ſhall be *ſerved* 15 *Days before the firſt Day of the Return of the Writs*; but 15 Days *before the fourth Day* of the Return is not ſufficient; and becauſe it wanted 4 Days of the 15 before the firſt Day of the Return, the Demandant could not recover Seiſin of the Land. Br. Summons in Terra, pl. 6. cites 24 E. 3.

4. Attachment *of the Bailiff of the Defendant* in Aſſiſe, *by Pledges*, is no good Attachment. Br. Attachment, pl. 7. cites 28 Aſſ. 40.

5. In Aſſiſe the Tenant ſaid, that *not attach'd by* 15 *Days*; and the *Sheriff* was examined, who *ſaid, that he warn'd the Tenant in the Preſence of* 4 *good Men* 15 *Days before*, &c. *but no* Attachment was made *of the Tenant's Goods, nor Pledges* found, &c. and the Attachment awarded good enough; Nota. Br. Attachmment, pl. 9. cites 34 Aſſ. 1.

Fleta, Lib. 6. cap. 6. S. 12.

6. If the Tenant *appears by the Summons*, he ſhall not take Advantage of ſaying, that he was not well ſummon'd. And the ſame Law, if he be *eſſoign'd*; becauſe theſe things affirm the Summons. Br. Summons in Terra, &c. pl. 22. cites 46 E. 3. 30.

7. It was agreed, that in *Præcipes againſt* 4, the Sheriff cannot *ſummons the one*, but *this is Summons againſt all*. Br. Sommons in Terra, pl. 3. Ed. 4. 21.

8. In Actions in the Realty, the *Proceſs* is *Summons, Attachment, and Diſtreſs Infinite*. The Summons ſhall be of the Defendant by his Goods. The Attachment is a Proceſs to take Surety of the Defendant by certain of his Goods, mere perſonal Chattels, (viz. neither real, as Ward, or the like; nor Parcel of his Franktenement, as a Clod of the Land, &c.) that he ſhall be there to anſwer; which Goods he ſhall forfeit, if he does not appear; and for that Reaſon it muſt be of his own proper Goods, and not of ſuch as are lent or pledg'd to him. And the Sheriff may either take them with him, or leave them with the Party as he pleaſe; But be it which it will, the Property is not out of the Party till he makes Default. Fin. Law, 94. a. b.

9. To prove a Summons of the Tenant there *ought to be* 2 *or* 3 *Witneſſes*. Co. Litt. 6. b.

See Diſceit (A) pl. 1.— If the *Pariſh extends into* 2 *Counties*, and the *Land lies in* the Pariſh

10. 31 *Eliz. cap.* 3. *S.* 2. *For the avoiding of ſecret Summons in all real Actions, without convenient Notice of the Tenants of the Freehold, be it alſo ordained and enacted by the Authority of this preſent Parliament, that after every Summons upon the Land in any real Action,* 14 *Days at the leaſt before the Day of the Return thereof, Proclamation of the Summons ſhall be made on a Sunday, in Form aforeſaid, at or near to the moſt uſual Door of the Churches or Chapel of that Town or Pariſh where the Land, whereupon the Summons was made,*

made, does lie, and that Proclamation ſo made as aforeſaid ſhall be returned, together with the Names of the Summoners.

And if ſuch Summons ſhall not be proclaimed and returned, according to the Tenor and Meaning of this Act, then no Grand Cape to be awarded, but an Alias and Pluries Summons, as the Cauſe ſhall require, until a Summons and Proclamation ſhall be duly made and returned, according to the Tenor and Meaning of this Act.

in one County, and the Church in the other County, the Proclamation ought to be made in the Church, in the ſame Manner as if all the Pariſh was in one County; and the Sheriff of the County where the original Writ is brought, ſhall make the Proclamation in the other County at the Church there, and has ſufficient Warrant to do it by the ſaid Statute, tho' he be not Sheriff of the County where the Church is. And. 278. pl 286. Trin. 34 Eliz. Anon.

But if there *be no Church in the Pariſh*, the Summons by the Common Law is ſufficient; for it was not the Intent to have Summons at the Church where there is no Church; And *ſo* it ſeems when there is *no Sermon nor Prayers* meane between the Delivery of the Writ to the Sheriff, and the Return or Time limited in the Statute. And. 278. pl. 286. Trin. 34 Eliz. Anon.

So if the *Land lies in 4 Pariſhes*, and there is *no Church in one of them*, it is ſufficient to make Proclamation where the Church is in which Pariſh the Summons is made. And. 278. Trin. 34 Eliz. Anon.

And if there *be a Church in every Pariſh*, Proclamation need not be made at all the Churches; but if it be made *at any of the Churches*, it is ſufficient. Brownl. 126. Allen v. Walter.——S. C. Hob. 133. Per Curiam held accordingly, that the Proclamation was ſufficient. 1ſt. In Imitation of the *Common Law*, where Summons *upon the Land in one Town* is ſufficient. 2dly, The Words of the Statute are, *For avoiding of ſecret Summons, and to give convenient Notice to the Party*; both which are ſatisfied in this one Proclamation. 3dly. Other Expoſition would be miſchievous; for the Land may lie in 20 Towns, and ſo the Notice muſt be at every Town, and every one upon a Sunday, and every one 14 Days before the Return of the Writ. And tho' there was *no actual Summons return'd, but only the Names of the Summoners*, that was not regarded; for that is all the Form *at the Common Law*, and there is no Alteration made by the Statute in the Point of Summons. Hob. 133. Allen v. Walter.

But where he did *return that he had proclaimed the Contents of the Writ*, that is inſufficient. Hob. 133. Allen v. Walter.——For he ought to ſay what. Brownl. 126. S. C.

It was moved to ſet aſide the Grand Cape, Proclamation not having been made 14 Days before the Return of the Summons according to the Statute 31 Eliz. cap. 3. S. 2. the Summons was *returnable Craſt. Animar.* and *Proclamation made October* 27, which was *but 6 Days before the Return*; the Court made a Rule to ſhew Cauſe, which was afterwards made abſolute. Barnes's Notes in C. B. 1. Eaſt. 8 Geo. 2. Freeman v. Canham.——Rep. of Pract. in C. B. 115. Freeman v. Cannon, S. C. No Defence being made, the Rule was made abſolute, on Affidavit of Service.

11. In Summons in real Actions, the Summoners *in the Preſence of the Pernours Veiors &c.* ought to ſummon the Tenant, 1ſt. *To keep his Day, and name it* in Certainty *to render &c.* 2dly. They ought to *name* the Name of *the Demandant* &c. 3dly. They ought to *name the Land in Demand.* 6 Rep. 54. b. cites 3 E. 3. 48. 43 E. 3. 32. a. 50 E. 3. 16. b.

12. Diſceit for Non-ſummons in a Formedon in Remainder; the *Summoners* and Veyors were *examined by the Court*, as it was held they ought to be, and not by the Clerks, *whether they ſpake the Words, or the Bailiff, and at what Time*; and it appeared they did it *after Sun-ſet*: And by all the Court, the Summons was not well made. Cro. E. 42. pl. 2. Mich. 27 & 28 Eliz. C. B. Greene v. Ardene.

(C. 4) Summons. *In other than Real Actions. Good.*

1. SUmmons *to appear on Friday the 17th* of April, *where Tueſday is the 17th*, is as no Summons; for the Time being impoſſible, it was the ſame Thing as if there had been no Summons. And when one Day is ſet forth in the Conviction, as that he was ſummoned to appear, and by Virtue thereof did appear on Friday the 17th &c. his Appearance cannot be intended on another Day; and for that Reaſon a Conviction was quaſh'd. 1 Salk. 181. pl. 1. Trin. 2 Ann. B. R. The Queen v. Dyer.

6 Mod. 41. S. C. accordingly.—— S. C. cited 8 Mod. 378. Trin. 11 Geo. in Caſe of the King v. Venables.

See Treſpaſs (B. a)

(C. 5) *Neceſſary.* In what Caſes. In other than Real Actions.

Cited by Powel J. 2 Lutw. 1565, and denied.

1. WHere a *Capias* iſſues out *of an Inferior Court*, and no Summons was firſt iſſued, Falſe Impriſonment lies upon the Arreſt. Vent. 220. Trin. 24 Car. 2. B. R. Read v. Wilmot.

4 Mod. 33. 37. Trin. 3 & 4 W. & M. in B R. the City of Exeter v. Glide, and cites James Bagg's Caſe; and Holt Ch. J. held, That there ought to have been a particular Summons for a particular Charge, and that it is not ſufficient to ſummon him generally, and then to allege particular Crimes againſt him, which he may not be prepared to anſwer; and therefore the Words *Licet ſummonitus fuit* (which were mentioned in the Return) were not material. But by the Opinion of the other 3 Juſt. the Return in this Caſe was held good. And yet afterwards in Mich. Term 7 Will. 3. one Morris brought a Mandamus to be reſtored to the Place of a Capital Burgeſs of the Devizes in Wiltſhire, and a Return was made of the Cauſes of his diſplacing; but no Mention was made that he had any Notice or particular Summons to anſwer the Charge: And Judgment was given in that Caſe, purſuant to the Opinion of the Ch. Juſt. that the Return was ill.——12 Mod. 27. The King v. Glide, S. C.

2. Summons is neceſſary in all Caſes of *Diſfranchiſement*, except where the Party does not live within the Corporation, but in ſome diſtant Place. Ld. Raym. Rep. 225. Hill. 8 W. 3. B. R. in Caſe of the King v. Chalke, cites it as the Rule down in Glide's Caſe.

1 Salk. 181. pl. 1. S. C. accordingly. ——6 Mod. 96. S. C. but not S. P.

3. D. was *convicted upon* a Penal Statute of *7 Jac. 1. cap. 7. for imbezilling of Yarn delivered to him to be woven.* Per Holt Ch. J. Of Common Right the Party ought to be ſummon'd, if poſſible; and it would be well to ſet forth, That he was ſummon'd, and appeared, or did not appear, or could not be found to be ſummoned; and though the Act of Parliament orders the Offender ſhould be convicted, yet that muſt be intended after Summons, that he may have an Opportunity of making his Defence; and it is abominable to convict a Man behind his Back. And all the Court agreed, That of Common Right there ought to be a Summons. 6 Mod. 41. Mich. 2 Ann. B. R. The Queen v. Dyer.

2 Barnard. Rep. in B. R. 241, 261. 282. in Caſe of the King v. Cotton, Paſch. 6 Geo. 2. cites the Caſe of the King v. Gregg, Mich. 13 Geo 1. and in the Caſe of the King v. Holland, Trin. 5 Geo. 2. and the Caſe of the Queen v. Squire, and of the King v. Allington.

4. An Order of Baſtardy was quaſh'd, for not ſetting forth that the Party was duly ſummon'd; for it is *againſt the Law* of England, *that a Man* ſhould *be impeach'd without Notice to make his Defence.* 8 Mod. 3. Mich. 7 Geo. The King v. Glegg.

5. Where a *Mandamus* was directed to the Chancellor &c. of the Univerſity of Cambridge, *to reſtore Dr. Bentley to his Academical Degrees*, to which a Return was made, but no Mention therein that the Doctor was ſummoned, nor did the Return ſet forth that the *Proceedings* in the Vice-Chancellor's Court, or the Congregation, are *according to the Rules of the Civil Law*, and therefore the Return was held ill, and that therefore the Proceedings muſt be intended to be agreeable to the Rules of the Common Law; and if ſo, it not appearing that the Party has any Relief by applying to another Court, this Court will relieve him, if he has been proceeded againſt and degraded without being heard, which is contrary to Natural Juſtice. And therefore a Peremptory Mandamus was granted. 2 Ld. Raym. Rep. 1334. Hill. 10 Geo. The King v. the Chancellor &c. of Cambridge Univerſity.

A Summons need not be mentioned in an Order of *Juſtices*,

6. Exception was taken to an *Order of Seſſions* made to hinder the Defendant from ſelling Ale, That it did not appear that the Defendant was ſummon'd. To this it was anſwer'd, That 'tis true a Summons had been neceſſary, if the Statute had not given the Seſſions, or two Juſtices, an abſolute

abſolute Power to put down Alehouſes at their Diſcretion; but that *where they have an unlimited Power, it is not neceſſary to ſet forth any Summons in their Order, neither is* a Summons *ever ſet* out in Orders, *but in Convictions* for Deer-ſtealing, or the like, *where great Fines are impoſed*, there 'tis uſual to ſet forth that the Party was ſummoned; but 'tis not ſo in Orders for Baſtardy. 8 Mod. 309. Mich. 11 Geo. The King v. Auſtin.

where they have Juriſdiction; but if they *proceed without ſummoning* the Party, it is *puniſhable by Information.* 2 Ld. Raym. Rep. 1407. Trin. 11 Geo. The King v. Venables.——8 Mod. 377. S. C. accordingly, as to its not being neceſſary to mention the Summons in the Order.

(D) Summons. Attachment. *By the Goods of whom* One may be attach'd.

1. IF B. has Goods of A. in his Poſſeſſion, **B. may be attach'd by thoſe Goods; for B. is charg'd to render it to A. 11 H. 4. 90. b.**

No Goods ſhall be attach'd, but the proper Goods of the Party, and not Goods pledg'd nor Goods borrowed. Br. Attachment, pl. 20. cites 35 H. 6. 25.

2. **In an Action againſt Baron and Feme, the** Feme, **becauſe ſhe has no Goods, ought to be attach'd by the Goods** of the Baron. **Contra 7 H. 6. 9. b.**

Fitzh. Tit. Attachment, pl. 2. cites Mich. 7 H. 6. 9. that ſhe may be attach'd by the Goods of the Baron.——And Ibid. pl. 4. cites Trin. 26 H. 6. accordingly.—Fitzh. Tit Forfeiture, pl. 17. S. P. admitted, cites Mich. 8 E. 2.

3. **So in Action againſt the Sovereign and his Commoigne, the** Commoigne **ought to be attach'd by the Goods** of the Sovereign. 7 H. 6. 10.

Fitzh. Tit. Attachment, pl. 2. cites Mich. 7 H. 6. 9. S. P. accingly.

(E) Summons and Severance. *In what Actions* it lies. See (I. 2)

1. IT **lies in Action of** Waſte, **becauſe the Land is to be recovered.** 48 E. 3. 32. 2 H. 4. 2.

Br. Summons and Severance, pl. 9. (bis) cites S. C.——S. P. Br. Waſte, pl. 29. cites 42 E. 3. 21, 22.——S. P. For the Writ is Ad Exhæredationem, and the Action of Waſte is a Plea real: In an Action of Waſte brought by 2 in the Tenuit, a Releaſe of the one is a Bar to both; but otherwiſe it is in the Tenet; for there it bars but himſelf. 2 Inſt. 307.

2. **It lies in** Quare Impedit. 11 H. 6. 23. b. * 55. **adjudged** † 21 E. 3. 38. b.

It lies in Quare Impedit, and in a *Writ of Error upon it.* Cro. E. 324. pl. 16. Paſch. 36 Eliz. B. R. Pipe v. the Queen.—— * Br. Summons and Severance, pl. 21. cites S. C.—In Quare Impedit *by* 2, if *they vary in Count*, there the Defendant may plead it to the Count, and the Writ ſhall abate; Per Littleton and others, and they ſhall not be ſevered. Br. Count, pl. 66. cites 6 E. 4. 10.
† Br. Summons and Severance, pl. 13. cites S. C.

3. But **the other ſhall have the** Suit of the Whole. **Contra.** 21 E. 3. 38. b.

4. **It lies in** * Ward of Body; **becauſe it goes in Diſadvantage of his Companion, being entire.** 49 E. 3. 19. 27. 18 E. 3. 56. 30 E. 3. 30. **Dubitatur.** 11 H. 6. 55. † 38 E. 3. 9. b. **adjudged** ‡. 45 E. 3. 2.

Jenk. 24. pl. 46. * Br. Summons and Severance. pl. 2. cites 34 H. 6. 31. & 35 H. 6. 19. S. P.——† Br. Summons and Severance. pl. 12. cites S. C.
‡ Br. Summons and Severance pl. 5. cites S. C.

5. So

5. So in Right of Ward of Land **Summons and Severance lies, becauſe it is ſeverable, and he is to have the Moiety.** 49 E. 3. 27.

6. So **it lies in Right of Ward** of Body and Land. 45 E. 3. 10.

Br. Charters de terre, pl. 74. cites

7. **It lies in a** * Detinue for Charters, **for Peradventure he is to recover a Warranty by it.** 20 H. 6. 45. 18 E. 3. 56. **adjudged.**

Fitzh. Tit. Severance, pl. 2. 20 H. 6. 45. & pl. 14. H. 19. E 3. That Summons and Severance lies in Detinue of Charters; And ſays, that ſo it ſeems of Actions real or mixt, but not perſonal; But that Fitzh. pl. 32. is to the contrary.

* S P. Br. Summons and Severance pl. 2. cites 34 H. 6. 31. & 35 H. 6. 19.

10 Rep. 135. In Caſe of

8. **It does not lye in** Quid Juris clamat. 48 E. 3. 32.

Read v. Redman; But the Nonſuit of the one ſhall be the Nonſuit of the other, for the Tenant ſhall not be compelled to attorn to one only.

9. **In** Forgery of Falſe Deeds **Summons and Severance does not lye.** 18 H. 6. 6.

* S. P. Br. Summons

10. **It lies in Action of** * Debt by Executors. 10 H. 6. 2. b.

and Severance pl. 1. cites 25 H. 6. 3. ——— S. P. Ibid. pl. 2. cites 34 H. 6. 31 & 38 H. 6. 19. ——— S P. 10 Rep. 134. Paſch. 10 Jac. C. B. Redman v. Read.

Trover and Converſion by 3 Executors againſt the Defendant,

11. **It lies in Action of** Treſpaſs by Executors of the Goods of the Teſtator taken. 14 H. 4. 29.

12. But **otherwiſe it is if it be** Quare bona Sua cepit. 14 H. 4. 29. b.

for a Bond, and declare, that it was *loſt in the Teſtator's Life-time*, but lay the *Converſion ſince his Death*; Two of the Plaintiffs were ſummoned and ſevered, and Non' Pros' enter'd as to them, to the 3d the Defendant pleaded Not guilty, and found againſt him, and 500 l. Damages. Upon Motion in Arreſt of Judgment, it was held by Hale Ch. B. and the whole Court, that Summons and Severance did not lye in this Caſe, becauſe the Converſion which is the moſt material Part of the Declaration was in the Executor's own Time; So that the Action was grounded on their Poſſeſſion, as *Treſpaſs of their own Poſſeſſion*, in which Caſe Summons and Severance does not lye, and conſequently the Nonſuit of one is the Nonſuit of all, and all the Proceedings after are to no Purpoſe. And per Hale chief Baron, there are *two Sorts of Severances*, one when a Plantiff will not appear, and the other, when all appear, but ſome one or more will not proceed and proſecute, there he or they ſhall be ſevered by Order of Court. Hard. 317. pl. 11. Mich. 14 Car. 2. in the Exchequer. Manly v. Lovel.

It was held that *Attaint* ſhall enſue the Nature of the Action upon which it is founded,

13. *Attaint by three*, They were eſſoign'd at the firſt Day, and *at the Day of Adjournment of the Eſſoign, two did not come*, by which Summons Ad Sequend' ſimul was awarded, and no other thing againſt them &c. But *it does not appear upon what Action* the Attaint was founded. Br. Sommons and Severance, pl. 15. cites 7 Aſſ. 8.

ſo that *if Summons and Severance lies in the firſt Action*, it ſhall lie in the Attaint, and otherwiſe not. Br. Sommons and Severance, pl. 2. cites 34 H. 6. 31 & 35 H. 6. 19.——*Therefore*, where it is brought upon *Formedon*, or ſuch like, Severance lies; *Contra* where it is founded *upon Treſpaſs, Conſpiracy*, and ſuch *Actions perſonal*; There if it be brought by two, and the one will not ſue, this ſhall be the Nonſuit of both. Ibid.

Aſſiſe by two the one did not come, by which Summons Ad Sequend' ſimul

14. *Aſſiſe by* 8 Daughters, *5 are Nonſuited*, or will not ſue, they ſhall be ſummon'd and ſever'd; Quod nota. Br. Sommons and Severance, pl. 16 cites 10 E. 3.

iſſued returnable ſuch a Day, at which Day the *Parol was ſine Die by the not coming of the Juſtices*, by which *general Re-attachment iſſued*, and at the Day the one came and the other not, but made Default as before, by which the Plaintiff prayed, That he be ſevered, and becauſe the Re-attachment *did nothing but revive the Aſſiſe and not the Meſne Proceſs nor the Summons*, therefore Summons ad ſequend' ſimul was awarded; Quod nota. Br. Sommons and Severance, pl. 4. cites 44 E. 3. 16. ——— S. P. in *Præcipe quod reddat*. Br. Sommons in Terra, pl. 15. cites S. C.

If Judgment be had againſt two and one would bring

15. *Writ of Error* was brought *by ſeveral* founded *upon Writ of Raviſhment of Ward*, They appeared by Attorney, and after two of them made Default after Appearance, and therefore were ſevered by Award without Proceſs. And ſo ſee that the Severance lies in Writ of Error founded upon

upon a perſonal Action. Brooke ſays the Reaſon ſeems to be in as much as the Plaintiffs in the Writ of Error made Default in the Writ of Raviſhment of Ward, and ſo in a Manner they are *by way of Defence*, in which Caſe the Act of the one ſhall not prejudice the other in Action perſonal, contra of the Plaintiff in Action perſonal; For the Nonſuit or Releaſe of the one goes againſt both. Br. Sommons and Severance, pl. 19. cites 29 Aſſ. 35.

a *Writ of Error* and the other will not join, he ſhould be ſummon'd & ſever'd, and if he brings a Writ alone it is not good. Carth. 7, Trin 3 Jac. 2. B. R. Hacket v. Herne. ——— 3 Mod. 134. S. C.

In *falſe Judgment*, one of the Plaintiffs, who before had appeared, was nonſuit and ſevered. D. 262. b. pl. 32.

16. *Champerty* by two *againſt one who maintain'd in Scire facias upon a Recognizance brought by the Plaintiff* for the Part of J. N. The one Plaintiff was nonſuited, and it was awarded the Nonſuit of both, and that Severance does not lie; *contra* by ſome, if the Action had been founded *upon a Real Action*. But Brooke ſays it ſeems that all is one; For a Man ſhall recover only Damages in this Action; Contra of Attaint; for by Attaint upon a real Action, a Man ſhall be reſtored to the Land, and ſo recover Land; But contra in Champerty. Note the Diverſity. Br. Sommons and Severance, pl. 7. cites 44 E. 3. 6.

In *Champerty* founded *upon a perſonal Actions* ſummons and Severance does not lie; per tot Cur. But per Finch it lies in this Action where it is founded *upon a real Action*. Brooke ſays, *Quære* inde; For it ſeems that it does not; For it is not like to Writ of Error or Attaint, which ſhall reverſe the firſt Action; For this Action of Champerty *is only to recover Damages or Penalty* againſt the Party Defendant; for the Writ at the Suit of the Party, ſays, Ad grave Damnum, &c. Br. Sommons and Severance, pl. 20. cites 47 Aſſ. 3.

17. It lies in Writ of *Coſinage*. Br. Judgment, pl. 144. cites 10 H. 6. 9, 10.

18. It was agreed arguendo, that in *Audita Querela* brought *by two, upon a Releaſe made to them*, if the one will not ſue, the other ſhall ſue alone, and he who makes Default ſhall be ſever'd; and the Reaſon ſeems to be, inaſmuch as they are *by way of Defence*; and of the Part of the Defendant, the Default of the one ſhall be the Default of both. Br. Sommons & Severance, pl. 2. cites 34 H. 6. 31. & 35 H. 6. 19.

19. It lies in Writ of *Intruſion*, *Raviſhment of Ward*, and other like Caſes, as *Ejectment*, &c. where a Man is to recover the thing itſelf which is in Demand. Per Vaviſor. Kelw. 47. b. pl. 4. Mich. 18 H. 7. Anon.

20. In a *Nativo habendo* Summons and Severance lies not. But in a *Libertate probande* it is otherwiſe. F. N. B. 78. (I)

21. In a *Quo Jure* brought by 2, Summons and Severance lies; and the Nonſuit of the one ſhall not be the Nonſuit of the other. F. N. B. 128. (K)

22. In a Writ of *Eſcheat*, *Formedon*, *Error*, * *Nuper Obiit*, if one Coparcener &c. deforces the other, he that is deforced ſhall be ſummon'd and ſever'd. See Jenk. 42. pl. 79.

* *Nuper Obiit by 2 againſt the third*, the one was ſummon'd and ſever'd, and the other awarded to ſue alone for the third Part. Br. Nuper Obiit, pl. 1. cites 45 E. 3. 49.

23. Summons and Severance lies in a *Writ of Partition*, and yet he that was ſever'd ſhall have his Part; for Partition muſt be of the Whole. Jenk. 211. pl. 46.

24. In an *Aſſize of Nuſance* Summons and Severance lies. Godb. 59. pl. 70. Mich. 28 & 29 Eliz. B. R. in Giles's Caſe.

25. And therefore it lies in an Action on the *Caſe Quare exaltavit Stagnum, per quod Pratum ſuum inundatum fuit.* Godb. 59. Giles's Caſe.

(E. 2) At what Time.

1. SUmmons and Severance is always *before Appearance*, and Nonſuit after Appearance, where the Severance is without Proceſs, &c. 10 Rep. 135. a. In a Nota by the Reporter, at the End of the Caſe of Read v. Redman, cites 38 Aſſ. 39. 26 Aſſ. pl. 35.

L. P. R. Tit. Summons and Severance, cites 6 W. & M. in B. R. that Summons and Severance was *after Joinder in the Aſſignment of Errors.*

2. Error was brought of a Judgment in Ejectment againſt 2 Defendants; and afterwards one of the Plaintiffs in Error gave a Releaſe to the Defendant in Error, who pleaded it in Bar as a Plea Puis darraign Continuance. It was inſiſted upon Demurer, that *after in Nullo eſt erratum* pleaded, there cannot be any Summons and Severance; and reſolved, that the Releaſe ſhould bar him only that releaſed. Cro. J. 117. pl. 5. Paſch. 4 Jac. B. R. in Caſe of Blunt and Farley v. Sneddon.

(E. 3) Neceſſary. In what Caſes.

1. A *Writ of Error* to reverſe a Judgment given againſt 20, was brought by them all; but only one of them appear'd, and the others *Exacti non venerunt* Afterwards the one aſſign'd Errors alone. It was held, that the Aſſignment of Errors of the one only, per ſe, without ſuing a Summons and Severance of the other 19, is as null and void; and the Writ was abated, and Execution awarded. Cro. E. 891. pl. 8. Trin. 44. Eliz. B. R. Andrews v. Lord Cromwell.

(F) Severance. *In what Caſes* it lies.

1. IN ſuch Caſes, where Men may have ſeveral Actions, if they join in an Action, there ſhall not be any Severance in it for their Folly. 7 H. 4. 45. b.

Br. Summons and Severance, pl. 11. cites S. C. Contra in Præcipe quod reddat.

2. As if ſeveral are out-law'd in Appeal of Murder, if they join in a Writ of Error, there cannot be any Severance therein, becauſe they might have had ſeveral Writs. 7 H. 4. 45. b.

——Writ of Error to *reverſe an Outlawry*, muſt be brought in the Names of both the Parties outlaw'd; and if one only appear, the other may be ſummon'd and ſever'd, for the Benefit of him that appears only. Per Cur. 2 Salk. 496. pl. 7. Paſch. 4 Ann. B. R. Symmonds v. Bingoe & Cook.

But when they plead a *joint Plea*, as *Releaſe*, or the like, which is found againſt them in Action perſonal, there *of*

3. In *Conſpiracy* againſt two, the one pleaded Not Guilty, and the other another Plea; and the Jury paſs'd againſt them to the Damage of 100 l. The one brought Attaint alone, and it was adjudged, that it lay well of the Principal; *But* he was compell'd to *abridge his Demand of the Damages*; for as to the Principal, their *Plea was ſeveral*, and therefore may ſever in Attaint; but the Damages were *entire*, therefore he ſhall abridge as to this, tho' he has paid the Whole, and made ſurmiſe of it: For the Court ſhall intend that both have paid it, according to

to the Form of the Judgment. Br. Summons and Severance, pl. 2. cites 34 H. 6. 31. & 35 H. 6. 19.

neceſſity they ſhall join; and yet there, if the one will not ſue, Severance does not lie. Ibid.

4. Where a Man *leaſes Land for Life, and has Iſſue two Daughters, and dies*; and the *one takes Baron*, and the *Tenant grants to her and her Baron all his Eſtate*, this is no Surrender; per Vaviſor, J. clearly. And *if they do Waſte*, the *Action* of Waſte *ſhall be brought in all their Names, and the Baron and Feme ſhall be ſummon'd and ſever'd*. Br. Summons and Severance, pl. 14. cites 21 H. 7. 40.

5. *Error* in C. B. was brought by *ſeveral Defendants*; the Defendant in Error pleads the *Releaſe of one of the Plaintiffs only*. This is a good Bar againſt the Releaſor, but not againſt the others; and therefore there ought to be a Summons and Severance, and for that Reaſon Judgment revers'd Niſi &c. Cumb. 95. Mich. 4 Jac. 2. B. R. Croket v. Daniel, cites 2 Cro. 116. Blunt's Caſe.

The Writ of Error ſhall follow the Nature of the firſt Action; ſo that if Summons and Severance lies in the firſt Action, then the Releaſe of one Defendant in a Writ of Error brought on ſuch Action is a Releaſe of the other Defendant. Godb. 59. pl. 70. Mich. 28 & 29 Eliz. B. R. Giles's Caſe.

(G) *At what Time.* In what Caſes there ſhall be Severance *without Writ* of Summons ad ſequendum ſimul.

1. AFter Appearance **made** by 2 Jointenants Plaintiffs, **if** one makes Default **he ſhall be ſevered immediately without ſuing Summons ad Sequendum,** * 2 H. 4. 23. b.

A Writ of Error in Aſſiſe was brought by ſeveral. *One Plaintiff in Error appeared, and the others made Default*; he who appeared ought to have prayed Proceſs Ad ſequendum ſimul, and thereupon Judgment of Severance ought to have enſued; for before Appearance there can be no Judgment of Severance without Proceſs; but otherwiſe it is after Appearance. Yelv. 4. Paſch. 44 Eliz. B. R. in Caſe of Ld. Crumwell v. Andrews, cites 38 E. 3. 3. b.

* Br. Summons and Severance, pl. 10. cites S. C.

2. But **otherwiſe it is if one makes Default** before Appearance. 2 H. 4. 23. b.

2 Br. Summons and Severance, pl. 10. cites S. C.

(H) What *Judges* have *Power* to award a Severance.

1. THE Juſtices of Niſi Prius **have not Power to do it.** 2 H. 4. 23. b.

S. P. And it was ſaid that they ſhall ſurceaſe from taking the Inqueſt, and the *Juſtices of the Bank, who have the Record, ſhall give the Judgment*; and others in a contrary Opinion; therefore quære. And Brooke ſays, this ſeems to be of the taking of the Inqueſt. Br. Summons and Severance, pl. 10. cites S. C.

(I) Summons

See (I. 2)

(I) Summons and Severance: *What Perſons* ſhall be ſummon'd and ſever'd.

1. IF Coparceners bring Writ of Coſinage, and one is nonſuited, ſhe ſhall be ſummon'd and ſever'd. 10 H. 6. 9. b.

2. So if one releaſes he ſhall be ſevered. 10 H. 6. 9. b.

So if 4 *Jointenant brings Quare Impedit*, and the one will not ſue, he ſhall be *ſummon'd and ſever'd*, but if he will *vary in Title*, there the *Writ ſhall abate without Remedy*; for then it appears that they have joined upon ſeveral Titles; Quod nota. Br. Quare Impedit, pl. 2. cites 26 H. 8. 5.

3. In Quare Impedit by Coparceners, they may be ſummon'd and ſever'd. 38 E. 3. 35. adjudged.

4. If 2 Executors ſue Execution of Damages recovered by Teſtator, Summons and Severance lies. 31 E. 3. 13. b.

But it lies not of *Treſpaſs of their own Poſſeſſion.*

5. So in Action of Treſpaſs by Executors, of the Goods of the Teſtator taken, Summons and Severance lies. 14 H. 4. 29.

Hard. 318. Manley v. Lovell.——Co. Litt. 139. a. (h) is, that it lies for Goods taken out of their own Poſſeſſion.

It lies in Account, as Executors, *by the Receipt of their own Hands.*

6. So in an * Account by Executors againſt the Bailee of their Teſtator, Summons and Severance lies. 20 E. 3. Account 78. adjudged.

Co. Litt. 139. a. (h)

* S. P. Br. Summons and Severance, pl. 9. cites 48 E. 3. 14. Brooke ſays, And ſo ſee Severance *in Action perſonal by Executors. Contra by other Men* in Action perſonal.——S. P. Ibid. pl. 2. cites 34 H. 6. 31. and 35 H. 6. 19.

See (E) pl. 10, 11, 12. —(I) pl. 4, 5, 6.

(I. 2) *Executors.* In what Caſes and Actions they may be Summon'd and Sever'd.

Br. Summons and Severance, pl. 3. cites S. C.

1. DEBT *by* 2 Executors, *Excommunication was pleaded in the one*, by which he *was demanded, and did not come*; wherefore he *was ſevered* by Award, and the other admitted to ſue alone: And ſo ſee that both did not ſue; quod nota. Br. Executor, pl. 30. cites 42 E. 3. 13.

Otherwiſe it is *in Writ of Debt brought by another Perſon*; the Reaſon ſeems to be inaſmuch

2. Debt *by* 2 Executors, the *Defendant was outlawed*, and *ſued Charter of Pardon* and *Scire facias againſt the Executor who was not ſerved*, by which *he ſued again, which was returned ſerved againſt the one*, and *not againſt the other*; and the Plaintiff *prayed Sicut Pluries*, and could not have it, but *was compelled to count againſt him only.* Br. Executor, pl. 44. cites 3 H. 4. 10.

as the Executor may be ſummon'd and ſever'd, and the one who comes firſt by Diſtreſs ſhall anſwer. Ibid.

3. In Action againſt 2 *Executors*, the *one made Default*, he ſhall be ſevered, and the other ſhall plead; Per Martin. Br. Executors, pl. 156. cites 10 H. 6. 2. 3. and Fitzh. Executor, pl. 10.

4. In *Debt for Arrears of Annuity granted by* Deed to the *Teſtator*, Summons and Severance lies for the Executors. Keilw. 47. b. Mich. 18 H. 7.

5. In

5. In *perſonal Actions* brought by Executors, there ſhall be Summons and Severance; becauſe the beſt ſhall be taken for the Benefit of the Dead. Co. Litt. 139. a. (h)

No Summons and Severance lies in *perſonal Actions*; as

if Treſpaſs be committed, in ſuch Caſe Jointenants muſt both join in the Action; for as one may releaſe the Whole, ſo the other may refuſe to go on, and the other cannot recover his Part of the Damage without him. And ſo in Debt, by an Obligation to 2, there can be no Summons and Severance; becauſe one of the joint Obligees may releaſe the Bond, and therefore may not join in the Action. But if a Man *appoints 2 Men Executors*, there ſhall be Summons and Severance, becauſe though one of the Executors may releaſe, though ſuch a Releaſe is a Devaſtavit in him, yet if he will not proceed at Law, 'tis no Devaſtavit; and therefore both Executors, being only Truſtees for the Perſon deceaſed, they ſhall not both be compell'd to go on together; but if one refuſes, the other may bring his Action in the Name of both, and have Summons and Severance; for otherwiſe each Co-executor might, by Colluſion with the Debtor, and not proceeding, keep the other from recovering the Aſſets, and not create a Devaſtavit in himſelf. But after ſuch Summons and Severance he does not proceed for the Moiety, as in Real Actions; but he proceeds in that Action as the whole Repreſentative of the Teſtator, and is intitled to the whole as the Teſtator was in his Life-time. G. Hiſt. C. B. 196, 197.—S. P. Cart. 191. cites 9 Rep. 37. Henſloe's Caſe, 7 H. 4. 18.

(K) *How* it ſhall be made. In what Caſes, *without Proceſs*.

1. IN a Right of Ward by 2, if the one be nonſuited after that he has appeared, he ſhall be ſever'd without Proceſs. 38 E. 3. 9. b. adjudged.

S. P. but after Appearance, there ſhall be Proceſs. Br. Summons and Severance, pl. 12. cites S. C.

2. Summons and Severance lies *between Executor's Plaintiffs*; and if one be outlaw'd or excommunicated, he may be demanded; and if he comes not, ſhall be ſever'd by an Award without Proceſs, after he hath appear'd, and the other ſhall proceed without him; but if he has *not appear'd*, then Summons and Severance ſhall iſſue out againſt him. Brownl. 37. in an Anonimous Caſe.

(L) *How* the *Proceſs* ſhall be, before Severance.

1. IN Formedon, if Summons ad ſequendum ſimul iſſues, the Grand Cape ſhall go of the Whole, and not of a Moiety, till the Severance comes. 17 E. 3. 36.

2. If two ſue *Scire Facias of the Land*, and the one makes Default, *Summons ad ſequendum* ſimul ſhall iſſue, and *not Scire Facias* ad ſequendum ſimul, as appears 3 E. 3. And yet it was ſaid, that upon Aid Prayer in Scire Facias, there Scire Facias ad Auxiliandum ſhall iſſue, according to the Nature of the Original. Br. Summons & Severance, pl. 18. cites 12 H. 4. 3. & 18 E. 3. accordingly. But by 6 H. 7. 12. Scire Facias ſhall be the Proceſs in the firſt Caſe, by the beſt Opinion.

3. *Debt by 2 Executors*, and the one will not ſue, he ſhall be ſummon'd and ſever'd; and if the Summons ad ſequendum ſimul be awarded, and *at the Day the Defendant makes Default*, yet the *Proceſs ſhall be made in Name of both the Executors, till the one be ſever'd, or the Proceſs determined by Outlawry* againſt the Defendant; and he ſhall not be ſever'd till he be ſummon'd. Br. Summons and Severance, pl. 1. cites 28 H. 6. 3.

Br. Proceſs, pl. 12. cites 28 H. 6. 3.

And if the *Tenant does not appear at this Day, nor the one Demandant,* then the other Demandant ſhall recover the Moiety, per Moyle; quod non negatur. Ibid. cites 28 H. 6. 5. And there all the principal Caſe above is agreed verbatim again as above.

4. *As in Præcipe quod reddat* by two, if the *one will not ſue at the Day of Return*, and the *Tenant makes Default*, there Summons ad ſequendum ſhall iſſue, and Grand Cape of the whole Land; quod non negatur. Br. Summons and Severance, pl. 1. cites 28 H. 6. 3.

5. There are 2 *Sorts of Severances*, 1. When the *Plaintiff will not appear*, there he ſhall be ſummon'd and ſever'd. 2. When *all appear*; *but* ſome *one* or more *will not proſecute*, there he or they ſhall be ſever'd by Order of Court. Per Hale, Ch. B. Hard. 318. Mich. 14 Car. 2. in Scacc. in Caſe of Manly & al' v. Lovell.

(M) *Pleadings.* And in what Caſes the *Writ* ſhall *abate before or after Severance.*

And if 2 *Jointenants are diſſeiſed*, and the *one re-purchaſes the Whole*, and ſever'd

1. IN *Aſſiſe*, if there are 4 *Jointenants*, and *two diſſeiſe two*, they *ſhall have Aſſiſe in Name of the four*; and the two ſhall be ſummon'd and ſever'd. Br. Summons and Severance, pl. 17. cites 23 Aſſ. 9.

the other ſhall have Aſſiſe in Name of both, and the Purchaſer ſhall be ſummon'd Br. Sommons and Severance, pl. 17. cites 23 Aſſ. 9.

2. In Aſſiſe *againſt* 3 *Daughters*, *it was found*, *that* 2 *made the Diſſeiſin*, and the third not, and *all three brought Attaint*, *and ſhe who did nothing was ſever'd*; and the Defendant pleaded to the Writ, becauſe the third, who was acquitted, and had no Cauſe, nor was not grieved, was join'd with the other two; and therefore the Writ was abated; quod mirum, after Severance. Br. Brief, pl. 294. cites 29 Aſſ. 14. ——and ſee thereof 39 E. 3. & 11 H. 4. 26, 27.

So in Writ of Account, brought by the Executors of the Earl of Salisbury,

3. A Writ of *Debt* was brought *by* 2 *Executors*. Defendant pleaded, that one was dead. Plaintiff replied, that he that died was ſever'd. But the Writ was abated. Br. Brief, pl. 136. cites 38 E. 3. 11. Contra * 16 E. 3.

it was pleaded, that one of the Executors, who was named in the Writ, is dead. Judgment of the Writ, &c. It was replied, that he was ſever'd, and died afterwards; and yet the Writ was abated by Award, &c. Fitzh. Tit. Accompt, pl 78. cites Hill. 20 E. 3.

But in Debt by two Executors, one was ſummon'd and ſever'd, and he that was ſever'd, died. The Defendant pleaded in Abatement of the Writ. Reſolved, that the Writ ſhall not abate. 10 Rep. 134. Paſch 10 Jac C. B. Read v. Redman.

* Went. Off. of Exec. 140. cites S. C. & Fitzh. 111.

4. *Præcipe* quod reddat *by* 2 *Femes againſt one who vouch'd*, and *at the Summons ad Warrant'* ſicut Pluries, the *one did not come*, *but was nonſuited*; and the *other appear'd*, *and pray'd*, *that the other be ſever'd*; and was demanded, and did not come, and was ſever'd by Award; and the *Tenant ſaid*, *that ſhe who is ſever'd has taken Baron pending the Writ.* And the Writ awarded good, quod Nota, by reaſon of the Severance; for otherwiſe it ſhall abate againſt all. And now *for the Moiety it remains good.* Br. Brief, pl. 225. cites 39 E. 3. 16.

Br. Garde, pl. 13. cites S. C.——

5. *Ward by* 2, *and counted*, *that the Tenant held of their Anceſtor*, *and convey'd the Deſcent to them*; the *Defendant ſaid*, *that there is one R. in full Life*, *not named*, *to whom the Seigniory deſcended with the Plaintiffs.* Judgment of the Writ. Belk ſaid, this *R. has releaſed to the Tenant*, againſt whom the Writ is brought, and ſo the Action is given to us two alone. But Cand. ſaid, You ought to have joined all three, and after

S. C. cited 2 Rep. 68. a. b. Hill. 43. Eliz. in Tooker's Caſe.

R. ſhould

R. ſhould have been ſummon'd and ſever'd. Finch ſaid, If you had *counted that he held of yourſelves, and had not mentioned the Deſcent*, then it had been good without R. But now, by mentioning the Deſcent, R. ought to be named, and ſummon'd, and ſever'd, and the 2 ſhall recover the Whole, and the other may have Account againſt them. Br. Summons and Severance, pl. 5. cites 45 E. 3. 10.

6. Where *two Lords are*, and the *one releaſes to the other*, and he comes to diſtrain, and the Tenant offers but a Moiety of the Rent, he ſhall take the Diſtreſs. Per Wych. Br. Summons and Severance, pl. 5. cites 45 E. 3. 10.

7. *Three leaſed for Life*, and 2 *releaſed to the third*, and he brought Waſte alone, ſuppoſing that he leaſed; and the Tenant ſhew'd Deed that the three leaſed, Judgment of the Writ; and the other pleaded the Releaſe of the two, and the Writ awarded good; for whereas three leaſed, therefore the one leaſed. Br. Summons and Severance, pl. 6. cites 46 E. 3. 17.

8. Aſſiſe *by* 2 *Barons and their Femes by* Title of *Coparcenary*, and the *one Baron and Feme were ſummon'd and ſever'd*, and the Tenant pleaded to the Writ, becauſe the *Baron who was ſever'd was Alien born*; Et non allocatur, but the Writ awarded good. Contrary it ſeems, if he had not been ſever'd. Br. Brief, pl. 120. cites 11 H. 4. 26.

9. For the better underſtanding the true Reaſon of the Law in the Caſes of Summons and Severance, theſe *Diverſities* are *to be obſerved*. 1ſt. Between *Writs real Original*, and Writs real *Judicial*; for if 2 *Coparceners or Jointenants* bring an original real Action, and one is ſummon'd and ſever'd, and dies, the Writ ſhall abate; for in a real Action a Man ſhall never recover upon a Writ which is falſe in Words, or unapt for his Caſe, becauſe he may have a Writ both true and apt, as this happens to become ſo by the Act of God; and in ſuch Caſe the Writ ſhall abate. But if 2 *Coparceners or Jointenants bring Scire facias*, which is a judicial Writ, *upon a Fine levied* &c. and one is ſummon'd and ſever'd, and dies without Iſſue, the judicial Writ ſhall not abate; but if the *Coparcener* that *died had Iſſue*, then the Writ ſhould abate, according to 42 E. 3. 2 & 8. 2dly, The *Diverſity* is between *real Writs original, where he that is ſummon'd and ſever'd dies*, which is the Act of God, and by which the Writ abates, *and where an Entry is made into the Land, or there is a taking of Baron by the Perſon who is ſummon'd and ſever'd*; for ſuch are the Acts of the Party ſummon'd and ſever'd, and the Writ by ſuch Acts (where there is not any Summons and Severance) become abatable only. 3dly. The Diverſity is between *Actions Real*, concerning Freehold or Inheritance, without any Regard to the Survivor, and *Actions meerly Perſonal, or Mixt with the Realty*, in which Chattels or Things intire are demanded, there, if one Plaintiff be ſummon'd and ſever'd (where the Thing intire ſurvives to the other) the Writ ſhall not abate; as in Writ of Ward of the Body, according to 37 H. 6. 11. 38 E. 3. 35, 36 &c. 10 Rep. 134. a. b. in Caſe of Read v. Redman.

10. In *Quare Impedit* in ſome Caſes, the Death of one of the Plaintiffs ſhall not abate the Writ *without any Severance*, viz. *where otherwiſe the ſurviving Plaintiff would be without any Remedy* &c. as upon Plenarty, and 6 Months paſs'd, where Lapſe ſhall incur, which Reaſon perhaps may reconcile all the Books, which prima facie ſeem to differ; and this is the Reaſon given in ſome of the Books, as in 38 E. 3. 36. 9 H. 6. 30. &c. that otherwiſe the Tort done to the Plaintiff will be diſpuniſhed, and the Survivor loſe his Preſentation by Lapſe, and perhaps his Inheritance, As where 2 purchaſe Advowſon in Fee, and a Stranger uſurps; but where after the Death of one the Survivor may have a new Writ without any Prejudice to him, there in ſome of the Books the Writ has abated, but without Queſtion, if one be ſummon'd and ſever'd, and dies, the Writ ſhall not abate. 10 Rep. 134. b. in Caſe of Read v. Redman.

(N) *What*

(N) *What* the *Party* ſever'd *may do after Severance.*

Several Books ſay, that after Judgment he who was ſummon'd and ſever'd may *ſue Execution.* Went Off. Exec. 104. cites 13 E. 3. Fitzh. Execution 9. 11 R. 2. Privilege 2. but adds Quære thereof; for he cannot acknowledge Satisfaction, as hath been ſince reſolved Mich. 14 & 15 Eliz. Dy. And the Reaſon thereof being becauſe he is no Party to the Judgment, by the ſame Reaſon can he not ſue Execution upon it; for how can he have Execution for whom there is no Judgment given? Now the Recovery is only in the Name of the other Executor; yea, by the ſaid laſt Book it ſeems, that after Judgment had he cannot releaſe his Debt, becauſe it is now altered in Nature, and *turn'd in Rem judicatam*, tho' at any Time before Judgment he might have releaſed it, as both that laſt Book ſaith, and the 2 precedent temp. Ed. 3. Rich. 2. Yea, *in* an Action of *Account*, *after Judgment had that the Defendant ſhall account*, the Releaſe of him ſever'd is a good Diſcharge to the Defendant, as was reſolved 48 Ed. 3. 14, 15. But this is not a Plenary Judgment; for nothing is recovered thereby, but another Judgment is to be had after the Account, which may be againſt the Plaintiff, ſo as this Releaſe came *before any Debt or Duty adjudged*, [and then puts a Caſe, viz.] What if the Defendant be had in Execution at the Suit of the Executor who proſecutes it and eſcapeth, whether may the ſever'd Executor diſcharge the Sheriff or Gaoler by a Releaſe? I think he may not. Went. Off. Executor 104, 105.

1. IN *Debt* by two Executors, one of them is ſummon'd and ſever'd, and the other *proceeds to Judgment*, in ſuch Caſe he who was ſevered ſhall not be received to *acknowledge Satisfaction* of the Debt, becauſe he has no Day, nor is privy to the Judgment, but ſecluded from it; and yet if he had made a *Releaſe before the Judgment*, it ſhould have been a Bar, notwithſtanding the Severance. D. 319. b. pl. 15. Mich. 14 & 15 Eliz. Anon.

(O) *Judgment.* How. After Summons and Severance.

1. IN *Ward by* 2, if the one is ſummon'd and ſever'd, the other ſhall recover the whole Ward; for this cannot be ſever'd; Per Finch. Br. Judgment, pl. 127. cites 45 E. 3. 10.

2. *Debt by* 6 *Executors, on a Bond* to Teſtator, 3 of them were ſummon'd and ſever'd, and *the other proceeded and had Judgment*; and upon a Writ of Error brought it was objected, that there is no Mention of thoſe who were ſevered; for that they being ſtill Executors, ought to be named in the Judgment. Precedents were ordered to be ſearch'd in C. B. as to the Courſe there, whether upon Summons and Severance Judgment ſhould be for thoſe only which proſecuted; which they certified to be ſo. And the Court (abſente Brampſton) held it a good Courſe; for perhaps the Executors which are ſever'd never prov'd the Teſtament, nor never will either prove it, or adminiſter; ſo that when they are named in the Writ, and would not join, it is reaſonable that *Judgment* ſhould be *for thoſe only that proſecuted without naming thoſe who ſever'd.* And Judgment was affirm'd Niſi &c. Cro. C. 420, 421. pl. 11. Mich. 11 Car. B. R. Price v. Parkhurſt.

3. A *Judgment* is recovered *againſt* 4 Defendants. A Writ of *Error is brought*, and *one* of the 4 Defendants *is ſummoned and ſevered, and* he *releaſes Errors*, the *Judgment is revers'd quoad the* 3, and a Nil capiat per Breve entered for the 4th. 2 L. P. R. 538. cites Mich. 9 W.

For more of Summons and Summons and Severance in general, ſee **Attachment, Jointenants, Nonſuit,** and other Proper Titles.

Summons of the Pipe.

(A) In what Caſes to iſſue &c.

1. THE Summons of the Pipe *got in the Tallages, and afterwards Rents, with the other Debts of the King.* Gilb. Hiſt. View of the Exch. 18.

2. The Summons of the Pipe is a Summons *in Words the* * *ſame with that of the Green Wax, only different Matters are charg'd in it.* This Summons was in order to quicken the Tenants to pay in their Rents into the Exchequer, and take Tallies from thence. Gilb. Hiſt. View of the Exch. 91.

* S. P. But the Summons of the Green Wax is iſſued by a different Officer, and the caſual Revenue is annex'd to ſuch Summons of the Green Wax. Gilb. Hiſt. View of the Exch. 138.

3. Summons of the Pipe iſſued againſt Defendant *to levy 500 l. upon a Super ſet upon him* by one Jones Treaſurer of certain Sums of Money in the late Times. And a Superſedeas was now moved for, becauſe this *is an Execution againſt Body and Goods*, and otherwiſe the Party cannot be received to plead in Diſcharge of it. And per Hale Ch. Baron, Summons of the Pipe *ought not to iſſue but for a Debt upon Record*, or a Debt *ſtated* and determined, and *not for Money due upon Matter in Pais*, as this Caſe is: Wherefore if a Collector in Chief charge his Under-Collector upon Account, or an Under-collector charge any particular Perſon within his Precinct; or if any Accountant charge another together with himſelf, for Timber, or other Goods of the King's ſold to him, and not paid for, Summons of the Pipe ſhall not iſſue in theſe Caſes, but a Scire facias, or a Diſtringas ad Computandum, to which the Party may plead; for that theſe Debts are not Debts upon Record, but ariſe upon the Accountant's Charge only; and ſo here: Wherefore in this Caſe the Summons of the Pipe was ſuperſeded, and a Scire facias ad Computandum awarded. Hard. 322. pl. 1. Paſch. 15 Car. 2. in Scac. Anthony Mildmay's Caſe.

For more of Summons of the Pipe in general, ſee other Proper Titles.

Sunday.

(A) *What Things done on a Sunday, are void*, or not.

1. DIE Dominico nemo Mercaturam facito: id quod ſi quis egerit, & ipſa *merces & præterea* 30 *ſolidis multatur*. 2 Inſt. 220. cites the Laws of King Ethelſtan.

2. A *Fair held on* a Sunday is well enough, altho' by the Statute ther is a Penalty inflicted on the Party that ſells on that Day, yet it make not the *Sale* void; Per Cur. Cro. E. 485. pl. 1. Mich. 38 & 39 Eliz. Comins v. Boyer.

3. *Information exhibited* on a Sunday is good; for tho' 'tis not Dies Juridicus to award *Judicial Proceſs*, or to make *Entry of a Judgment of Record*, nevertheleſs 'tis good to accept of an Information upon a Special Law. Jo. 156. Mich. 20 Jac. in the Exchequer, Bedoe v. Alpe.

6 Mod. 95. S C. accordingly.

4. One was *taken* on a Sunday, *by* Virtue of an *Eſcape Warrant*; and it was held good; for one may take another on a Sunday upon freſh Purſuit; And this is in the Nature of it, tho' it be by a new Method; for this *is no original Proceſs*, but the Party is in ſtill upon the old Commitment continued down. 2 Salk. 626. pl. 7. Hill. 2 Ann. B. R. Parker v. Sir William Moor.

(B) *Service of Proceſs*, Rules &c. In what Caſes *good* on Sunday.

1. 29 *Car.* 2. *cap.* 7. *S.* 6. ENacts, That *no Perſon upon the Lord's Day ſhall ſerve or execute any Writ, Proceſs, Warrant, Order, Judgment, or Decree, (except in Caſes of Treaſon, Felony, or Breach of the Peace) but the Service of every ſuch Writ &c ſhall be void; and the Perſons executing the ſame ſhall be as liable to anſwer Damages, as if they had done the ſame without any Warrant.*

2. In Treſpaſs and Battery, upon Not guilty pleaded a ſpecial Verdict was given, viz. The Plaintiff being complained of to a Juſtice of Peace, he makes a *Warrant* to the Defendant to take the Plaintiff, and *to find Sureties for the good Behaviour*, the Defendant, being *Conſtable*, *executes the Warrant upon a Sunday*. Whether this was good within the late Statute which ſays, That all Proceſs executed upon a Sunday other than for the Peace ſhall be void? Reſolved for the Defendant, that a Warrant for the good Behaviour is a Warrant for the Peace and more; And this Statute is to be favourably extended for the Peace. This Judgment was affirm'd in a Writ of Error in B. R. Trin. 32 Car. 2. Raym. 250. Hill. 30 & 31 Car. 2. C. B. Johnſon v. Coltſon.

Declaration was *delivered on Trinity Sunday* and debated on Motion, if ſuch Delivery were not void by the Statute of 29 *Car.* 2. 7. And per Holt ſtrongly it is; For firſt it is *no Act of Neciſſity* within the Meaning of the Statute, *as putting of Eccleſiaſtical Proceſs upon the Church Door*, or *making a Tender to ſave a Penalty*. And he ſaid he would take the Word Proceſs for proceeding, and ſuch Conſtruction as tends to a better Obſervation is to be made; And this Declaration, as deliver'd, could not be taken Notice of, without breaking of the Sabbath, till Trin. Term; For that by the Statute of 32 H. 8. 21. begins on Monday; But Quind. Paſch. is indeed always on the Sunday, but is kept on the Monday. Gould & Powis dubitabant. 12 Mod. 606. Mich. 13 W. 3. Waldegrave's Caſe. ——— This was on a Motion to ſet aſide a Judgment in Treſpaſs after a Judgment by Default, and a Writ of Inquiry executed. Holt Ch. J. ſeemed to incline that the Delivery was not good; Becauſe the Statute intended to reſtrain All legal Proceedings; But Powis and Gould contra, becauſe ſuch Delivery was but Quaſi a Notice, and as a Letter and not a Proceſs. But it appearing to the Court that the Defendant had appeared, and that a Writ of Inquiry had been executed, they would not intermeddle and ſaid that that had made all good. And the Judgment ſtood. Ld. Raym. Rep. 705, 706. Mich 13 W. 3. Walgrave v. Tailor, S. C.

3. *Delivery of a Declaration* upon a Sunday is not good. Ruled per Holloway, J. Comb. 21. Trin. 2 Jac. 2 B. R. Anon.

4. *Venire facias* bore Teſte on a Sunday, and held amendable. Cro. J. 64. Paſch. 2. Jac. B. R. Dolphin v. Clerk.

To have an *Attachment for Non-performance of*

5. If an *Award* be *made by Rule of Court*, and the *Party* who refuſes to obey the Award *abſconds*, ſo that he cannot be found on a Week-Day, a Service thereof on a Sunday is ſufficient to bring him into Contempt, whereon

whereon to have an Attachment. 12 Mod. 158. Mich. 9 W. 3. Br. Anon.

an Award, there muſt be perſonal

Service, which if it be on a Sunday, tho' 'tis not good to have an Attachment for Non-payment on that Day, yet it is for Refuſal on any other. Cumb. 462. Mich. 9 W. 3. B. R. Anon.

6. The Queſtion was, Whether ſerving an *Attachment for Contempt* on Sunday were within the Statute againſt Sabbath-breaking, the Words being that all arreſts on Sunday, except for Breach of Peace, are void. Holt Ch. J. ſaid, ſuppoſe it were a *Warrant to take for Forgery, Perjury &c.* Shall they not be ſerved on Sunday? And ſhall not any Proceſs at the King's Suit be ſerved on Sunday? Sure the *Lord's-Day ought not to be a Sanctuary for Malefactors*; And this here partakes of the Nature of Proceſs upon an Indictment; But Cur. adviſare vult. 12 Mod 348. Paſch. 12. W. 12. 10. 3. B. R. Sir . . . Cecil and others of the Town of Nottingham.

7. *Service of a Declaration in Ejectment* upon a Sunday was held good per Cur. and not within the Statute 29 Car. 2. cap. 7. Comb. 286. Trin. 6 W. & M. B. R. Anon.

Comb. 462. Mich. 9 W. 3. B.R.Anon. S. P. —— But Hill.

13 W. 3. It was held per Cur. That *Service of a Declaration in Ejectment* on Sunday is not good now upon the Statute of 29 Car. 2. For it *is a Proceſs*, tho' not a judicial one; For it is *compulſive* on the Party to appear; And it may as well be ſaid, That Service of a *Summons in a Real Action* may be good on Sunday. 12 Mod. 667. Taylor's Caſe.

8. A Man was *arreſted* on a Sunday by a Writ out of the Marſhalſea. The Court refuſed to diſcharge him, but directed to bring an Action of *falſe Impriſonment*. 5 Mod. 95. Trin. 7 W. 3. Wilſon v. Guttery.

1 Salk. 78. pl. 1. S.C. by the Name of Wilſon v. Tucker.

9. A Woman was libell'd againſt for living incontinently with the Lord &c. and was thereupon excommunicated. The Suggeſtion for a Probition, and likewiſe for an Abſolution, was, That ſhe was wrongfully excommunicated, the Citation being ſerved on her on a Sunday contrary to the Statute 29 *Car.* 2. by which it it enacted, *That no Proceſs whatſoever ſhall be ſerved on a Sunday, except in Caſes of Treaſon, Felony, or Breach of the Peace.* And tho' it was pretended this Citation was fixed on the Church Door on a Sunday, and that 'tis the conſtant Uſage both before and ſince the Statute ſo to do, it was ſaid, That this might be well enough where the Perſon cannot be perſonally cited; But where he can, 'tis not the conſtant Practice which will give Authority to ſuch a Citation, for 'tis a miſchievous Practice and ought to be redreſſed; But the Chief Juſtice thought it was not the Intent of the Statute to take away the ſerving this Proceſs in this Manner, but that the Caſe might be different in the Execution of other temporal Proceſs which might have been ſerved as well on any other Day as on a Sunday. 5 Mod. 449. Mich. 11 W. 3. B. R. Anon.

Carth. 504. S. C. by Name of Alanſon v. Brookbank, and that a Prohibition was denied. —— 2 Salk. 625. pl. 4. S. C. accordingly. —— 12 Mod. 275. S. C. accordingly —— S. C. cited Arg. Ld. Raym. Rep. 706. in Caſe of Walgrave v. Tailor.

10. If a Bailiff *arreſts* a Man on a Sunday ſince 29 Car. 2. cap. 7. by which all ſuch Arreſts are made unlawful, and the Bailiff *is killed in the making it*, Serj. Hawkins ſays, Perhaps this will be Manſlaughter only. Hawk. Pl. C. 86. cap. 31. S. 58.

(C) In what Caſes it ſhall be *Dies Juridicus*.

1. IF an *Original* ſhould *bear Date on a Sunday*, the *Appearance* of the Party would *not help it*. Arg. Vent. 7. Hill. 20 & 21 Car. 2. B. R. in Caſe of * Vaughan v. Loyd.

But where a Declaration in *Ejectment* was *deliver'd on a Sunday*, *and a Writ of Inquiry was executed.* The Court refuſed to intermeddle, and ſaid, That the *Appearance* had *made all good*; And the Judgment ſtood. Ld. Raym. Rep. 705, 706. Mich. 13 W. 3. Walgrave v. Tailor.

* Sid. 406. pl. 16. S. C. but S. P. does not appear.

2. Ser-

2 Saund. 290, 291.—2 Keb. 731. —— 1 Vent. 107.

2. Serjeant Hawkins ſays, It hath been holden, that in every *Caption of an Indictment* taken *in* a Sheriff's *Torn or Court-Leet*, the Day whereon it was taken ought to be ſet forth, that it may appear not to have been on a Sunday. 2 Hawk. Pl. C. 56. S. 9. cites the Caſes in the Margin.

The 4 Days to plead muſt always be reckoned ſuch Days wherein the Defendants may plead, and *when the Offices are open*; and

3. Caſe againſt the Cuſtos Brevium, the *Declaration* was *delivered on Friday Morning*, and *Rules* given *to plead within* 4 Days, whereas Saturday and Sunday were not juridical Days. Et per Cur' we reckon them Non juridici as to *Matters to be tranſacted in Court*, and therefore Sundays and Holidays are no Days to **move in Arreſt of Judgment. But* as to Buſineſs *done out of Court*, *Rules to plead* within 4 Days &c. Sundays are reckoned the ſame wirh other Days. Salk. 624. pl. 2. Trin. 11 W. 3. B. R. Aſmole v. Serjeant Goodwin.

therefore Sunday is never reckon'd one of thoſe Days, becauſe neither Courts or Offices are then open. And this is not like the Caſe mention'd on the other Side, where Sunday is reckon'd *one of the* 14 *Days for giving Notice of Trial*, becauſe a Man may prepare for his Journey, or come up to London on that Day as well as on any other Day of the Week; and for this Reaſon it was reſolved, That the Plea ſhould be received. 8 Mod. 21. Mich. 7 Geo. 1721. The Ld. Coningsby's Caſe.

* Sunday is not included in the 4 Days *to move in Arreſt of Judgment*, but the Defendant muſt have 4 juridical Days. 2 Salk. 625. pl. 6. Trin 2 Ann. B. R. Sir Chriſtopher Hales v. Owen.

Upon hearing Council on both Sides, and after taking Time to conſider,

4. It was moved to ſtay the Proceedings, the *Writ* being *returnable in* 8 *Days from St. Hillary*, and the Notice being *to appear on Sunday* Jan. 20. Per Cur. The Sunday is the true Day of the Return, and therefore it is as it ought to be. Notes in C. B. 205. Hill. 7 Geo. 2. Jenner v. Oatridge.

The Court were of Opinion, that a *Notice to appear on Monday Jan.* 21, *as the Return-Day of Oct. Hill.* was bad; It ought to have been to appear on the 20th, which, although it be *Sunday*, *is the true Day* of the Return. Notes in C. B. 207. Eaſt. 7 Geo. 2. Lloyd v. Beeſton.

5. The *Writ was returnable Quinden' Paſchæ*, ſerved with *Notice to appear on April* 28, *which was Sunday*. It was moved to ſtay Proceedings; But per Cur. the Day in the Notice is the true Day of the Return. No Rule. Notes in C. B. 207. Eaſt. 7 G. 2. Lloyd v. Beeſton.

Notes in C. B. 209. S. C.

6. A Motion to ſtay Proceedings the *Writ* being *returnable on a Sunday*, and a *Copy* thereof *ſerved with Notice to appear upon the Monday after*, whereas the *Eſſoin-Day was on the Sunday*; The Defendant did not complain to the Court of this Irregularity till after Notice of a Declaration was ſerved, tho' before Judgment ſigned, which it was inſiſted was too late; But the Court ſaid, Since he came before Judgment was ſigned, it was ſoon enough; for till ſerving of the Notice of the Declaration, he could not tell whether the Plaintiff would proceed upon ſuch irregular Service of the Proceſs; and therefore Proceedings were ſtaid. Rep. of Pract. in C. B. 105, 106. Trin. 7 & 8 Geo. 2. Jamet v. Voyer.

(D) Statutes.

1. 1 *Car.* 1. cap. 1. ENacts, That *there ſhall be no Meetings, or Concourſe of People, out of their own Pariſhes, on the Lord's Day, for any Sports and Paſtimes, nor any Bear-baiting, Bull-baiting, Interludes, Common Plays, or other unlawful Exerciſes, uſed by any within their own Pariſhes; and every Perſon offending ſhall forfeit* 3 *s.* 4 *d. to the Uſe of the Poor of the Pariſh. And if any Juſtice of Peace, or the chief Officers of any City, Borough, or Town Corporate, upon their View, or Confeſſion of the Party, or Proof of one Witneſs by Oath, ſhall find any Perſon offending in the Premiſſes, the ſaid Juſtice or chief Officer ſhall give Warrant to the Conſtables and Church-Wardens of the Pariſh, to levy the Penalty by Diſtreſs and Sale of Goods;*

Goods; and in Default of Diſtreſs, that the Party offending be ſet in the Stocks 3 Hours; and if any Man be ſued for Execution of this Law, he may plead the General Iſſue, provided that no Man be impeach'd by this Act, except he be call'd in Queſtion within one Month after the Offence; Provided alſo that the Eccleſiaſtical Juriſdiction by this Act ſhall not be abridg'd.

Continued indefinitely by 3 *Car.* 1. *cap.* 4. *and* 16 *Car.* 1. *cap.* 4.

2. 29 *Car.* 2. *cap.* 7. *S.* 1. Enacts, That *all the Laws in Force concerning the Obſervation of the Lord's Day, and repairing to Church thereon, ſhall be put in Execution; and all Perſons ſhall on every Lord's Day apply themſelves to the Obſervation of the ſame, by exerciſing themſelves in Piety and true Religion publickly and privately; and no Perſon ſhall do any worldly Labour or Work of their ordinary Callings upon the Lord's Day (Works of Neceſſity and Charity excepted;) and every Perſon of the Age of* 14 *Years, or upwards, offending in the Premiſſes, ſhall forfeit* 5 *s. And no Perſon ſhall publickly cry, or expoſe to Sale, any Goods upon the Lord's Day, upon Pain to forfeit the ſame Goods.*

S. 2. *No Drover, Horſe-courſer, Waggoner, Butcher or Higler, ſhall travel or come into their Inn or Lodging upon the Lord's Day, upon Pain to forfeit* 20 *s. And no Perſon ſhall travel upon the Lord's Day with any Boat, Wherry, Lighter, or Barge, except upon extraordinary Occaſion, to be allowed by ſome Juſtice of Peace, or Head-Officer, upon Pain to forfeit* 5 *s. And if any Perſon offending in the Premiſſes ſhall be convicted before any Juſtice of Peace, or Chief Officer, upon View or Confeſſion of the Party, or Proof of one Witneſs by Oath, the ſaid Juſtice or Chief Officer ſhall give Warrant to the Conſtables or Church-wardens to ſeiſe the Goods cried or put to Sale, and to ſell the ſame, and to levy the other Forfeitures by Diſtreſs and Sale of Goods; and in Default of Diſtreſs, the Offender ſhall be ſet in the Stocks* 2 *Hours; and all the Penalties aforeſaid ſhall be employed to the Uſe of the Poor of the Pariſh, ſaving that it ſhall be lawful for any ſuch Juſtice, Mayor, or Head-Officer, out of the Penalties to reward any Perſons that ſhall inform, ſo as ſuch Reward exceed not the* 3*d Part of the Penalties.*

S. 3. *Nothing in this Act ſhall extend to the prohibiting of Dreſſing of Meat in Families, or Dreſſing or Selling of Meat in Inns, Cooks Shops, or Victualling-houſes, for ſuch as otherwiſe cannot be provided, nor to the Crying of Milk before* 9 *in the Morning, or after* 4 *in the Afternoon.*

S. 4. *No Perſon ſhall be proſecuted for any Offence before mentioned, unleſs he be proſecuted within* 10 *Days after the Offence.*

3. 11 *&* 12 *W.* 3. *cap.* 21. *S.* 3. Enacts, That *it ſhall be lawful for the Rulers &c. of the Company of Watermen, to appoint any Number of Watermen, not exceeding* 40, *to work on every Lord's Day between Vaux-hall above London Bridge, and Limehouſe below Bridge, at convenient Places for carrying Paſſengers croſs the River, at* 1 *d. each &c.*

4. 9 *Ann. cap.* 23. *S.* 20. Enacts, That *Coachmen or Chairmen licens'd, may ply on the Lord's Day, notwithſtanding the Act* 29 *Car.* 2. *cap.* 7.

For more of Sunday in general, ſee **Eſcapes, Robbery,** and other Proper Titles.

S Super-

Superſedeas.

(A) Superſedeas. *What Thing* will be a Superſedeas. *Writ of Error.* [* *Audita Querela*, pl. 6.]

* See (H)

1. WHere the Party cannot be reſtored to all that which ſhall be loſt by the Execution (if it be made) when the Judgment is reverſed, **there the Writ of Error ſhall be a Superſedeas of the Execution**; (**at what Time ſoever it be brought as it ſeems is intended**) **becauſe otherwiſe it will be miſchievous.** 7 H. 6. 29.

2. As **if a** Juror be attainted **in a Writ of Attaint, a Writ of Error ſhall be a Superſedeas, becauſe he cannot be reſtored to that which he ſhall loſe, if the Execution be made.** 7 H. 6. 29.

3. **The** ſame **Law is in Writ of Error** upon an Attainder of Felony. 7 H. 6. 29.

Where a Man brings Writ of *Error* of a Judgment given againſt him, he ought to ſue Superſedeas of Execution: Otherwiſe the Plaintiff may ſue Execution in the firſt Court: By the beſt Opinion; quod Mirum! for by the Writ of Error the Record is removed; but this Caſe was upon the Recovery of a Statute, and then he ſued Execution upon it in Chancery; ſo that the *Execution came upon the Statute Merchant, and not upon the firſt Judgment.* Br. Superſedeas, pl. 16. cites 7 H. 6. 44.——Br. Error, pl. 66. cites 7 H. 6. 42.———S. P. Br. Executions, pl. 48. cites 7 H. 6. 42.——And tho' all the Editions of Br. Superſedeas, pl. 16. cites 7 H. 6. (44) yet it ſeems it ſhould be (42) pl. 17. and that there is no ſuch Point at (44)

4. But **if** Conuſee of a Statute recovers **the Statute** in Bank in Detinue againſt Garniſhee by Falſe Judgment, **and after the Garniſhee brings Writ of Error in B. R. thereupon, if the** Garniſhee after ſues Execution upon the Statute in Chancery, **this Writ of Error ſhall not be any Superſedeas in Law, tho' if it be executed, the Garniſhee ſhall not be reſtored thereto, becauſe it is collateral.** 7 H. 6. 42. (**It ſeems becauſe it** is collateral to the firſt Judgment.)

Fol 490.

Br. Error, pl. 66. cites S. C. but Brooke adds, that it ſeems that after the Writ of Error is ſued and allowed, Execution cannot be awarded of the firſt Judgment; for *by the Writ of Error the Record itſelf is removed, and then the Court has nothing whereof to award Execution.*

5. But **it ſeems it is a Superſedeas in Law** to the Defendant; **ſo that he ought not to deliver the Statute to the Plaintiff, as he there did, and thereupon the Plaintiff ſued Execution; and there it is held that** it is not any Superſedeas in Law of the Delivery without an actual Superſedeas.

Br. Superſedeas, pl. 18. cites S. C.—

6. **An** Audita Querela upon a Statute, **ſhall be a Superſedeas in Law of the Execution upon it.** 24 E. 3. **Audita Querela** 11.

If a Man ſues forth an Audita Querela, to avoid a Statute Staple or a Statute Merchant, he ſhall have a Superſedeas to the Sheriff, not to do Execution hanging the Plea &c. F. N. B. 240. (A) cites Regiſt. 113.

Audita Querela *is no Superſedeas*, and therefore Execution may be taken out, *unleſs a Superſedeas be ſued forth*; and if the Audita Querela be founded on a Deed, it muſt be proved in Court before a Superſedeas ſhall be granted. 1 Salk. 92. pl. 1. Mich. 3 W. & M. B. R. Langſton v. Grant.———It is no Superſedeas *till* there be *a ſpecial Superſedeas*, which ſhall not be granted till the Matter be *proved by 2 Witneſſes.* 12 Mod. 105. Anon.———Comb. 389. Mich. 8 W. 3. B. R. Langſton v Grant, That when the Deed is produced in Court, and prov'd or confeſs'd, a ſpecial Superſedeas may iſſue, but not to ſtop the Sheriff from ſelling; Per Holt Ch. J. But the Goods were ſtay'd by Conſent.

7. When

7. When *one is in Execution*, they cannot ſuperſede it by Error, but *he muſt continue committed*, elſe there would be no Remedy to bring him into Cuſtody, in caſe the Judgment ſhould be affirm'd; *but on* an *Audita Querela* the Party *is diſcharg'd by Bail*, becauſe this is a *new Suit*; and the Party is never to be taken again. 2 Keb. 43. pl. 88. Paſch. 18 Car. 2. B. R. The King v. Whitmore.

Sid. 286. pl. 23. S.C. The Party was in Execution at the Suit of the King upon a Conviction for Deer-ſtealing and Breaking of Parks.——So where Perſons were fined to the King at the Seſſions, and in Execution for it, and brought Habeas Corpus and a Writ of Error, the Court would not bail them, becauſe they are in Execution for the King; but it was ſaid that it is uſual in the Crown Office to bail in ſuch Caſe. Sid. 320. pl. 10. Hill. 18 & 19 Car. 2. B. R. The King v. Marſcull &c. Inhabitants of Lyme-houſe.

(B) By Error. *In what Caſes* it ſhall be a Superſedeas in Law. By what Thing. [*Not where it is as a new Original.*]

1. **Upon a Recovery againſt Executors, and a Return of a** a Deveſtavit, **if a** Scire Facias be awarded de Bonis Propriis, and **this** found for the Plaintiff, **by Niſi Prius returnable** 15 **Paſch.** and before Judgment, **Scilicet,** at the 4th Day, **a Writ of** Error is brought of the firſt Judgment; **yet it ſhall not be any Superſedeas to give Judgment and Execution upon the** Scire Facias, **for they are diſtinct, and in a manner** ſeveral Originals. 10 H. 6. 6. **adjudged, and Judgment ſhall have Relation to the firſt Day.**

2. If after a Re-diſſeiſin **brought, the Tenant brings Writ of** Error upon the Recovery in Aſſiſe, **yet this ſhall not be any Superſedeas** to the Proceeding in the Re-diſſeiſin, **becauſe it is in a manner** a new Original. 10 H. 6. 6. b.

3. But if Scire Facias **be ſued to have Execution of a Judgment in Annuity, a Writ of** Error of the Judgment in **the** Annuity **ſhall be a Superſedeas** of the Scire Facias; **for it always depends upon the firſt Original.** 10 H. 6. 6. b.

4. **If a Man brings** Debt for Damages recover'd by Judgment, **if** after **the** Record **of the Judgment** be removed **by Writ of Error, yet this is not any Superſedeas** to the Action of Debt; **for it is a** new Original. 10 H. 6. 6.

S. P. Br. Error, pl. 170. cites 13 E. 4. 4.——But where a *Man recovers Debt and Damages*, &c. and Writ of *Error is thereof brought*, there the Demandant or Plaintiff can't ſue Execution by Original nor otherwiſe of the Damages, nor of the Land; becauſe *by the Writ of Error the Record is gone, and the Hands of the Juſtices cloſed.* Br. Execution, pl. 68. cites 4 H. 6. 31.—Br. Dette, pl. 106. cites S. C.

But in Action upon the *Caſe*, the *Plaintiff was nonſuited at the Verdict*; by which the *Defendant*, by the Statute 23 H. 8. *had Judgment to recover his Coſts*; and after the *Record was removed by Error into B. R.* by the Plaintiff, pending which the *Defendant brought Action of Debt in C. B. upon a new Original, and counted upon the Record of the Action upon the Caſe*, and this Matter was pleaded by the Defendant, &c. and the beſt Opinion of the Court was, that the Action is maintainable, inaſmuch as it is brought upon a new Original. D. 32. pl. 5. Paſch. 28 & 29 H. 8. Anon.

Defendant brought a Writ of *Error in the Exchequer-Chamber*, of a Judgment given againſt him in B. R. And then *Plaintiff brought* an Action of *Debt upon that Judgment*; to which *Defendant pleaded, Nul tiel Record.* Reſolved, that the Plea is naught; for Debt lies notwithſtanding, and cited D. 32. b. pl. 5, 6. & 18 E. 4. 7. But Bendl. 20. pl. 31. takes this Difference, that when the Action of Debt is brought before the Writ of Error, the Action continues good. But if the Writ of Error is brought firſt, then Debt does not lie. But that in Caſe of **Limbny v. Langham**, the Judges held it was all one, and that Writ of Error is no Superſedeas to an Action of Debt; and that notwithſtanding the Writ of Error, the Bail may bring in the Principal in Diſcharge of the Mainpernors. Raym. 100. Hill. 16 & 17. Car. 2. B. R. Adams v. Tomlinſon.——Lev. 153 S. C. and ſays, that all except Keeling held, that it well lies; for the Record itſelf is ſtill in this Court, and the Writ of Error is a Superſedeas only of the Execution——Sid. 236. S. C. accordingly.——Mod 121. pl. 23. Paſch 26 Car. 2. Draper v. Bridwell: All the Court held, that an Action of Debt would lie upon a Judgment after a Writ of Error brought.—3 Keb. 330. pl 25. S. C.—S. C. cited Lutw. 602. & S. P. reſolved accordingly, (the Ch. J. being

being abſent) Mich. 11 W. in Caſe of Denton v. Evans. For (as Powel, J. ſaid) this Action has been allow'd ever ſince the Reign of H. 6. And ſometimes this Plea has been pleaded in Abatement, and ſometimes in Retardatione, &c. of the Suit; but could not be made good, becauſe there can be no certain time for Re-ſummons of the Party, when the Judgment ſhould be affirm'd, as there is in the Caſe of a Protection.

So Debt upon a Judgment in B. R. the Defendant pleaded, in Abatement of the Action, a Writ of *Error* pending upon this Judgment *in Cam. Scacc.* To which the Plaintiff demurr'd; and it was adjudg'd for the Plaintiff being argued by Serjeant Levinz for the Plaintiff, & Sid. 236. 4 H. 6. 31. & 18 E. 4. 6. were cited by him to be ſo reſolved. And a Caſe was cited by Dolben to be adjudged accordingly in the Time of Roll, and after affirm'd in Parliament before all the Judges in England, between Limerick and . . . . . And tho' it had been ſtuck at, and Vaughan queſtion'd it, yet it had been oftentimes ſo ruled. And it was held in the Caſe of Danvers and Smith in the Exchequer-Chamber, that ſuch Plea is not good in Bar, but good in Abatement; but this Difference was not thought reaſonable. And Holt, Ch. J. ſaid, if it was not for the Current of Authorities contra, it ſeemed hard to him that ſuch an Action lies; for the Writ of Error is a Superſedeas to an Execution, and therefore, Pari ratione, it ought to be a Superſedeas to all the Ways to come at an Execution; and he cited the Caſe of Read and Bearblock, where a Man pays a Security of an inferior Nature, pending a Writ of Error upon a Judgment on a Security of an higher Nature, this was not a Devaſtavit, which ſhews that the Writ of Error had ſo totally ſuſpended the Effect of the Judgment, that it ſhall not have any Regard or Eſſence; but this notwithſtanding, it was, tho' with ſome Reluctance, adjudged by him and all the Court ut ſupra. Skin. 388. Mich. 5 W. & M. B. R. Grandvill v. Dighton.—Comb. 229. Greenvil v. Dighton, S. C. accordingly.——See 4 Mod. 247. Dighton v. Granvil.

In *Debt in C. B. upon a Judgment in the ſame Court*, upon Nil Debet pleaded, the Iſſue was tried at Guildhall, where the Defendant gave Evidence, that *the Judgment on which this Action was founded, was removed into B. R. by Writ of Error* now depending there. The Queſtion (upon a Caſe made) was, Whether this Action is maintainable in C. B. after the Record removed into B. R. It was argued, that it was; becauſe the Record remains ſtill in C. B. to all Purpoſes, except as to ſuing out Execution upon it, and the Superſedeas is only to ſtay Execution, and cited Sid. 236. & 4 H. 6. 31. a. & 18 E. 4. 6. b. But the Ch. J. held, that the Action did not lie as the Plaintiff had laid it, as upon a Judgment in this Court, but *ought to declare upon the whole Matter*, (viz.) of *the Judgment in C. B.* and *the Removal of it* by the Writ of Error; *and that the Judgment is ſtill in Force, Prout patet per Recordum inde in B. R.* 3 Lev. 396. Paſch. 7 W. & M. in C. B. Gale v. Till.——The Reporter adds, that in Trin. or Mich. 9 W. 3. in Debt brought in C. B. upon Judgment in C. B. after Error brought, declaring upon the whole Matter, Judgment was given for the Plaintiff by all the Court. 3 Lev. 397.—3 Lev. 375. Mich. 5 W. & M. in B. R. S. C. but D. P.———Comb 228. S. C. but D. P.——Carth. 281. S. C. but D. P. —— Skin. 400. S. C. but D. P ——4 Mod. 244. S. C. but D. P.

The Court doubted if Debt would lie upon a Judgment *pending a Writ of Error.* Holt, Ch. J. ſaid, Vaughan was of a different Opinion from Hale in this Matter. Et adjornatur. But the Law ſeems now fixed, That a Writ of Error ſtays all Proceedings whatſoever. 11 Mod. 78. pl. 10. Paſch. 5 Annæ, B. R. Anon.

Scire Facias to execute a Fine, the Tenant brought Writ of Error; and 'twas argued if it ſhould be allow'd, becauſe *Execution was awarded*; and at laſt it was allow'd, for by the Writ of Error their Hands are cloſed; ſo that if they proceed it will ſerve for nothing, wherefore they allow'd it. Br. Error, pl. 10. cites 20 H. 6. 4.

5. If a Scire Facias be ſued to have Execution of a Fine, and Tenant comes and pleads, and after brings Writ of Error of the Fine; yet this ſhall not be any Superſedeas to the Scire Facias; for it is in a manner a new Original. 10 H. 6. 6.

6. But otherwiſe it is, if he brings the Writ of Error before the Return of the Scice Facias. 20 H. 6. 4. b.

7. If a Man be adjudg'd to Account, and after the Plaintiff brings a Capias ad Computandum, in which the Parties are at Iſſue, and it is found againſt the Defendant; and after the Defendant brings Writ of Error, admitting that it lies, yet it ſhall not be any Superſedeas; ſo that the Judges ſhall not give Judgment according to the Verdict. 21 H. 6. 26.

S. P. but is founded upon the firſt Grant of the Annuity. Br. Error, pl. 200. cites 4 H. 6. 31.

8. Where a Man *grants an Annuity for* 20 *l. and for Non-payment* at the Day 10 *l. nomine Pœnæ*; there if *Writ of Annuity be brought of the Annuity*, and the *Plaintiff recovers*, and the *Defendant brings Writ of Error*, there the *firſt Plaintiff, upon ſhewing of the Deed, may have* Writ of *Debt for the Pain in C. B.* And it is no Plea, that there is Writ of Error pending of the principal Annuity; for *this Action is not brought of any thing* which was *adjudged by the firſt Record.* Br. Execution, pl. 68. cites 4 H. 6. 31.

2 Lev. 38. S. C. by the Name of

9. Writ of *Error in the Exchequer-Chamber* of a Judgment in B. R. and *Error in Fact was aſſign'd* there, and *they affirm'd the Judgment:*

Whereupon

Whereupon *the Record of Affirmation was remitted into B. R. and another Writ of Error in B. R. coram vobis reſiden'*; (as is uſual for Error in Fact.) It was moved, that upon putting in Bail, this new Writ of Error might be a Superſedeas to the Execution: But the Court held, that this Writ was not to be allow'd in this Caſe; becauſe the Judgment being affirm'd in the Exchequer-Chamber tranſit in Rem Judicatam, and a Writ of Error cannot be brought here on a Judgment there; and it is the Courſe, in a Writ of Error, to recite all the Proceedings that have been in the Matter. And the Courſe is, that if a Writ of Error be brought here, upon Error in Fact of a Judgment here, the Writ ſhall be allow'd in Court; which the Court ſaid they would not do in this Caſe. Vent. 207. Paſch. 24 Car. 2. B. R. Prior v. .....

Hopkins and Prior v. Wrigleſworth, ſays *the Error aſſign'd in the Exchequer Chamber was the Death of one of the Plaintiffs*; and the *Defendant* in Error there, *pleaded In nullo eſt Erratum*, which is a Confeſſion of the Error in Fact. And now by Hale Ch. J. the new Writ of Error does not lie in B. R. becauſe it ought to be brought upon, and recite all the Proceedings in the Exchequer-Chamber.

10. After Judgment in B. R. the Defendant *brings Error in the Exchequer-Chamber, and puts in Bail* to anſwer the Meſne Profits, and all Damages the Defendant in Error may ſuſtain, in caſe the Judgment be affirm'd; pending which the *Plaintiff in the original Action brings Treſpaſs* againſt the Defendant *for the meſne Profits*. It was moved, that the Plaintiff has no Title to this Action, pending the Writ of Error; for by this means the Defendant may be doubly charged; and ſhould the Plaintiff get Judgment in Treſpaſs before the Writ of Error be determined, we have no Remedy (in caſe the Judgment be reverſed) for the Damages recover'd againſt us in Treſpaſs. But it was anſwer'd by 3 Judges, (Holt abſent) that this Writ of Error in the Exchequer-Chamber is no Superſedeas of the Judgment, as it would be in this Court upon a Judgment in C. B. and we think he may as well have this Action for the meſne Profits, as Debt upon the Judgment, notwithſtanding the Writ of Error; and there is no Inconvenience to the Party thereby, for *the Damages upon the Treſpaſs are a good Bar to the Plaintiff in any Action brought for them after the Affirmance of the Judgment*; wherefore this Action muſt proceed. Comb. 455. Mich. 9 W. 3. B. R. Tonford v. .....

11. The Plaintiff had Judgment in *Ejectment*, of which Error was brought, and Bail given to proſecute, and anſwer the mean Profits, and pending it, the Plaintiff brought *Debt for Rent*. And, per Cur. the Writ of Error does not hinder the Plaintiff from bringing Debt, or diſtraining for his Rent; and here he might have enter'd without a Writ of Execution, and *only* all *Executions by Writ are ſuſpended* by the Writ of Error. 12 Mod. 398. Paſch. 12 W. 3. Badger v. Floid.

12. *Debt upon* a *Judgment* in B. R. the Defendant pleads a Writ of Error, pending in the Exchequer-Chamber before the Juſtices and Barons; and prays quod Billa caſſetur. The Plaintiff demurs. The Reſolution of the Court was deliver'd by Parker, Ch. J. That this was no good Plea, and that the Defendant muſt anſwer over; and declared, that they founded their Judgment upon the many Reſolutions that there had been in the like Caſe. He obſerved, that two *Queſtions* were made in the debating of this Caſe: 1ſt, *How far the Plaintiff could proceed*, pending the Writ of Error. And 2dly, *Whether the Record was remaining in this Court*, or removed into the Exchequer-Chamber. The Action here was brought on the Record of a Judgment in this Court. 1ſt, As to this it has been thought a very hard thing, that while the Judgment was in Diſpute, the Plaintiff ſhould go on to recover this way. It has been attempted every way, that could be thought on, to put a Stop to this Way of proceeding; ſometimes by pleading it in Bar, to ſuch an Action, ſometimes by pleading it in Abatement, and ſometimes by pleading it as a temporary Bar only; but it has nevertheleſs been adjudged, that the Action did lie. And cited 1 Lev. 153.

* See among the Notes to pl. 4. S. C.

* Adams v. Tomlyns, (ſee 4 H. 6. 31.) Syd. 236. Raym. 100. And alſo the Caſe of **Creamer v. Humberſton,** 2 Keb. 520. where Debt was brought by an Executor on a Judgment by the Teſtator, the Defendant pleaded in Abatement, that there was a Writ of Error depending in the Exchequer-Chamber. To which the Plaintiff demurr'd, and a Reſpondeas ouſter was awarded. It was here agreed per Curiam, that Debt did lie, but that it was gone by reverſing of the firſt Judgment. In 1 Vent. 34. it is ſaid, that if a Judgment in Debt be had in B. R. and a Writ of Error be brought, it ſtill remains a Record of B. R. and an Action of Debt may be brought upon the Judgment. See 2 Keb. 659. Holmes v. Chamberlaine, this Plea was pleaded, and diſallow'd. See 2 Keb. Poſterne v. Weber. And the Court ſaid they would ſtay the Proceedings; albeit there had been no Delay in the Proſecution of the Writ of Error, and ſo adjudged in * **Lymry** and **Langham**'s Caſe. There are many other Caſes, and it has been always held, that the Action did lie. Show. 146. † **Rottenhuffer v. Lenthall.** 4 Mod. 247. Lutw. 600. 2dly, It was reſolved, that the Record does remain in the Queen's Bench, notwithſtanding the Writ of Error in Cam. Scacc. Suppoſing the Writ of Error does not prevent the Action, it has been reaſonably argued, that they ſhould have a Record before them to proceed upon; but yet it has been held, that the Record is not before them. The Words of the 27 Eliz. cap. 8. are only directory: It enacts, That in the Caſes mention'd in the Act, a ſpecial Writ of Error ſhall be deviſed in the Court of Chancery, directed to the Ch. Juſt. of B. R. commanding him to cauſe the ſaid Record, and all things concerning the Judgment, to be brought before the Juſtices of C. B. and Barons of the Exchequer, into the Exchequer-Chamber, there to be examin'd by the ſaid Juſtices of B. R. and Barons of the Exchequer, &c. It has been always thought ſufficient, if the Tranſcript of the Record were only removed; That is a Removal of the Record quoad their Conſideration. All the Entries are Tranſcript' Record' & Proceſſ' &c. cum omnibus ea tangent' prætextu cujuſdem Brevis Dominæ Reginæ de Error' corrigend' &c. in præmiſſis proſecut' Juſtic' dictæ Dominæ Reginæ de C. B. & Baron' de Scaccar' Dominæ Reginæ in Cam. Scacc' Juxta formam Statuti, &c. a Cur. dictæ Dominæ Reginæ hic coram ipſa Regina tranſmiſſ. fuerunt, &c. except 1 And. 143, 144. where Record' & Proceſſ' are tranſmitted into Cam' Scacc. but all other Precedents are to the contrary. It was reſolved, that the Action was well brought, and that the Defendant ſhould anſwer over; Per tot. Cur. Parker, Ch. J. Powell, Powis, and Eyre. Paſch. 10 Ann. Regina, B. R. Godwin v. Godwin.

* See (B) pl. 4. in the Notes there, S. C.

† See (C) pl. 22. S. C.

1 Saund. 18c. Lawe v. King.

Plaintiff recover'd Judgment; Defendant *brought a Writ of Error, and pending that Writ, Plaintiff brought* an Action of *Debt on the Judgment, and* after Judgment therein, *levied Execution.*

13. In Action of *Debt upon a Judgment,* Defendant *moved to ſtay the Proceedings pending a Writ of Error,* which the Court order'd upon giving Judgment in this Action. A Rule of Court of B. R. was produced, whereby Proceedings were ſtaid, without giving Judgment pending the Writ of Error; but per Cur. the Practice is otherwiſe. Barnes's Notes in C. B. 170. Trin. 7 & 8 Geo. 2. Sedgley v. Weſtbrooke.

And the Queſtion was, Whether Plaintiff could do this without Leave of the Court, per Cur. *Defendant* might have moved the Court to ſtay Proceedings in the Action on the Judgment, pending the Writ of Error, which is always granted; but *having made no* ſuch *Application, Plaintiff is regular.* Barnes's Notes in C. B. 137. Eaſt. 9 Geo. 2. Humphreys v. Daniel.—Rep. of Pract. in C. B. 129. S. C. accordingly.

(C) Super-

(C) Superſedeas. By *Error or Attaint.* See (A) (B)

1. IF a Man recovers Debt againſt Executors, **a Writ of Error ſhall be a Superſedeas of the Execution.** 17 E. 3. 46.

2. **If a Man** recovers **againſt J. S.** in **a Writ of** Treſpaſs, by which it is awarded quod Defendens capiatur; **and after the Defendant brings Writ of Error, yet it ſhall not be any Superſedeas** of the Capias pro fine **for the King.** 16 Ed. 3. **Attaint** 24. **by Hill.**

3. So **if the Defendant brings an** Attaint, **yet this ſhall not be any Superſedeas of the Capias pro Fine for the King.** 16 E. 3. **Attaint** 24. **by Hill.**

If a Man be *condemned* in Debt or Treſpaſs *by falſe Verdict*, and a Capias be awarded to arreſt the Party, now if the Party ſues an Attaint, he may come into the Chancery, and there *find Sureties that he ſhall appear* at the Day &c. and *anſwer the Party, and ſatisfy the King and the Party* what belongs to them, *if the Attaint does paſs againſt him*; And upon the ſame he may have a Superſedeas to the Sheriff, that he do not arreſt him. F. N. B. 237. (F)

If a Man be *condemned in Treſpaſs* and the *Defendant brings Attaint*, and the *Plaintiff ſues Execution by Elegit*, and *Capias is awarded* againſt the Defendant *for the King's Fine*; the Defendant in Chancery may ſue a Superſedeas of the Capias reciting in the Writ, that the Defendant has brought an Attaint, and that the Plaintiff has ſued forth an Elegit, commanding the Sheriff to whom the Superſedeas is directed, that if the Defendant do yield himſelf to Priſon, and there *find Sureties* to the Sheriff *to ſatisfy the King for what belongs to him* &c. that then he do deliver him out of Priſon upon that Security, if he conceives the ſame to be ſufficient Security. F. N. B. 238. (c)

4. **If A.** recovers **againſt B.** Debt or Damage, and **after** ſues a Capias ad Satisfaciendum **againſt B. which** is returned Non eſt inventus, and **upon this a** Scire * facias is awarded againſt the Bail **and return'd,** and **after** a 2d Scire Facias is awarded, but a Day before the Return thereof B. brings Writ of Error upon the firſt Judgment. **This is not any Superſedeas to the Proceedings againſt the Bail, but the 2d Scire facias may be returned, and thereupon the** Plaintiff may proceed againſt the Bail, **notwithſtanding the Writ of Error**; **for it is** diſtinct from the principal Judgment. **Mich. 13. Car. B. R. between** *Lock v. Tilliard*, **by Jones and Croke againſt the Opinion of Brampſton.**

* Fol. 491.

5. **If a Man** recovers **againſt J. S.** and upon a Scire Facias has Judgment againſt the Bail, **and after the** Bail brings **Writ of** Error upon the Judgment given in the Scire Facias. **This ſhall not be any Superſedeas in Law of the Execution upon the firſt Judgment againſt the Principal. H. 11. Ja. B. R. adjudged.**

6. If A recovers againſt B. in B. R. where C. and D. are ſpecial Bail **for B. and after** B. brings **Writ of** Error **againſt A. upon this Judgment** in the Exchequer Chamber, **and after C. and D.** the Bail to diſcharge themſelves **of their Bail,** bring into the **Court of** B. R. the Body of B. and pray that his Appearance be entered, and that A. ſhall take him in Execution. **Yet tho' the Roll for the Bail is a ſeveral Roll from the Roll of the Judgment, that is to ſay, when Scire facias is brought againſt the Bail this is a Roll by itſelf, yet the Court cannot accept this Appearance to diſcharge the Bail, for the Writ of Error is a Superſedeas in Law thereto, in as much as it is a Superſedeas to the Principal Judgment. So that A. cannot there pray B. in Execution upon this Judgment, the Record being removed into the Exchequer Chamber. Hill. 20. Ja. B. R. between** * *Codnor* **and** *Henderſon* **per Curiam. Contra Mich. 2 Car. between** *Calfe* **Plaintiff,** † *Dingley* **and** *Davis* **Defendants, per Curiam.**

* S. C. cited Arg. Lat. 149. in the Caſe of Calf v. Bingley. —— S. C. cited Poph. 186. in S. C. by the Name of Calf v. Nevil & al'.

† Jo. 138. pl. 4 S. C. —— Poph. 185. S. C.

—— 3 Bulſt. 331. Calf v. Bingley. S. C. —— And ſee Bail (B) pl. 11. S. C. and the Notes there.

7. If

7. **If a Man** brings **Writ of** Error **upon a Judgment,** but does not remove the Record in 6 Days after, **Execution ſhall be granted, becauſe it appears that the Writ of Error is brought merely for Delay. P. 13. Ja. B. R. between** *Marſh* **and** *Whetſtone*, **adjudged per Curiam.**

Br. Execution pl. 3. cites 7 H. 4. 40. — Br. Surety pl. 3. cites S. C.

8 Where *Damages are recovered and the Defendant is impriſonable*, there he ſhall find Surety in Writ of Error, or remain in Priſon if the Year be not paſt, or if he be not in Priſon by way of Execution. Br. Error. pl. 38. cites 7 H. 4. 36. [40.]

S. P. But Brook ſays, Mirum! that their Hands are not clo'ed by the coming of the Writ of Error, which is

9. In Treſpaſs the Plaintiff recover'd, and *Writ of Error* came and it *expired, no Record being removed*, and after came *another Writ of Error*, by which *Execution was awarded for the Delay*, but it was ſaid, That when the Record is removed into B. R. the Defendant may come here and have Superſedeas to the Sheriff to ſurceaſe from Execution. Br. Superſedeas pl. 17 cites 9[it ſhould be 19] H. 6. 8.

directed to them. Br. Executions pl. 51. cites 19 H. 6. 7. 8. ——— The *very Sealing a Writ of Error* is a Superſedeas to the Execution per Keeling. And Twiſden ſaid, That in a Writ of Error to remove the Record of a Judgment *ſome of the Parties Names were left out*, and that by Advice of Wild J. the Writ not removing the Record, they took out Execution. But that the Court was of Opinion, that tho' the Record was not removed thereby (of which they ſaid, he was not Judge whether it was or not) yet that it ſo bound up the Cauſe that they could not take out Execution. It is indeed good Cauſe to quaſh the Writ of Error, when it comes up, but Execution cannot be taken out. Mod. 28. pl 73. Mich. 21 Car. 2. in B. R. Hughes v. Underwood.

The Difference of the Books is, that when the *firſt Writ abates by Act of the Party*, the *ſecond Writ* ſhall be no Superſedeas, but otherwiſe when it abates by the Act of God, or without the Act of the Party, As for want of Form. Per Jones J. and Judgment accordingly. Lat. 57, 58. Paſch. 1 Car. Crouch v. Hains.

10. Where the *Defendant is awarded to Account*, and *pleads to Iſſue before Auditors*, and this is certified to the Juſtices, and *found againſt him* by Niſi prius, and upon this a Writ of Error is caſt, yet the Court ſhall award him to the Fleet, for *he is as a Priſoner by Reaſon that he had found Mainpriſe before to appear in proper Perſon every Day pending the Plea*; for Writ of Error can't ſtay Execution, by Reaſon that there was a Judgment given before viz. the Award to account, and all Times after he ſhall be adjudged in Ward; and *if a Man be in Ward, he cannot be taken out* of Ward *by Writ of Error*. Br. Error pl. 77. cites 21 H. 6. 66.

11. If Error is ſued, there if it be *Error apparent* in the Record, the Juſtices ſhall let the Party to Mainpriſe, but if it be *Error in Fact Triable per Pais*, they uſed to award the Party to Priſon; per Priſot. Br. Error pl. 16. cites 32 H. 6. 21.

A *Writ of Error*, tho' it removes not the Record itſelf (in which Caſe it would neceſſarily be a Superſedeas,

12. *Judgment* was given *in the Exchequer*, and an *Attaint* was *brought in London*, and before Execution the Record was removed by Certiorari into Bank, and pending the Attaint, the firſt Plaintiff prayed Scire facias in Bank to have Execution on the Judgment, and had it; For an Attaint is not a Superſedeas, nor does a Superſedeas lie in Attaint as it does in Caſe of Error. Sic nota diverſitatem. D. 81. b. pl. 65. Hill. 6 & 7 E. 6. Ayliff v. Plat.

the Foundation of their Proceeding below being taken from them) is upon very good Reaſon in Law a Superſedeas; And in this Reſpect *differs from an Attaint which is no Superſedeas*, for the *Verdict* being founded *upon the Oaths Duodecim legalium & proborum Hominum*, the Law will admit of *no Preſumption* againſt the Truth of ſuch Verdict, till it be legally ſet aſide by Verdict in Attaint, which is the Reaſon the bringing ſuch Attaint only, is in itſelf no Superſedeas; So tender is the Law of the Reputation of the Subject, as for no Reſpect to preſume him perjured without manifeſt Proof upon the Oaths of a double Jury, and ſo tender of his Liberty and Property, as not to admit the ſame to be taken from him, upon ſo ſlight a Preſumption as the only ſuing forth a Writ of Error is. See Skin 422. Hill. 5 W. & M. in B. R. In the Caſe of the Certioraries in Chancery.

See (C. 2)— Error was brought in the Exchequer Cham-

13. 3 *Jac.* 1. *cap.* 8. Enacts, That *no Execution ſhall be ſtayed by any Writ of Error or Superſedeas thereupon in any Action of Debt upon a ſingle Bond, or upon any Obligation with Condition for Payment of Money only, or*

for

for Rent, or upon any Contract in the Courts of Record at Weſtminſter, or in the Counties Palatine, or in the Courts of Great Seſſion; unleſs ſuch Perſon, in whoſe Name ſuch Writ of Error is brought, with two Sureties, ſuch as the Court, wherein the Judgment is given, ſhall allow of, ſhall firſt be bound unto the Party for whom Judgment is given by Recognizance in double the Sum recovered, to proſecute the Writ of Error with Effect, and alſo to pay (if the Judgment be affirmed) all Debts, Damages, and Coſts, adjudged upon the former Judgment, and all Coſts and Damages to be awarded for Delay of Execution.

This Act was made perpetual by 16 *and* 17 *Car.* 2. *cap.* 8.

ber of a Judgment in this Court in Debt for Rent, which (and all other Writs of Error depending there) were *diſcontinued by the not coming of the Juſtices*; the Term being adjourned *Propter peſtilentiam* in London, and the Adjournment did not extend unto them: Now a *new Writ of Error, Quod coram vobis reſidet, was brought*; and foraſmuch as this Writ was brought after this Statute to ſtay Execution in Debt, it was prayed that according to the ſaid Statute he might have Execution, or that the Parties ſhould put in Sureties to pay the Condemnation: But upon Conſideration of the Statute, all the Juſtices held, That it was out of the Statute; becauſe it is not an original Writ of Error, but it is *in Lieu of a former Writ* upon which the Record was remov'd before the Statute; *and* it being diſcontinued *not thro' Default of the Party*, it is not Reaſon he ſhould be prejudiced thereby; Wherefore it was reſolved, that this Caſe was out of the Statute 3 Jac. cap. 8. Cro. J. 135. pl. 8. Mich. 4 Jac. B. R. Boſtock v. Snell.

Judgment in Debt upon an *Inſimul computaſſet*, the Defendant brought a Writ of Error in B. R. and the Plaintiff in the Action moved, that he might put in Bail, according to this Statute. But per Cur. This Caſe *is out of the Statute, becauſe the Debt recovered did not ariſe upon any Contract, or other Duty certain at the firſt*, but meerly upon an Account between the Parties, which has reduced diverſe uncertain Sums to a Certainty. So that the original Cauſe of Action being founded upon the Account, which is uncertain, it is therefore out of the Statute. Yelv. 227. Hill. 10 Jac. B. R. Girling v. .... ——— 2 Bulſt 53. 54 S C. by the Name of Gilling v. Baker; and the whole Court agreed, that this Caſe is out of the Statute, and the Writ of Error was allowed without finding Sureties; and the Counſel affirm'd it to have been ſo adjudged before.———S. C. cited and agreed Lev. 117. Paſch. 15 Car. 2. B.R. in Caſe of the Dean and Chapter of Paul's v. Capell.

Debt *upon Arbitrement*, is not within the Statute, becauſe here is no certain Debt at the firſt, nor till the Arbitrators have reduced the Controverſies to be recompenc'd by a certain Sum. Yelv. 227. Hill. 10 Jac. B. R. in Girling's Caſe.——S. P. 2 Bulſt. 54. in Caſe of Gilling v. Baker, S. C.——— S. P. agreed Paſch. 15 Car. 2. B.R. in Caſe of the Dean and Chapter of Paul's v. Capel.

But in Debt upon a *Bond* conditioned *to pay to B. ſo much* Money *as J. S. upon an Account by him ſtated* between the Plaintiff and Defendant, *ſhould declare to be due* to the Plaintiff. The Defendant pleaded, that J. S. had not declared any Thing to be due; upon which they were at Iſſue, and Judgment for the Plaintiff. Upon Error brought, the Queſtion was, whether the Plaintiff in Error ſhould find Bail upon this Statute, which extends only to Bonds to pay a certain Sum expreſs'd in the Condition. It was agreed, that this Action is founded on a Bond for Payment of Money only, which, *tho' uncertain when the Bond was executed*, yet *was certain before the Action brought*. And ſo ruled the Plaintiff in the original Action to take his Execution, unleſs the Plaintiff in Error puts in Bail before ſuch a Day. 1 Lev. 117. Paſch. 15 Car. 2. B. R. Dean and Chapter of St. Paul's v. Capel.

Debt upon *Bond for Performance of Covenants*, is an uncertain Debt; and therefore out of the Statute. 2 Bulſt. 54. Mich. 10 Jac. in the Caſe of Gilling v. Baker.

But where *Debt* was brought *on a Bond for Performance of Covenants*, and a Breach aſſign'd, and *Verdict* and Damages *for the Plaintiff*; and *Debt was brought on that Judgment*, and *Judgment had by Default*; and *Error* being brought *on the Judgment by Default*, the Queſtion was, whether the Plaintiff in Error ſhould put in Bail according to 3 Jac. 1. for it was agreed not to be within the Statute 13 Car. 2. It was objected, that the Original of this Action, being founded on Covenants, is not within any of the Words of 3 Jac. which are of Actions of Debt for Payment of Money only, or for Rent or Contracts for Money. And to this Twiſden inclined; but per Keeling and Morton, This laſt Action, upon which the Error is brought, was for Money only recovered by the firſt Judgment, and Judgment is within the Words (Contracts for Money) and ſo ruled the Plaintiff in Error to put in Bail. Lev. 260. Hill. 20 & 21 Car. 2. B. R. Biddolph v. Temple.

Executor pleaded Plene Adminiſtravit, which was found againſt him. He brought a Writ of Error; and it was moved that he ſhould not have a Superſedeas to ſtay Execution without *ſpecial Sureties* to pay the Condemnation, if Judgment be affirm'd. Reſolved that this Caſe is out of this Statute, which, tho' the Words are general, yet muſt be *intended where the Action is brought againſt the Party himſelf upon his Obligation, or* in Caſe *where the Judgment is general againſt the Executors*; but where the Judgment is ſpecial, that Execution ſhall be be Bonis Teſtatoris, and Damages only de Bonis propriis, it is not reaſonable that he ſhould find Sureties to pay the whole Condemnation with his own Goods; and according to this Difference Coke Ch. J. ſaid it had been ruled in C B. when he was there; and Man the Secondary ſaid, that the Precedents of this Court ever ſince the Statutes were, that a Superſedeas had been allowed upon Error brought by an Executor or Adminiſtrator. Cro. J. 350. pl. 2. Mich. 12 Jac. B.R. Goldſmith v. Platt.——2 Bulſt. 284. S. C. accordingly. And Coke Ch. J. ſaid, that if in this Caſe Sureties ſhould be found, this would then change the Judgment of the Law, which in this Caſe here is conditionally, (with a Si habuerit) and if he ſhould here find Sureties, that will then make the Judgment to be abſolute; and the whole Court agreed with him.—S. P. reſolved and ruled accordingly in Debt upon a Bond againſt an *Adminiſtrator*. And Wright Clerk of the Errors, ſaid it was the common Practice upon this Statute. Cro. C. 59. pl. 3. Hill. 2 Car. C B. Sir Henry Mildmay's Caſe

But in Scire facias againſt Adminiſtrator Defendant upon *Devaſtavit* alleg'd, and *Judgment de Bonis propriis*, Error was brought, and it was agreed Per tot. Cur. that he ſhall find Bail; for being charg'd de Bonis propriis, it is not like the Caſe where Adminiſtrator is charg'd de Bonis teſtatoris; but here it is in Jure proprio, and not like **Wildmay's Caſe**, nor to **Goldſmith and Platt's Caſe**, [above] Lev. 245. Trin. 20 Car. 2. B.R. Fitzwilliams v. More.——Sid. 368. pl. 4. S.C. accordingly.

Judgment was given in Debt upon an Obligation for Payment of Money, and Debt upon this Judgment, and another Judgment thereupon; and in Error of the laſt Judgment, it was doubted if Bail ſhall be found. Cited Lev. 268. in Caſe of Biddolph v. Temple, as Mich. 29 Car. 2. Taylor v. Baker.

Bond for Payment of Money *upon the Return of a Ship on a Bottomree Contract* is out of the Letter of the Act of 3 Jac. cap. 8. ſo that no Bail is needful. Show. 14, 15. Paſch. 1 W. & M. Garret v. Dandy.——S. C. cited Comyns's Rep. 322. Arg. Mich. 6 Geo. 1. in the Caſe of Huddy v. Gifford, and agreed to as reaſonable by the Counſel of the other Side.

Where a *Bond was to pay Money, and to do other collateral Acts*, tho' in an Action on the Bond, the Breach aſſign'd was only for *not paying the Money*, and ſo the Caſe upon the Pleading is the ſame as if the Condition of the Bond had been for Payment of Money only, yet Per Holt Ch. J. this Caſe is not within the Statute which relates to Judgments upon Bonds, with a Condition for Payment of Money only; and in this a Judgment being given, a Writ of Error was allowed without Bail. Carth. 29. Paſch. 1 W. & M. B.R. Gerard v. Danby.

A. was bound with J.S. the Defendant, for the Debt of J.S. to pay 50 *l. to W.R.* 30*th October next*, and *at the ſame Time J.S. gave Bond to A. reciting the Joint Bond* to W.R. *and ſays, If therefore the ſaid J.S. pay to the ſaid W.R. the ſaid* 50 *l. on the ſaid* 30*th October* &c. *then* &c. The 50 l. not being paid at the Day, *A. brought Debt* againſt J.S. *and had Judgment.* J.S. brought Error, but he not finding Bail, A. took out Execution. It was inſiſted that this Bond was only as an Indemnification-Bond, and ſo not within the Statute. But it was urg'd on the other Side, that this was a Bond for Payment of Money, and conſequently within the Statute. King Ch. Juſt. ſeemed to think this Caſe within the Letter of 3 Jac. cap. 8. and that this Statute ought to have a liberal Conſtruction; but becauſe the Judges of B.R. doubted, and inclined to the contrary Opinion, that there might be one uniform Opinion in the two Courts, it was agreed to be put off till the Court could talk with the Judges of B.R. And in the laſt Day but one of the Term, the Ch. Juſt. delivered the Opinion of the Court, and ſaid, That this Court was agreed that Execution ought not to be ſtay'd in this Caſe, if Bail was not found; for the Statute ought to be conſtrued liberally, and for the Benefit of him who had obtained Judgment; and therefore the Rule for ſtaying Execution was diſcharg'd. Comyns's Rep. 321, 322, 323. pl. 164. Mich. 6 Geo. 1. Huddy & Uxor. v. Yate Gifford.——In this Caſe was cited the Caſe of **Hammond v. Webb**, as determined in B.R. 1 Geo. where the Condition recited a former Bond given by the Defendant to A. and then goes on, viz. (If the ſaid J.S. ſhall pay the ſaid Sum of &c. on the ſaid Day &c. then &c.) in the ſame Words as in the preſent Caſe; and ſays that the Court was of Opinion, that Bail was not neceſſary, becauſe of the *ſame Nature with a Bond to indemnify.* But it was ſaid by the Counſel of the other Side, and alſo by the Court in the principal Caſe, that no Judgment was given in the Caſe of Hammond v. Webb.

Debt was brought in C.B. by A. againſt B. on a *Contract to pay Money on S.S. Articles, at the End whereof the Parties bound themſelves to each other in* 100 *l. for Performance*, and Plaintiff had Judgment. On Error brought in B.R. it was inſiſted that this Writ of Error was no Superſedeas to the Execution, unleſs B. had put in Bail according to this Statute. Per Cur. The Statute *requires*, that *where an Action is brought on a ſingle Bill or Bond, or Contract for Payment of Money only*, that in ſuch Caſe *Bail ſhall be given*, which implies that it is not requiſite on any other Bond or Contract. And tho' this is a Contract, yet it is not for Payment of Money only, but is to pay it on Non-performance of an Agreement, and ſo not within the Proviſion of this Statute. But *tho' Bail is not requiſite to the Original Action*, yet *it muſt be given upon a Writ of Error of a Judgment* obtained *in ſuch Action*; as for Inſtance, if an Action be brought in B.R. for 5 l. there Bail is not required; but if Judgment be had in that Action, and a Writ of Error brought, Bail muſt certainly be put in. 8 Mod. 121, 122. Paſch. 9 Geo. 1724. Strode v. Chriſty.

If a Man be *taken in Execution* he cannot be bail'd tho' he brings a Writ of Error. Vent. 2. Mich. 20 Car. 2. B.R. Anon.

14. The *Record* of a Judgment in B. was *removed by Error into the Exchequer-Chamber*, and it was pray'd, that the *Defendant, being in Execution*, might be bail'd; but becauſe the Record was removed, ſo as there was no Record here, it was held, that he could not be bail'd here; neither could he in the Exchequer-Chamber, becauſe they have no Authority, but only to reverſe or affirm the Judgment, and not to make Execution, and ſo he is not bailable. Cro. J. 108. Hill. 3. Jac. B.R. Sheppard v. Allen.

15. *Judgment* was given in B.R. *in Ireland*, and a *Writ of Error* on that Judgment, *returnable in B.R. in England.* All the Juſtices of B.R. were of Opinion, that the Writ of Error in Judgment of Law is a Superſedeas, tho' the *Record itſelf is not ſent, but the Tranſcript only.* For it is the ſame where Error is brought in Parliament of a Judgment in B.R. here. And ſo alſo of Error in the Exchequer-Chamber, the Tranſcript only is ſent, and yet the Court is fore-cloſed Pendente placito indiſcuſſo. And they all reſolved, that the Writ of Error was a Superſedeas until the Error was examin'd, affirm'd, or revers'd. Cro. J. 534, 535. pl. 19. Paſch. 17 Jac. B.B. The Biſhop of Oſſory's Caſe.

16. The

16. If a Writ of Error is brought in this Court, and the *Day of the Return* is *long*, in order to delay the Party, *as* if it be *more than the next Term*, the Court may award Execution. Het. 17. Paſch. 3 Car. C. B. Anon.

The Court agreed 6 H. 7. 15. That a Writ of Error with an *over-long Return*, is no Superſedeas; nor can ſuch Writ, being under Seal, be mended here; but in Chancery, by Motion, it may 1 Keb. 109. pl. 1. Mich. 1661. 13 Car. 2. in B. R. Anon.——S. P. Sid. 45. pl. 2. Mich. 13 Car. 2. B. R. Anon.

17. 13 *Car.* 2. *Stat.* 2. *cap.* 2. *S.* 9 Enacts, That *no Execution ſhall be ſtay'd in the Courts mentioned in the Act* 3 *Jac.* 1. *cap.* 8. *by Writ of Error or Superſedeas thereupon after Verdict and Judgment thereupon, in any Action of Debt upon the Statute* 2 *Edw.* 6. *cap.* 13. *for not ſetting forth of Tithes, nor in any Action on the Caſe, upon Promiſe for Payment of Money, Trover, Action of Covenant, Detinue and Treſpaſs, unleſs ſuch Recognizance as by the former Act is directed, be firſt acknowledged.*

18. 16 & 17 *Car.* 2. *cap.* 8. *S.* 3. Enacts, That *no Execution ſhall be ſtay'd in any of the aforeſaid Courts, by Writ of Error or Superſedeas thereupon, after Verdict and Judgment thereupon, in any Action Perſonal whatſoever, unleſs a Recognizance with Condition, according to the Statute* 3 *Jac.* 1. *cap.* 8. *be firſt acknowledged. And in Writs of Error upon any Judgment after Verdict in Dower, or in Ejectione firmæ, no Execution ſhall be ſtay'd, unleſs the Plaintiff in Error ſhall be bound unto the Plaintiff in Dower, or Ejectione firmæ, in ſuch Sum as the Court to which ſuch Writ of Error ſhall be directed, ſhall think fit, with Condition, that if the Judgment be affirm'd, or the Writ of Error diſcontinued in Default of the Plaintiff, or that the Plaintiff be Nonſuit in ſuch Writ of Error, that then the ſaid Plaintiff ſhall pay ſuch Coſts, Damages, and Sums of Money, as ſhall be awarded upon ſuch Judgment affirm'd, Diſcontinuance or Nonſuit had.*

S. 5. *Provided that this Act ſhall not extend to any Writ of Error to be brought by any Executor or Adminiſtrator, nor unto any Action Popular, nor unto any other Action upon any Penal Law (except for not ſetting forth of Tithes) nor to any Indictment, Preſentment, Information, or Appeal.*

19. Error was brought in the Exchequer Chamber, to reverſe a Judgment in B. R. The *Writ of Error was ſign'd by the Ch. J. but before the Record certified he died*, and no new Writ of Error was brought. Upon a Motion for Leave to take out Execution, the Court (upon Inquiry of the Practice) ſaid, That if the Record be not certified within 8 Days, they in the Office of the Clerk of the Papers, would give Rules to take Execution, but they may certify the Record, and ſo make all good, becauſe the Writ was ſign'd; but if it had not been ſign'd, it had abated by the Death of the Ch. J. Sid. 268, 269. pl. 20. Trin. 17 Car. 2. B. R. Allen v. Shaw.

In ſuch a Caſe upon ſuch a Motion, the Court ordered the Defendant to ſhew Cauſe. Barnes's Notes in C. B. 136. Hill. 9 Geo. 2. Cramborne v. Quennel. The Book ſays, There were ſeveral other Motions of the ſame Kind this Term; and it was held by the Court, that where the Writ of Error is *not returned by the Ch. J. it becomes ineffectual*; but Plaintiff cannot take out Execution without Leave of the Court.——S. P. And where in ſuch Caſe the Plaintiff *took out Execution without Leave of the Court*, it was held to be irregular. Barnes's Notes in C. B. 137. Hill. 9 Geo. 2. Hayes v. Thornton.

It was held upon hearing Counſel on both Sides, that the Writ of Error *not being returned and ſigned by the Ch. J. becomes ineffectual by his Death*; and the Rule to ſhew Cauſe why Plaintiff ſhould not have Leave to take out Execution, was made abſolute. Barnes's Notes in C. B. 136. Hill. 9 Geo. 2. Olorenſhaw v. Stanyforth.—— Rep. of Pract. in C. B. 128. S. C. and cites Middleton and Gardiner the like Rule.

20. Twiſden J. ſaid, That Trin. 5 Car. 1. * Godb. 439. it was ſettled on ſolemn Argument, that the Writ of Error was the Superſedeas in itſelf, and there is no Inconvenience, and if it be deliver'd, ſhew'd, or *allowed before the Return* thereof, it is a ſufficient Superſedeas; *but if the Return be before the Day in Bank, or of the Judgment*; Per Cur. it is no Superſedeas. And by Hale Ch. J. Errors, nor other Records, are not return'd till a Term after taken out, and ſometimes longer; therefore it

* The Caſe of the Earl of Pembroke v. Boſtock. Mod. 112. pl. 9. Anon. ſeems to be S. C. of Ayers v. Lenthall.

it is no Reaſon to ſtay ſo long; to which Rainsford and Wild agreed; and Wild ſaid he knew it ruled, that Allowance of Error after Execution taken out, and before executed, was a Superſedeas. 3 Keb. 309. pl. 51. Paſch. 26 Car. 2. B. R. in Caſe of Ayers v. Lenthall.

Where in ſuch an Action the Defendant pleaded ſuch a Plea in Abatement, upon Demurrer it was adjudg'd that the Writ ſhould abate.

21. The Plaintiff brought an Action of *Debt on a Judgment* obtained in B. R. and the Defendant *pleaded* in Bar, that he *ante Diem impetrationis Billæ prædicti, had brought a Writ of Error on that Judgment*, which was ſtill depending; and upon a Demurrer to this Plea, it was adjudged, That this Matter could not be pleaded *in Bar*, tho' it might be pleaded in *Abatement*; and thereupon the Plaintiff had Judgment. Carth. 1. Trin. 3 Jac. 2. in B. R. Rogers v. Mayhoe.

Carth. 1. Trin. 3 Jac. 2. B. R. Aby v. Buxton.—Ibid. The Book ſays, The Reporter makes a Quære in this Caſe, and refers to the Caſe of **Rottenhoffer v. Lenthall**, where it was adjudged to the contrary. [which ſee afterwards, pl. 22.] and cited a Caſe of **Rowley v. Rowley**. Trin. 7 W. 3. B. R. Rot. 590. where in an Action of Debt on a Judgment, the Defendant pleaded a Writ of Error depending, neither in Abatement, nor in Bar, but concluded his Plea thus, viz. Petit &c, if he ſhould be compell'd to make any farther Anſwer pending that Writ of Error. And this was adjudged ill, and the Defendant was ruled to anſwer over.

Show. 146. S. C. accordingly per tot. Cur. and that the Law was always taken to be ſo till one Caſe in Sir Fran. Pemberton's Time, when a Difference was made between in Bar and Abatement; but the Court now held it all one and Judgment for the Plaintiff. And the Book ſays, that the Defendant afterwards pleaded the ſame Plea in Bar, and the Plaintiff had Judgment.——S. C. cited, and S. P. adjudged accordingly. Show. 98. Trin. 2 W. & M. between Syms and Tyms.

22. *Debt upon Eſcape* was brought againſt the Marſhal, in which the *Plaintiff had* a Verdict and *Judgment*; and in an Action of *Debt brought upon that Judgment*, the Defendant *pleaded* that he brought *a Writ of Error* on the ſame, *Adhuc dependen.* & indiſcuſs. *and concluded in Abatement*, (viz.) Si reſpondere compelli debeat &c. And upon a general Demurrer to this Plea, it was adjudged ill; ſo the Defendant was ruled to anſwer over. Carth. 136. Paſch. 2 W. & M. B. R. Rottenhoffer v. Lenthall.

23. In a *real Action*, after Judgment the Plaintiff may enter, notwithſtanding Writ of Error, if his Entry were lawful without the Judgment; for that is not by Force of the Judgment, which ſhall not put him in a worſe Condition than he was in before. 12 Mod. 398. Paſch. 12 W. 3. in Caſe of Badger v. Floyd.

24. Upon a Writ of Error brought after Judgment, *Execution ought not to be ſtay'd, if Bail be not found.* Comyns's Rep. 321. pl. 164. Mich. 6 Geo. 1. Huddy & Uxor. v. Yate Gifford.

25. Plaintiff in Error *put in Bail*, but the *Plaintiff in the original Action excepted againſt them as inſufficient*, and *nothing further was done to juſtify them, or to put in other Bail.* It was inſiſted, that this putting in inſufficient Bail will not conclude the Party, and compared it to the Caſe of **Reeve v. Pike**, where after *Defendant put in Bail, he moved that they might be diſcharged*; but it was denied. And in the Principal Caſe Judgment was given, that this Writ of Error was no Superſedeas, unleſs good Bail was put in. 8 Mod. 121. 122. Paſch. 9 Geo. 1. 1724. Strode v. Chriſty.

26. An Action of *Treſpaſs for the mean Profits* was brought *pending a Writ of Error on an Ejectment*; Defendant moved to ſtay Proceedings. The Court ſaid this Caſe was within the Reaſon of the Rule which is conſtantly granted where an Action of Debt is brought on a Judgment pending a Writ of Error; and therefore made a *Rule that the Plaintiff might proceed to aſcertain his Damages, and* to *ſign his Judgment, but* that *Execution* thereon ſhould be *ſtaid till the Writ of Error* on the Judgment was *determined.* Rep. of Pract. in C. B. 46. Trin. 2 Geo. 2. Harris v. Allen.

27. The

27. The Plaintiff did *not ſign* his *Judgment till after the Return of the Writ of Error*; the Court, on hearing Counſel on both Sides, and the Matter fully debated, and many Caſes cited, declared that the Plaintiff might ſign his Judgment when he pleaſed; and if he thought fit to defer ſigning of it till after the Return of the Writ of Error, he had Liberty to do ſo, and *might then take out Execution*, notwithſtanding the Writ of Error, *in regard the Writ of Error, if returnable before Judgment ſigned, does not attach upon the Suit*; and therefore the Court diſcharged a Rule to ſhew Cauſe. Rep. of Pract. in C. B. 50. Mich. 2 Geo. 2. Harding v. Avery.

28. *But* on a Motion to ſetaſide an Execution, which was executed after a Writ of Error allowed, the Caſe was, the Defendant had *confeſs'd a Judgment by Cognovit Dampna*, and the *Plaintiff's Attorney promiſed to ſign it the 31ſt of May*, which was *the Day before the Eſſoign Day* of this Term, *but* he *deferr'd doing it till after the Return of the Writ of Error was expired, and then took out his Execution*, which the Court ſaid would have been regular, if he had not conſented to ſign Judgment at the Time above mentioned, but ſeeing he had acted this Part contrary to his own Agreement, they ordered the Execution to be ſet aſide, and Reſtitution made; and likewiſe *ordered the Plaintiff's Attorney to ſue out a new Writ of Error at his own Coſts*. Rep. of Pract. in C. B. 54. Trin. 2 & 3 Geo. 2. Griffin v. King.

The Plaintiff having delay'd ſigning his Judgment till the Return of the Writ of Error was expired, tho' called upon for that Purpoſe, the Court ordered a new Writ of Error to be ſued out, at the Plaintiff's Expence, and that he ſhould pay the Defendant his Coſts. Rep. of Pract. in C. B. 71. Eaſt. 5 Geo. 2. Duſfield v. Warden.

But the Reporter cites the Caſe of Harding v. Avery, [ſupra, pl. 27] and ſays Quære; for it does not appear in this Caſe that the Plaintiff has in any Manner misbehaved himſelf. Rep. of Pract. in C. B. 71.

29. On a Motion to ſet aſide an *Execution taken out upon a Judgment ſign'd in Trinity Vacation after the Expiration of the Writ of Error*, which was *returnable tres Trin.* the Court were of Opinion, that the Plaintiff could not regularly ſign his Judgment, and take out Execution thereon till Michaelmas Term following, becauſe every Judgment is of the firſt Day of the Term; ſo *the Judgment having Relation to the firſt Day of the Term, muſt be conſtrued to be ſign'd pending the Writ of Error*, which was returnable tres Trin. *and conſequently the Writ of Error attach'd upon the Judgment and was a Superſedeas*, and Execution afterwards was irregular; which therefore the Court ſet aſide, and ordered the Plaintiff's Attorney to pay Coſts. Rep. of Pract. in C. B. 77. Mich. 6 Geo. 2. Warwick v. Figg.

S. P. But it was inſiſted that if the Plaintiff had ſtaid till Michaelmas Term following, before he had ſign'd final Judgment, as in the Caſe of Joy and Franſhaw, he might have had ſome Colour to take out Execution (though that is a Practice not to be encouraged) and the Court were of that Opinion, and ordered the Execution to be ſet aſide, and Reſtitution and Coſts; and an Attachment Niſi againſt the Plaintiff's Attorney, to ſtand over till he ſees Reſtitution made, and Coſts paid. Barnes's Notes in C. B. 127, 128. Mich. 6 Geo 2. Warwick v. Figg.

30. *Joint Action againſt ſeveral* Defendants; *Damages* 20 *l. againſt* 4 *of them* on Trial, *and* 5 *s. againſt one* Defendant, *who had let Judgment go by Default*. Writ of *Error* was brought *by the* 4, in the Name of the one who was not obliged to find Bail, becauſe it was by Default. It was moved for *Leave to take out Execution againſt the* 4, notwithſtanding ſuch Writ of Error. Cur. Shew Cauſe; Rule made abſolute Trinity next, on Affidavit of Service. Barnes's Notes in C. B. 138, 139. Eaſt. 9 Geo. 2. Maſon v. Simmonds & others.

31. Judgment for the Plaintiff; a Cap' ad Satis' iſſues thereon againſt the Defendant; *upon* that *Ca.' ſa' an Exigent was taken out, teſted* 7 *Feb.* Then a Writ of *Error was ſued* by the Defendant, *teſted* 5 *Feb. and allow'd* 8 *Feb.* It was moved, that the Plaintiff might proceed to outlaw the Defendant, notwithſtanding the Writ of Error; as if Debt be brought on a Judgment, and then a Writ of Error is ſued on the Judgment, the Court will permit the Plaintiff in that Action of Debt to

Barnes's Notes in C. B. 309. S. C. accordingly.

proceed to Judgment, tho' they will ſtay Execution. But it was anſwer'd, that the Writ of *Error is of itſelf a Superſedeas.* It is true, it is no Contempt till Notice; but by taking out the Writ of Error, the Court is ſtay'd from proceeding in Execution. And of that Opinion was the Court, for the Exigent is only to carry on the Execution. Comyns's Rep. 564. pl. 241. Paſch. 10 Geo. 2. Spinks v. Bird.

Ibid. 268. Mich. 10 Geo. becauſe the charging in Execution was after the ſealing and allowing the Writ, but *before Notice thereof to Plaintiff's Attorney*, the *Court ſet aſide the Commitment in Execution, but refuſed* to grant *an Attachment againſt Plaintiff's Attorney*, becauſe tho' the Writ of Error be a Superſedeas from the Allowance, no Contempt is incurr'd till after Notice of it. ——Rep. of Pract. in C. B. 133. S. C. accordingly.

32. Defendant being *brought* to the Bar by the Warden of the Fleet, *by* Virtue of a *Habeas Corpus ad Satisfaciendum*, in order *to be charged in Execution* at the Plaintiff's Suit, *produced the Allowance of a Writ of Error*, and objected, that as ſuch Writ was ſeal'd and allow'd, he ought not to be charged. But the Court ſaid, they would not intermeddle; Plaintiff might proceed at his Peril; and thereupon Defendant was charged in Execution. Barnes's Notes in C. B. 267. Trin. 10 Geo. 2. Hannot v. Farettes.

(C. 2) Error in Parliament. In what Caſes it ſhall be a Superſedeas.

Lat. 57. Paſch. 1 Car. Crouch v. Hain, S. C. accordingly, and ſays the Parliament was diſſolv'd by Death of King James. ——Jo. 66. pl. 2. S. C. accordingly, tho' it was inſiſted that this Abatement was not by the Act of the Party, but of God. And the Court ſaid they would not ſtay Execution in Expectation that he would bring a new Writ of Error the next Parliament; and tho' Execution be made, yet he may bring a new Writ of Error, and be reſtored to all that he loſt, if the Judgment was erroneous.——2 Roll. Rep. 352, 353. Trin. 21 Jac. S. C. but not S. P.——Godb. 407. pl. 448. S. C. but not S. P.

1. C. Had *Judgment in* the *C. B. in Ejectment*; and H. brought a Writ of *Error in B. R.* and the *Judgment was affirmed.* And afterwards he *brings Error in the Parliament*; and the Ch. J. in B. R. brought the Record itſelf in Parliament, and there *left a Tranſcript* of it, *and brought back the Record* itſelf. And after the *Parliament is diſſolved*, and C. now prays Execution, and had it; altho' the Writ of Error abated without the Act of the Party. And Noy ſaid, It is doubted if Error in Parliament ſhall be a Superſedeas; for upon that, if the Party be in Execution, he ſhall not be bail'd, as he ſhould be in another Court; and cited 1 H. 7. 19. b. 15 H. 6. 18. By Diſſolution of Parliament the Error is abated. 22 E. 3. 3. 1 H. 7. 19. And ſo was the Caſe of **Godſave** aud **Heydon**, Error in Parliament abated by Diſſolution. And by Doderidge Error was brought in Parliament, and the Party prays a Scire Fac. returnable the next Parliament, and it was denied, for the Delay. And in our Caſe Execution was awarded. Noy 76. Crouch v. Hanney.

Sid. 413. pl. 11. S. C. adjornatur. —— See 2 Keb. 438. pl. 89. 491. pl. 43. and 509. pl. 87. S. C.—— Holt Ch. J. ſaid, A Writ of Error in Parliament, where there is a *long Prorogation, ſo that a Term does intervene*, is no Superſedeas. And ſo of a Writ of Error upon a Judgment in C. B. where a Record is actually return'd into Parliament, if there be a *Prorogation*,

2. A Writ of Error in Parliament to reverſe a *Judgment in Dower*, given *in C. B.* which was after *affirm'd in B. R.* was *diſcontinued by the Prorogation* of the Parliament. Then *another Writ was brought, Teſte the laſt Day of the Seſſions*, viz. 1 *March*, *returnable* 19 *November*, being the Day to which the Parliament was prorogued. The Court reſolved, that tho' the firſt Writ of Error was not diſcontinued by any Act of the Party, yet, becauſe of the Length of Time on which this Writ was returnable, it ſhall be no Superſedeas. Vent. 31. Paſch. 21 Car. 2. B. R. Wortley v. Holt.

vegation, and no Continuance of the Writ of Error, Execution ſhall be awarded. Comb. 206. Paſch. 5 W. & M. in B.R. James v. Barkley.

3. It was moved to diſcharge a Superſedeas on Error in Parliament *ad prox' Seſſionem*, on Judgment in C.B. in Action ſur Caſe for not delivering Wine affirm'd in B. R. which the Court granted. But had it been returnable *in præſenti Parliamento*, or *on a Day certain*, it would have been a good Superſedeas; but being amended ſince Delivery to the Clerk of the Errors, the Parties thereto were committed; but would not quaſh the Writ of Error, nor allow any new one; and they agreed that a Return in præſenti Parliamento *without Day, unleſs ſedente Parliamento*, if adjourn'd for half a Year, or any long Time, is no Superſedeas. 2 Keb. 647. pl. 83. Paſch. 22 Car. 2. B. R. Roderiguez, Francia v. Waldow. Sid. 454. pl. 22. S. C. and the Court doubted if they did quaſh the 1ſt Writ, whether the 2d Writ, being without Day, would be a Superſedeas.

4. If a Writ of Error be *brought in the Exchequer Chamber*, and *that be diſcontinued*, and *another* Writ *is brought in Parliament*, this ſecond Writ is a Superſedeas. Vent. 100. Mich. 22 Car. 2. B. R. Anon.

5. *But* if a Writ of Error be brought *in Parliament, and that abates, and the Plaintiff brings a ſecond*, this is no Superſedeas, becauſe it is *in the ſame Court*. Vent. 100. Mich. 22 Car. 2. B. R. Anon. Mod. 285. pl. 31. Trin. 29 Car. 2. B. R. Sir Fran. Duncomb's Caſe, S.P. and were it not for the Difference of the Year ſeems to be S. C.

6. It was moved that the Clerk of the Court might make out Proceſs, notwithſtanding a Writ of *Error*, of Conviction of Perjury brought *in Parliament, returnable ad prox. Seſſionem*, being *after another Writ of Error determined by Prorogation*, and ſo no Superſedeas, as * Worthly's Caſe; but the Court refuſed to meddle in it, but left the Party to uſe Diſcretion. 2 Keb. 749. pl. 2. Paſch. 23 Car. 2. B. R. The King v. Robinſon. * Vent. 31. Wortley v. Holt.

7. Error was brought in Parliament, and this *determined by Prorogation*, and a *2d Writ* of Error *was brought, and* this alſo *determined by Prorogation* in November to 7 January following, and then *a 3d Writ* of Error *was ſued*, and a Superſedeas pray'd to ſtay Execution; and after ſeveral Debates and Search of Precedents it was granted, the Prorogation being *to a Day certain, and no Term interpoſing*. But per Hale, if a Term had interpoſed between the Teſte and the Return of the Writ of Error, no Superſedeas ſhould iſſue, unleſs there be *Error apparent* in the Record, notwithſtanding that the Writs of Error are abated by the Prorogation, without Default of the Party. And Wild J. held, That tho' a Term had interpoſed between the Teſte and Return of the firſt Writ of Error, yet a Superſedeas ſhould be granted in this Caſe, becauſe the Determination of the Writ is by the Prorogation, without Default of the Party. 2 Lev. 93. Mich. 25 Car. 2. B. R. Goſton v. Sedgwick. Mod. 106. pl. 15. S. C.

8. Execution was prayed on a Writ of Error brought in *Parliament*, and *diſcontinued by Prorogation*, which Wild and Raynsford granted, the Record being never carried hence, nor tranſcribed. 3 Keb. 238. pl. 55. Mich. 25 Car. 2. B. R. Iſtead v. Streater.

9. A * *Rule* was lately made *by the Houſe of Lords, that* all *Cauſes there depending ſhould not be diſcontinued by the intervening of a Prorogation*. Vent. 266. Hill. 26 & 27 Car. 2. Lord Eure v. Turton. * 2 Lev. 93. at the End of the Caſe of Goſton v. Sedgwick, the ſame Rule is mentioned to have been made.

10. Some Time after the above Rule, a Writ of *Error, teſted* 30*th November*, was brought *returnable in Parliament* 13*th April following, that being the Day to which the Parliament was prorogued*. It was inſiſted that this Caſe will not be there depending before the Return of the Writ. Hale Ch. J. ſaid, that *the Rule does not reach this Caſe, becauſe the Writ is not returned*. And the Opinion of the Court was, That the Writ of Error was 2 Lev. 120. S. C. by the Name of Lord Eure v. Truron; and Levinz, who was of Counſel for

the Plaintiff, ſays the Court ſaid they might take Execution at their Peril, if by Law they might do it; for that Executions are iſſuable of Courſe without Rule of Court; but if the other Side had moved for a Superſedeas, they ſaid perhaps they ſhould have denied to grant it.

was no Superſedeas; but they would make no Rule in it, becauſe they ſaid the Cauſe was not judicially before them, but the Party might take out Execution, if he thought fit; and then if the other Side moved for a Superſedeas, they ſhould then reſolve the Point. Vent. 266. Hill. 26 & 27 Car. 2. B. R. Lord Eure v. Turton.

7 Mod. 120. Anon. but ſeems to be S. C. And the whole Court inclined that it was not a Superſedeas without Bail; but upon the Importunity of Broderick gave Leave to ſpeak to it again.

11. Debt on a Bond in C. B. and Judgment for the Plaintiff; *Error* was brought *in B. R.* and *Bail put in according to the Statute*, and *Judgment affirm'd*; thereupon *Error was brought in Parliament*, and the Clerk of the Errors refuſed to allow the Writ, unleſs the Party would give a new Recognizance. It was moved that it ought to be allowed without, it being not requirable by the 3 Jac. 1. cap. 8. Sed per Cur. The firſt Recognizance does not include Payment of Coſts to be aſſeſs'd in the Houſe of Lords, and thoſe Coſts ought to be paid; and therefore a *new Recognizance ought to be given* within the Intent of the Statute; and it is not the Buſineſs of this Court to examine whether Bail was put in upon the firſt Writ; for the *Want of Bail does not hinder the Proceſs of the Writ of Error, but only makes it no Superſedeas.* Salk. 97. pl. 2. Hill. 1 Ann. B. R. Tilly v. Richardſon.

Tho' on a *Writ of Error* in B. R. Bail ſhall be put in there, yet if afterwards *Error in Parliament* be brought, *new Bail* muſt be put in B. R. 8 Mod. 79. Trin. 8 Geo. Colebrook v. Diggs.

12. Writ of Error *ad proximam Seſſionem* Parliamenti, and *before that Time it was diſſolv'd*, and *Day fix'd for the Meeting of a new one, and Term intervened.* The Queſtion was, Whether this was a Superſedeas of Execution? The Ch. J. ſaid, That as the preſent Caſe was, the Writ in Queſtion could not be an Authority to carry up the Record, neither could the Lords be legally poſſeſs'd of it by Virtue of that Writ. And after all, here the Court left them to do what they could by Law. 12 Mod. 604. Mich. 13 W. 3. 1701. Peters v. Benning.

13. *Error of* Judgment in the Exchequer Chamber, *returnable the 1ſt Day of Parliament*, viz. the preſent Seſſions, and now it was *moved that Plaintiff in Error might tranſcribe the Record within* 8 *Days*, otherwiſe that Execution might be taken upon the Judgment; and a Rule was made to ſhew Cauſe upon this Matter, but now the Rule was diſcharged; for *by Order of the Lords* in Parliament, *13th July* 1678. *All Perſons upon Writs of Error in Parliament, ſhall bring in their Writs in* 14 *Days after the 1ſt Day of the Seſſion in which* ſuch Writs ſhall be returnable, otherwiſe ſuch Writs ſhall not be received *unleſs* it be *upon Judgment given during the Seſſion, which ſhall be brought within* 14 *Days after Judgment given*; and therefore ſuch Motion within 14 Days after the Beginning of the Seſſion, is too haſty; for it is not reaſonable that a Plaintiff in an original Cauſe ſhould take Execution within the Time allowed by Order of the Lords to bring ſuch Writ into their Houſe; but if the Plaintiff in Error ſhould exceed the Time allowed by the Lords, in ſuch Caſe it would then ſeem reaſonable that the Plaintiff ſhould be at Liberty to take Execution upon the firſt Judgment; and thus it was ſaid to be formerly determined in this Court, in the Cauſe between **White** and **Roberts.** Comyns's Rep. 420, 421. Hill. 13 Geo. 1. in the Exchequer, Barnes v. Otway.

(D) Error. *At what Time* it ſhall be a Superſedeas in Law.

See (C. 2) (E. 2)

1. IF a Capias ad Satisfaciendum **be awarded, and after a Writ of Error comes, this ſhall not be a Superſedeas to the Capias, for it is out of the Court, and lawfully granted.** 17 E. 3. 8. 20 H. 6. 4. b.

After *Judgment in* an Action of *Debt, on a former Judgment*, and *Ca. Sa. delivered to the Sheriff*, Defendant moved to ſtay Execution pending a Writ of Error brought to reverſe the former Judgment. Per Cur. the *Motion* comes too late; it *ought to be before Judgment in the later Action*. And ſo Rule to ſhew Cauſe was diſcharged. Barnes's Notes in C. B. 140. Mich. 13 Geo. 2. Clarkſon v. Phyſick.

2. **In** Aſſiſe of Darren Preſentment, **if** upon Demurrer a Writ be awarded to the Biſhop for the Plaintiff, and a Writ of Inquiry **of the Damages, and after a Writ of Error is brought of the Principal, this is not any Superſedeas to the Writ to inquire of the Damages; but the Sheriff may ſerve it notwithſtanding, and return it.** 17 E. 3. 34. b.

3. But when it is return'd in Bank, **the Court cannot give Judgment and award Execution upon them, becauſe their Power is** bound by the Writ of Error. 17 E. 3. 34. b. 36.

4. **If A.** recovers **againſt B. and after a** Nihil return'd againſt the Principal, **he ſues a** Scire Facias againſt the Bail **upon their Recognizance, and after B. the** Principal brings Writ of Error, **this Writ of Error ſhall not be any Superſedeas of the Scire Facias againſt the Bail. P. 14. Ja. B. R. between the Spaniſh Ambaſſador and Gifford, by Cook and Houghton.**

Mo. 850. pl. 1156. S. C. by the Name of Don Diego d'Acuna v. Gifford, and reſolved accordingly.

——Roll. Rep. 336. pl. 50. Hill. 13 Jac. S. C. but not S. P.——3 Bulſt. 182. S. C. & S. P.——After a Writ of Error brought, and before the Return of it, B. the Plaintiff in Error, was brought to the Bar by Habeas Corpus brought by his Bail, when B. and alſo his Bail, pray'd that he might be committed in Execution in their Diſcharge. But Hobart Ch. J. held, That by bringing the Writ of Error the Court was diſabled either to award Execution, or to put him in Execution. And this alſo was the Cauſe that the Bail could not be diſcharged; for the End of the Bail is not only to bring the Body, but that he come ſubject to the Court, according to the Meaning of the Bail, which cannot be in this Caſe, becauſe of the Writ of Error; for the Entry in Diſcharge of the Bail muſt be, that the Defendant reddidit ſe to the Court to be in Execution, if the Plaintiff will; which cannot be ſo here. And Quære, Whether this has not ſo diſabled this Defendant by his own Act, that the Bail is forfeited, (note, the Bail have not diſabled themſelves) tho' afterwards he proceeded not in his Writ of Error; and ſo Execution may be taken here. But note, that afterwards this Term, Bradſhaw the Defendant was brought again to the Bar by another Habeas Corpus, and the Plaintiff pray'd him in Execution; which was granted, becauſe the Day of the Return of the Writ of Error was paſs'd, and he had not cauſed the Record to be removed, and therefore this Court was re-enabled to award Execution. Hob. 116. pl. 142. Paſch. 14 Jac. Wickſtead v. Bradſhaw.——It was agreed, per Cur. and the Attorney General, that the Bail may render their Principal pending a Writ of Error, tho' during that Time the Plaintiff cannot charge him in Execution. 7 Mod. 77. Mich. 1 Annæ, B. R. in the Caſe of Goodwin v. Hilton.——Ibid. 98. S. C. & S. P.

5. **If** upon a Fieri Facias **upon a Judgment againſt B. the** Sheriff takes the Goods **of B. into his Hands**; but, before Sale of **them,** B. delivers **to the Sheriff** a Superſedeas upon Writ of Error, **B. ſhall have his Goods again; for no Property was alter'd by the Seiſure. H. 17 Ja. B. between Sare and Shelton. Per Curiam.**

Goods were *taken by Fi. Fa.* and *before Sale, the Record was removed by Writ of Error into the Exchequer-Chamber*, and a *Superſedeas awarded*; and the *Sheriff return'd*, on the Fi. Fa. *that he had ſeiſed the Goods, and* that *they remain'd in his Hands for want of Buyers*; *and* alſo, *that a Superſedeas was awarded*; Thereupon the Defendant moved to have Reſtitution. But, per tot. Cur. tho' the Record be removed, and a Superſedeas awarded, yet ſince it came not to the Sheriff before he began to make Execution, as appears by his Return, a Venditioni exponas ſhall be awarded to perfect it; and tho' the Plea-Roll be removed, yet it ſhall be awarded upon the Return of the Fi. Fa. which remains filed in the Office. Cro. Eliz. 597. pl. 2. Hill. 40 Eliz. B. R. Charter v. Peter.—Cro. E. 602 Charter v. Peter is a D. P.——Mo. 542. pl. 718. Hill. 40 Eliz. ſeems to be S. C. accordingly, by Popham & Gawdy, abſentibus Fenner & Clench, and that the Execution is intire, and cannot be divided.

If one recovers in Debt, and has Fi. Fa. to the Sheriff to levy the Debt, and Defendant brings Error on the Judgment, and has Superſedeas to the Sheriff, ſo much Goods of Defendant as the Sheriff has in his Hands by the Fi. Fa. before the Superſedeas comes to him, ſhall remain to ſatisfy the Recoveror, and Venditioni exponas ſhall iſſue thereupon; but after the Superſedeas comes to the Sheriff, he cannot proceed further upon the Fi. Fa. Yelv. 6. Trin. 44 Eliz. B. R. Tocock v. Honeyman.

If *before* the Writ of *Error* the *Sheriff returns* a *Fieri Feci*, *& non inveni emptores*, the Execution is not to be undone. Per Hale Ch. J. Vent. 255. Hill. 25 & 26 Car. 2. B. R. Anon.

Tho' a Writ of Error be a Superſedeas in itſelf, yet, *after Execution begun*, it ſhall not hinder it; but the Sheriff may *go on*, and on a Fieri Facias *ſell the Goods*; per Holt Ch. J. 12 Mod. 99. Trin. 8 W. 3. Anon.

If Goods are taken on a Fi. Fa. and a Writ of Error is brought, and a Superſedeas comes before Sale, yet the Sheriff ſhall ſell. Per Holt Ch. J. 6 Mod. 293. Mich. 3 Annæ, B. R. in Caſe of Clerk v. Withers, cites D. 99. tho' 2 Roll Abr. 491. be contra, and ſaid, that after Seizure, and Writ of Error, and Superſedeas, a Venditioni exponas ſhall go.

* Fol. 492.

6. If upon a Fieri Facias upon a Judgment, the Sheriff returns Quod cepit Bona & Catalla of the Defendant, and Quod remanent in Cuſtodia pro defectu * emptoris, & quod ante Returnum hujus Brevis breve de non moleſtando fuit direct' quod de ulteriori executione ſuperſederet, the which Writ he return'd anner'd to the Fieri Facias. And this Writ De non Moleſtando was awarded in Bank, by reaſon of a Writ of Error there brought by Defendant; but the Record was not yet removed, eo quod the Return of the Writ of Error was Craſtino Aſcenſionis & non ante, and the Fieri Facias 15 Paſch. and a Writ of Venditioni exponas awarded. D. 1. Ma. 99. S. 57. *Milton v. Eldrington.* (But it ſeems that this is not Law.)

Surmiſe.

S. C. cited 3 Lev. 313. in Caſe of Smith v. Cave.—S. C. cited 3 Keb. 309. Paſch. 26 Car. 2. B. R. in Caſe of Ayers v. Lenthall.—S. P. Sty. 159. Mich. 1649. Mercer v. Rule.—† S. P. per Cur. 11 Mod. 272. pl. 17. Anon.

7. If a Writ of Error be brought returnable in the Exchequer-Chamber, and it is allow'd by the Clerk of the Errors, and Superſedeas granted, but the Record is not mark'd by the Clerk of the Errors, as the uſe is, or † Notice of it given to the Attorney of the other Side, it not being done, becauſe it was not known who was Attorney, nor the Number-Roll of the Record known, by which it might be mark'd, yet this is a Superſedeas in Law; ſo that if Execution be awarded after to another County than that where the Superſedeas was granted, and is there executed, this is erroneous, and a Superſedeas ſhall be awarded Quia erronice emanavit. But it is not any Contempt by the Attorney of the other Side in ſuing out of the Execution, he not having Notice of the Writ of Error, nor the Roll mark'd. Mich. 1649. between *Methwold* and *Bawd*, adjudged accordingly, and ſuch Superſedeas, Quia erronice emanavit, granted.

8. A Man is *taken upon Ca. Sa.* upon Condemnation, *and brought to the Bar* by the Sheriff, *and pray'd to be deliver'd* from it, *becauſe there is Writ of Error of it come to the Treaſury*, as he ſhould be if the Writ of Error had been brought before the Award of the Capias, and was not delivered, but ſent to the Fleet. But Priſot ſaid, that *when the Record is come up here*, the Juſtices may ſend for him to the Warden of the Fleet. Br. Executions, pl. 9. cites 34 H. 6. 18.

9. A Man was *outlaw'd* in B. R. and *brought Writ of Error* out of Chancery to them *the ſame Term*, and they were in Doubt if the Writ of Error was good or not; for it was *too general*, &c. And upon long Debate it was awarded, that the Party ſhall have *Superſedeas for his Goods*, *Quod capta Securitate quod non elongabit bona ſua*, that *then the Sheriff and Eſcheator ceſſabunt ſeiſire bona ſua*, quod nota; and if the Matter paſs for the Party outlaw'd, he ſhall retain his Goods, and if againſt him, then the King ſhall have his Goods. Br. Superſedeas, pl. 27. cites 4 E. 4. 43.

10. Judg-

10. Judgment was given in B. R. but before Execution a Writ of Error was brought in the Exchequer-Chamber; but the *Plaintiff in Error* did *not bring a Scire Facias ad audiendum errores*; the *Defendant in Error brought a Scire Facias in B. R. quare Executionem habere non debet*, and ſince only a Tranſcript of the Record was removed by the Writ of Error, and the Record itſelf remain'd here, he pray'd Execution. But by 3 Juſtices, abſente the Ch. J. tho' this be true, yet B. R. cannot award Execution, 'till the Matter is determined in the Exchequer-Chamber, and then they ſend back the Tranſcript; and B. R. awards Execution upon the firſt Judgment; ſo that the *Sci. Fa. ſhould have been brought in the Exchequer-Chamber*, and the Plaintiff in Error would have been nonſuited there for this Omiſſion, and then the Tranſcript would be remitted hither, whereby this Court would be authoriz'd to award Execution upon the firſt Judgment. Palm. 186, 187. Trin. 19 Jac. B. R. Anon

11. Judgment in B. R. the Defendant brought a Writ of Error in the Exchequer Chamber, and the Record was removed thither; the Plaintiff took out Execution, and the Sheriff levied the Money. The Defendant moved for Reſtitution. After the Court had taken Time to adviſe, Roll Ch. J. ſaid, the *Record* being *removed by* Writ of *Error in the Exchequer* is not now before us, nor was at the Time of the Execution ſued forth; and this being after Verdict and Judgment, the Writ of Error is no Superſedeas; but ordered a *Superſedeas quia erronice* &c. to ſuperſede the Execution (it being ill awarded) and to take the Money out of the Sheriff's Hands. Sty. 414, 415. Hill. 1654. B.R. Wingfield v. Valence.

12. Nota; If the *Roll* be *mark'd* for a Writ of Error *before Execution* done, the Sheriff ſhall be excuſed for doing it before a Superſedeas delivered; but this is ſufficient to ſuperſede the Execution; Per Twiſden & Curiam. 1 Keb. 12. pl. 27. Paſch. 13 Car. 2. B. R. Anon.

But, per Cur. the *marking the Roll*, or *paying Fees* for a Writ of Error, or *Allowance by the Ch. J.* unleſs it be *actually taken out*, is no Superſedeas to Execution; but being taken out, it is. But the Sheriff is not in Contempt if he have no Notice of it, or Superſedeas deliver'd to him. This was on a Motion to ſet aſide Execution, which the Court granted, if the Secondary reported it was unexecuted when the Writ of Error was taken out. Keb. 863. pl. 4. Paſch. 17 Car. 2. B. R. Abbot, Adminiſtrator of Pickas, v. Leech.

Till the Roll be mark'd, *or* the *Writ deliver'd unto the Officer in Court*, a Writ of Error is no Superſedeas, eſpecially after the Return of it. 3 Keb. 191. pl. 39. Trin. 25 Car. 2. B. R. Paſcal v. . . . . .

13. *Error* being brought and *ſhewed to the Attorney* is no Superſedeas by Twiſden, until it be ſhewed to the Clerk of the Errors, which is an Allowance in Court: And therefore *if Execution be done before it be allowed by the Judge, or ſhewed to the Clerk of the Errors*, it is well done, becauſe the Attorney otherwiſe would never have it allowed, but only ſhew it to the Attorney of the other Side. But if he ſhew it, and * *declare his Intention to have it ſpeedily allowed*, there Execution is ſuperſeded in the mean Time; but yet if Bail be not put in according to the Statute, the Execution may be well done, which the Court agreed. 1 Keb. 33. pl. 89. Paſch. 13 Car. 2. B. R. .... v. Noell.

Nota, per Cur. *at Common Law*, if a Writ of Error be brought, and *ſhew'd to the Attorney* of the other Side, the Party could not have taken Execution, *nor before, unleſs a Rule be enter'd for Judgment on the Poſtea*; but if he that ſhews the Writ of Error does *not get it allow'd within 4 Days after*, the Party may ſue Execution, ſo if *in 4 Days after the Allowance no Bail be put in*; but if the *Parties agree to accept the Allowance and Bail together*, the Party cannot ſue Execution; and becauſe he had done ſo, the Court awarded Reſtitution. 2 Keb. 129. pl. 84 Mich. 18 Car. 2. B. R. Warcop v. Pallavicine.

* See pl. 23.

14. A Superſedeas was prayed for ſuing out Execution, notwithſtanding *ſpecial Bail put in* (as it ought) before my Lord Ch. J. in Writ of Error, which altho' it be but *de bene Eſſe*, yet it *is good, if no Exception againſt them*; And per Curiam, till over-ruled no Execution ought to be made; the *Notice of Bail put in is* only to excuſe the Party of Contempt, but *not neceſſary*, ſo the Bail be put in: The Court awarded Superſedeas and

Lev. 117. Paſch. 15. Car. 2. B. R. S. C. but not S. P.——— Nota pro Regula, tho' the *Bail*

were *not put in within* 4 *Days after* the Writ of *Error brought*, according to the Rule of the Court, yet it is a Superſedeas; but the Defendant ought to pay all the Coſts and Charges of the Plaintiff's proceeding after the 4 Days; by Twiſden and Keeling, contra Windham, on a Motion for Superſedeas to an Execution, being executed after Bail put in but only de bene eſſe, and Notice of it to the Plaintiff, which the Court granted. Keb. 926. pl. 31. Trin. 17 Car. 2. B. R. Ranut v. Kingſton.

and Reſtitution. 1 Keb. 690. pl. 2. Paſch. 16 Car. 2. B. R. The Dean of St. Paul's v. Capell.

2 Keb. 506. pl. 78. S. C. and Liveſey ſaid, that Berkley J. had ſerved him ſo heretofore.—— So where a *Fieri Facias* was *ſued out on Friday*, the *Warrant deliver'd that Evening to the Officer*, a Writ of *Error allow'd on Saturday Morning*, and *Notice deliver'd at the Plaintiff's Attorney's Houſe about a Quarter after* 11 *that Morning*, and Execution executed before the Plaintiff's Attorney could countermand it, viz. about One at Hammerſmith. Per Cur' The Allowance of the Writ of Error with the Clerk of the Errors, is a Superſedeas, without Notice of ſuch Allowance. And tho' it was inſiſted, that this Execution being taken out before the Allowance of the Writ of Error might be executed, notwithſtanding ſuch Allowance the Execution being awarded by the Court; yet it was declared to be the ſettled Opinion of the Court, that the *Allowance of a Writ of Error is a Superſedeas, even where the Execution iſſues before, and is executed after the Allowance* thereof, *without Notice* of it. Rep. of Pract. in C. B. 39. Mich. 1 Geo. 2. Miller v. Miller.

15. Judgment was entered for the Plaintiff, and Execution taken out, and a *Writ of Error* was brought, which was *ſealed about an Hour before Execution executed.* Whereupon it was moved, That the Sheriff might bring the Money into the Court, for that the Writ of Error was a Superſedeas; for though the Sheriff ſhall not be in Contempt, if he makes Execution after the Writ, if no Superſedeas be ſued out, for that he had no Notice; yet the Writ of Error immediately upon the Sealing forecloſes the Court, ſo that Execution made after is to be undone; Of which Opinion was the *Court*, and *ordered the Money to be brought in*, and not delivered to the Plaintiff. Vent. 30. Paſch. 21 Car. 2. B. R. in Caſe of Sir Robert Cotton v. Daintry.

So where the Defendant ſuffer'd *Judgment by Default*, and ſtaid till *after Execution* was *ſent down into Dorſetſhire*, and then *got a Writ of Error allow'd, and ſerved the Agent* with the Allowance thereof, and tho' it was impoſſible to ſtop the Execution in Dorſetſhire, the Writ having been ſent down ſome time before; yet the *Court ſet aſide the Execution, and ordered Reſtitution*, and would not give the Plaintiff his Coſts. For the Allowance of a Writ of Error is a Superſedeas from the Time of the Allowance, tho' the Sheriff executes the Writ before Notice thereof was given; and yet neither the Plaintiff, nor his Attorney, nor Agent, nor the Sheriff, were blameable for any Miſconduct. Rep. of Pract. in C. B. 35. Eaſt. 13 Geo. 1. Jennings v. Weſt.

16. At *Common Law* the very *Writ of Error*, eſpecially when *entered on Record*, *was a Superſedeas* of itſelf; therefore *unleſs Bail be put in*, *or* the *Defendant declares* that *he will not ſtay Execution*, no Writ of Error ought to be allowed until execution be awarded. And unleſs the Party render himſelf in Execution or agree, it ſhall not ſuperſede; per Cur. The Allowance of the Writ of Error without Bail was denied. 3 Keb. 169. pl. 2. Trin. 25 Car. 2. B. R. Hammond v. Gaap.

17. A Superſedeas was prayed after *Execution executed* by Seiſure, and *before the Sale* of the Goods upon 2 Rolls 49. S. 5. and 1 Roll 894 there being a *Writ of Error duly taken out before, but the Clerk of the Errors not then in Town, it was not allowed.* The Court inclined, that the Sheriff could not ſell after Superſedeas; But held, that *before Allowance the Court can take no Notice of any Writ of Error.* But Adjornatur till the Sheriff's Return of Scire facias. 3 Keb. 169. pl. 4. Trin. 25 Car. 2. B. R. Mull v. Warren.

If the Plaindoes *not ſhew his Writ of Error* to the other Party *or get it allow'd by the Clerk*, by his endoſing Recipe upon it within 4 Days (which Time the Court gives as a convenient Time for putting in Bail according to the Statute) it

18. After *Execution made out*, the Defendant's *Attorney ſhew'd a Writ of Error to the Plaintiff's Attorney*, after which Execution is done, and per Cur. it's well done, the Writ of Error *not* being *allowed with the Chief J. within* 4 *Days after making*; But if it had been allowed, tho' the Sheriff might be excuſed of the Contempt, yet a Superſedeas is grantable; but per Cur. keeping a Writ of Error in the Pocket is of no Value after the 4 Days. The Court would not undo the Execution. 3 Keb. 294. pl. 23. Paſch. 26 Car. 2. B. R. Brittain v. Haukinſon.

it is no Superſedeas; per Hale Ch. J. Vent. 255. Hill. 26 Car. 2. B. R. Anon. —— S. P. Mod. 112. pl. 9. Paſch. 26 Car. 2. B. R. Anon.

19. If Writ of Error *bears Teſte before the Judgment given, and the Judgment is given before the Return*, 'tis good to remove the Record, and whenever the Judgment is entered it hath *Relation to the Day in Bank*, viz. the firſt Day in Term; So that a Writ of Error returnable after, will remove the Record whenever the Judgment is enter'd; per Hale Ch. J. Mod. 112. pl. 9. Paſch. 26 Car. 2. B. R. Anon.

3 Keb. 308. pl. 51. Ayers v. Lenthall ſeems to be S. C. accordly, and ſays the Caſe in Queſtion was, That the Plaintiff had Judgment for Security, after which the Defendant came in and prayed leave to plead, and before the Rule is out procured a Writ of Error, and ſhewed it to the Plaintiff, after which the Plaintiff entered a ſecond Judgment for want of a Plea, and to which of theſe Judgments the Writ of Error ſhould be applied was the Queſtion; And per Cur. it's in the Plaintiff's Election to either, and ſo was applied to the laſt, and a Superſedeas thereon granted.

A Writ of Error was brought *returnable on the Eſſoin-Day of Hillary Term*, the *final Judgment was ſigned of the ſame Term the 26th of January*, and the Plaintiff took out Execution, apprehending the Judgment not to be removed by the Writ of Error. It was moved to ſet aſide the Execution, for that the Judgment relates to the Eſſoin-Day, and is a Judgment from that Day; And the Court will not make a Fraction of the Day, and conſequently the Record is removed by the Writ of Error. It was anſwered that the Judgment muſt be given before the Return of the Writ of Error, and if given upon the Return-Day of the Writ of Error, it is not removed by that Writ. The Court held the Record well removed, and ſet aſide the Execution with Coſts. Barnes's Notes in C. B. 131. Eaſt. 6 Geo. 2. White v. Morgan.

20. A ſecond Writ of Error brought *after Nonſuit in a former* is no Superſedeas; per Cur. and leave was given upon Motion to charge the Defendant in Execution. Comb. 19. Paſch. 2 Jac. 2. B. R. Anon.

21. The Plaintiff *had a Verdict in Ejectment* at the Aſſiſes *in the Long Vacation*; the Defendant brought a Writ of *Error*, which *was allowed, and Bail put in* 24 *Octob.* The *Plaintiff* afterwards *on* 27 *Octob. having no Notice* of the Writ of Error *entered Judgment generally* (which Refers to the firſt Day of the Term) *and took out Execution Teſte the firſt Day of the Term, and had it executed before Notice of the Writ of Error*; but upon a Motion the Defendant had Reſtitution; For by ſuing the Writ of Error and the Allowance, and putting in Bail the Hands of the Court are cloſed and ſo the Execution void, tho' the ſuing it was no Contempt, no Notice being given. And tho' the Judgment by the general Entry relates to the firſt Day of the Term, (viz.) to the 23d Octob. and the Execution is of the ſame Date, and both before the Allowance of the Writ of Error, which was 24 Octob. yet the Judgment being founded on the Verdict given in the Vacation, upon which by the Rules of the Court, Judgment could not be entered till the *Quarto die poſt*, (viz.) till the 27th Octob. at which Time the Judgment was ſigned, the Court awarded Reſtitution. 3 Lev. 312. Trin. 1 W. & M. in C. B. Smith v. Cave.

S. C. cited by Eyre J. 8 Mod. 148. in Caſe of Belt v. Collins.

22. In Debt brought in B. R. the Plaintiff had Judgment. The Defendant brought a Writ of *Error in the Exchequer Chamber*, and the *Judgment was affirmed*; The Plaintiff ſued out a *Scire Facias in B. R. and had an award of Execution*; Hereupon the *Defendent brought Error in the Exchequer Chamber Tam in Redditione Judicii quam in adjudicatione executionis*. Notwithſtanding all this, the *Plaintiff* in the original Action went on and *ſued out of Execution*; and now a Motion was made to ſet it aſide, becauſe it was ſued out when there was a Writ of Error depending. The Court held that the Writ of Error could be no Superſedeas to the Execution, and that what the Plaintiff did was well, and no Contempt. Salk. 263. pl. 4. Mich. 8 W. 3. B. R. Hartop v. Holt.

5 Mod. 229. S. C. accordingly; for the Deſign of the Act of Parliament was to give a Writ of Error upon the Merits of the Caſe; but here the Right is determined, and the Writ of Error is brought upon the Award of Execution, ſo that the Exchequer Chamber have no Authority after they have affirm'd the firſt Judgment. —— Comb. 393. S C accordingly. —— 12 Mod. 105. S. C accordingly; For the Exchequer Chamber, by the affirming the firſt Judgment on the former Writ of Error have executed their Authority, and have no Power to examine their own Judgment. —— S. C. Ld. Raym. Rep. 97. accordingly, and that it is privileged from any other Writ of Error after Affirmance there, or otherwiſe the Law would be infinite and without End. —— And ſays, that

that afterwards Hill. 8 W. 3. B. R. it was held in the Caſe of **Bonics, and Rawlins, and Dan**, that Error in the Exchequer Chamber upon Judgment in Scire Facias againſt Bail is not a Superſedeas to the Execution, becauſe Error does not lie there in ſuch Caſe.

S. C. 6 Mod. 130. The Point was that a Capias on a Judgment was returnable ſuch a Day, and Non eſt invent' return'd, but not filed. A Writ of Error was taken out before the Day of Return of the Capias, but not allowed till that very Day nor any Notice thereof to the Plaintiff's Attorney, and the Court ſaid, that the Opinion in ſome Books was, That a Writ of Error was a Superſedeas to avoid Execution from the enſealing thereof, tho' not to puniſh the Officer till Superſedeas comes to him; And of this Opinion is Rolls. But that the Law now is taken, that it is not a Superſedeas till Notice to the Plaintiffs Attorney, and that the Allowance thereof is ſufficient Notice, or that actual Notice be before Allowance.

23. A Writ of Error is a Superſedeas *from the Time of the Allowance*, and that is Notice of itſelf, but *if Defendant has Notice before Allowance* 'tis from the Time of that Notice a Superſedeas; But if a *Writ of Execution* be *executed before a Writ of Error allow'd or Notice*, it may be return'd afterwards. The utmoſt length of Time the Law allows for executing a Writ, is the Day whereon the Writ is returnable; and it is not executable any longer that Day than the Court ſits; So long as it is *executable, but not executed*, the Allowance of a Writ of Error is a Superſedeas, but not afterwards. Salk. 321. pl. 8. Paſch. 3 Ann. B. R. Perkins v. Woolaſton.

24. Error *Coram vobis reſiden.* was brought on a Judgment given in B. R. and the Queſtion was, Whether it was a Superſedeas before it was allowed by the Court. The Ch. J. and two other Judges were of Opinion, that it would be hard that the Execution of a Judgment in this Court ſhould be delay'd by a Writ of Error *allowed by a Secondary*; for if that ſhould be ſo, then any Man may avoid the Execution for a whole Vacation, at the Expence of no more than 1 s. There is certainly ſome *Difference between* a Writ of *Error* of a Judgment *Coram nobis reſiden. and other Writs of Error*, for the one is directed to the Juſtices of this Court, and therefore ſhould be allowed by the Court; but the other is directed to the Ch. Juſtice only. But Juſt. Eyre was of another Opinion, he cited the Caſe of **Lowns** and **Carter** in the Ch. J. Holt's Time, where a Writ of *Error was adjudged a Superſedeas before it was allowed*. 'Tis true, there is a Difference between this Caſe and other Writs of Error, but the Reaſon is plain, for where Writs of Error are brought in the Exchequer Chamber, or in the Houſe of Peers, to reverſe the Judgments of this Court, they are always directed to the Ch. J. alone, becauſe he is to certify the Record; but where a Writ of Error Coram vobis reſiden. is brought, there is no Record certified. Beſides there never yet was a Motion in a Court of Law to allow a Writ of Error, becauſe 'tis a Writ of Right, and due to the Subject Ex debito Juſtitiæ. But admitting this Writ is no Superſedeas before the Allowance, yet 'tis a good Superſedeas after 'tis allowed, as this was by the Secondary, and before Notice; And ſo it was adjudged in the Caſe of **Smith v. Cave**, in which Caſe an Execution executed was ſet aſide, but the want of Notice excuſed the Contempt. 8 Mod. 147, 148. Trin. 9 Geo. 1724. Belt v. Collins.

Rep. of Pract. in C. B. 88. S. C. And adds, Note, If the Writ of Error had been *returnable after the firſt Return of the Term in which Judgment was ſigned*, it would have removed the Record, ſuch Judgment having *relation to the Day in Bank.*

25. A Motion was made to ſet aſide an Execution iſſued after a Writ of Error allowed, and Notice thereof given to the Plaintiff's Attorney; It appeared that an *interlocutory Judgment was ſign'd, and a Writ of Inquiry executed in Michaelmas Term laſt*, and a *Writ of Error was then allow'd, and Notice given*; *But* the *final Judgment was not ſign'd till after the Beginning of Hillary Term laſt*. The Court held the Execution to be regular, the interlocutory Judgment not being removeable by the Writ of Error, and the final Judgment being ſigned of a ſubſequent Term, was not removed, and therefore refuſed to make any Rule. Barnes's Notes in C. B. 130. Eaſt. 6 Geo. 2. Cooke v. Harrock.

(D. 2) Error. In what Caſes it ſhall be a Superſedeas; To what Perſons. Privies or Strangers.

1. JUdgment was given Erronice *that the King ſhould ſeiſe the Temporalities of the Biſhop of D.* and upon this the *Biſhop brought Writ of Error*, and *pending this the King ſued Scire Facias againſt R. of the Provendery* [Prebend] *of M. and ſuppoſes the Provendery to be annexed to the Temporalties, and that this voided after*, and the other ſaid, That Writ of Error is yet pending of this Judgment; and yet becauſe R. was a Stranger to the firſt Judgment, therefore the Judgment not being reverſed, the King recovered againſt him by Award; quod nota, and ſo it ſeems that Writ of Error is no *Superſedeas* but *only to Privies*, and *not to a Stranger*. Br. Error. pl. 62. cites 21 E. 3. 29.

(E) At what Time. Not *after a Superſedeas*. See (C. 2.)

1. IF a Man brings Writ of Error in the Exchequer Chamber upon a Judgment in B. R. before the Judgment is entered or ſigned for Judgment, and has Superſedeas, and after this Writ of Error is diſallowed, becauſe it was brought before Judgment; upon a New Writ of Error after Judgment he ſhall have a new Superſedeas, for the firſt Superſedeas and Writ of Error was as none and merely void, and then this 2d Writ of Error is as the firſt Writ, and ſo a Superſedeas in Law. Mich. 15. Ja. B. R. between *Smith* and *Bowles* adjudged. Cro. J. 458. pl. 5 Hill. 15 Jac. B. R. ſeems to be S.C. but S P. does not appear. ——— 3 Bulſt. 290. Paſch. 15 Jac. S. C. but not S. P.

2. If A. recovers againſt B. in an Aſſiſe en Pais, which Judgment is after affirmed in B. R. upon a Writ of Error brought there, and upon the Writ of Error brought, a Superſedeas of the Execution is granted in B. R. and after B. brings a new Writ of Error in Parliament. This Writ of Error ſhall be a Superſedeas in Law of the Execution, for this Writ is now brought in another Court than where the firſt Superſedeas was granted, and by the Writ the Hands of the Judges of B. R. are cloſed. P. 12 Ja. B. R. between *Godſoll* and *Shepherd* Plaintiffs, and Sir Chriſtopher *Heydon* Defendant, adjudged. Cro. J. 341. pl. 7. Heydon v. Godſalve S. C. and it was pray'd that Execution might be granted notwithſtanding this Writ of Error, becauſe at another Time he ha a Superſedeas upon the firſt Writ of Error, whereby the Plaintiff was delayed in the Execution of his Judgment in the Aſſiſe, and therefore he ought not to be again delayed by a new Writ of Error, and cites 5 H. 7. 22. 6 H. 7. 2dly, This Writ of Error is to reverſe a *Judgment upon a Judgment*, and the 1ſt Judgment being affirmed by the 2d Judgment is more than a ſingle Judgment, and it ſhall be intended true; wherefore the Execution ſhall not be ſtayed, no more than in an *Attaint*. All the Juſtices except Coke Ch. J. held, that the Writ of Error itſelf is a Superſedeas in itſelf; For altho' there were a Superſedeas before, that was upon another Judgment, and this Writ of Error is upon another Judgment, and is in Debate, whether it be Error or no, and until it be determined, they may not proceed to Execution; And they all held that a Writ of Error in Parliament is by the Diſſolution of the Parliament determined. ——— Mo. 834. pl. 1122. Heydon v. Shepherd and al' S. C. ſays, that Haughton and Croke J. and Coke Ch. J. held that the Writ of Error did not lie in Parliament to reverſe a Judgment given in B. R. upon Error brought there becauſe there is a double Judgment, and that the Reverſal of the Judgment given in the Writ of Error ſhall not reverſe the firſt Judgment, but that Execution ſhall iſſue upon the firſt Judgment in Aſſiſe; But Doderidge Contra. ——— Cro. J. 334. pl. 2. Heydon v. Godſalve is a D. P. —— Godb. 250. pl. 347. S C. by the Name of Sir Chriſtopher Heydon's Caſe, and there Haughton, Doderidge, and Crooke held clearly, That this Writ of Error was a Superſedeas in itſelf, and that upon the Book of 8 E. 2. Error 88. and 1 H. 7. 19. which ſays, That the Juſtices proceeded to Execution after that Judgment affirmed in Parliament, and therefore Ex Conſequente ſequitur not before; and ſo the Writ of Error is a Superſedeas that they cannot proceed, but there is no Precedent of it in the Regiſter but a Scire Facias. fol. 70. And the Court held, That if a Superſedeas

Superſedeas be once granted and *determined in Default of the Party himſelf.* he ſhall never have another Superſedeas, but otherwiſe if it *fail by not coming of the Juſtices.* Coke Ch. J. ſaid, that admitting the Writ of Error be a Superſedeas for the ſecond Judgment, yet it is a Queſtion, whether it be ſo for the firſt, which is not touched by the Writ, and whether they may grant Execution upon it or not, and cited 13 E. 4. 4. 43 E. 3. 3. 8 H. 7. 20. and therefore the Court adviſed Sir Chriſtopher to Petition the King for a New Writ of Error, and to do it in Time convenient, otherwiſe they would award Execution if they perceived the ſame merely for Delay according to the Caſes in 6 H. 7. & 8 H. 7. and the Parliament being afterwards ſuddenly diſſolved without any thing done therein Execution was awarded. ——— Roll Rep. 18, 19. pl. 19. S. C. accordingly. And there Coke Ch. J. ſaid, That if a Man has Judgment in Writ of Annuity, and then ſues a Scire facias and has Judgment thereupon, and afterwards the Defendant brings Error upon the firſt Judgment, this was a Superſedeas for the firſt Judgment, but not for the 2d, and ſo in the principal Caſe. ——— 2 Bulſt. 159 to 176. S. C. accordingly.

Br. Superſedeas pl. 18. cites S. C. ——He who is *nonſuited in an Audita Querela after Superſedeas*, and brings *another Audita Querela*, he ſhall not have another Superſedeas, per Jay. But Brooke ſays, It ſeems to be all one. Br. Superſedeas. pl 23. cites 2 H. 7. 12.

3. **If a Man be** nonſuited in **an** Audita Querela, **he ſhall not have a Superſedeas** upon a New Audita Querela, **Becauſe the** firſt **Writ** was a Superſedeas **in Law.** 24 E. 3. **Audita Querela.** 11.

Br. Execution pl. 41. cites S. C. — Br. Nonſuit pl. 56. cites S. C. —— If a Man brings Writ of Error and has Superſedeas, and after is *Nonſuited in Writ of Error*, and then bring another Writ of Error he ſhall not have Superſedeas; For he ſhall have only one Superſedeas. Br. Superſedeas pl. 29. cites 5 E. 4. 2. ——— S. P. per Mordant. Ibid. pl. 23. cites 2 H. 7. 12. ———Br. Error pl. 140. cites S. C. per Jay and Mordant.

4. A Man brought *Writ of Error and Scire facias* upon it, and after *is Nonſuited*, and then brings *another Writ of Error and another Scire facias* thereupon, and the *Plaintiff in the firſt Action*, who recovered, *pray'd Execution*, and the Plaintiff in the Writ of Error pray'd Superſedeas till the Error was diſcuſſed, and had it by Award, becauſe he *had no Superſedeas in the firſt Writ* of Error; And yet by Hongate Chief Clerk, the firſt Writ of Error is Superſedeas in itſelf, and 'tis ſaid that it is ſo where the Writ of Error abates becauſe the Plaintiff is made Biſhop or Knight, he ſhall have other Superſedeas. Br. Error. pl. 55. cites 9 H. 5. 13.

In Error, the Plaintiff may be Nonſuited and have another Writ of Error, but *if the Party be in Execution, he ſhall not* have Superſedeas; per Cur. Br. Error, pl. 140. cites 2 H. 7. 12. —— Br. Superſedeas, pl. 23. cites S. C.

But per Cur. *if he be not in Execution nor taken*, he may have Superſedeas in the Second Writ of Error, tho' he had Snperſedeas, before in the firſt Writ of Error. Br. Superſedeas, pl. 23. cites 2 H. 7. 12. —— Br. Error, pl. 140. cites S. C.

Br. Superſedeas, pl. 23. cites S. C.— Abatement of Writ of Error by Death of Parties, or of Ch. J. or by Act of Court, does not hinder but that the 2d Writ be a Superſedeas; Per Cur. Keb. 658. pl. 40. Hill. 15 & 16 Car. 2. B. R. Tremain v. Sands.

5. Where a Writ of *Error abates by Death* of one of the Parties, or by Demiſe of the King, he ſhall have Superſedeas again in a new Writ of Error. Br. Error, pl. 140. cited 2 H. 7. 12. Per Jaye.

6. After Execution awarded, a Superſedeas iſſued *Quia improvide* emanavit Executio, but *no Clauſe of Reſtitution* was in the Superſedeas; whereupon it was ſaid that the Execution was made before the Execution was awarded. And upon that the Court awarded a new Superſedeas, with a Clauſe of Reſtitution reciting all the Matter. Mo. 466. pl. 661. Paſch. 39 Eliz. Core v. Hadgill.

7. In Formedon the *Judgment was pronounc'd* 16 *Novemb.* 18. and Writ of *Error* was *brought*, bearing *Teſte* 27 *Novemb.* and then allowed, *and in majorem cautelam a Superſedeas* made againſt Executions, and yet the *Demandant obtained a Writ of Seiſin*, bearing Teſte 9 *Die Octobris before, by Warrant of the Judgment which was afterwards entered* but *as of Octab. Mich.* being the laſt Continuance; which being opened to the Judges, and they well knowing that Judgment was not pronounced till 16 Nov. ſo that the Tenant could not have a Writ of Error before, neither ought the Defendant to have a Writ of Seiſin before, for by this Trick any

any Writ of Error might be defeated, as to ſaving Poſſeſſion; and therefore a *new Superſedeas was awarded* againſt that Writ of Execution *quia erronice* &c. Hob. 329. pl. 404. Clanrickard v. Liſle.

(E. 2) Error. Superſedeas. From what Time. See (D)

1. TReſpaſs; the Plaintiff recover'd; the *Defendant ſued Writ of Error returnable Menſe Michaelis, and* after ſued *another Writ returnable* 15 *Martini*; and becauſe it *ſounded in Delay* of the Plaintiff, there at the Prayer of the Plaintiff the *Court awarded Execution, becauſe the Record was not removed*, & ſic vide inde. But it was ſaid that as ſoon as the Record is removed into B. R. the Party may have Superſedeas here in C. B. to the Sheriff, to ſurceaſe Execution; quod nota. But Brooke ſays he wonders that their Hands are not cloſed by the Acceptance of the Writ of Error; for this is directed to the Juſtices who err'd. Br. Error, pl. 73. cites 6 H. 6. 7, 8.

2. *Detinue*, the Plaintiff *has Verdict* for him *of the Thing demanded, and* 40 *s. Damages, if the Thing may be obtained, and if not,* 20 *l.* Damages for all, and *Judgment is given to recover the Thing, and* 40 *s.* Damages, and *Diſtringas iſſued to deliver the Thing demanded returnable Octabis Hillarii*, and at the Day the *Sheriff return'd Iſſues*, and the *Defendant neither came nor delivered the Thing*; and *after the 4th Day of Octabis Hillar. comes Writ of Error*; and the Plaintiff prayed Judgment and Execution of the 20 l. and to have it entered upon the 4th Day, which is before the Writ of Error came, and could not have it; for by the coming of the Writ of Error the Hands of the Juſtices are cloſed; quod nota. Br. Error, pl. 80. cites 22 H. 6. 41.

3. A *Capias* was *returnable the 1ſt Day of Hill. Term*, and *in the Afternoon* of that Day *a Writ of Error was brought returnable in Cam. Scacc. the next Day*. Per Holt Ch. J. It has been a Vexata Queſtio, *whether the ſuing out* the Writ, *or the Notice* thereof to the Plaintiff or his Attorney, were what ſuperſeded the Execution? If the Writ be *teſted after Return of the Capias*, it does not ſuperſede it. If a Capias be out, and Execution thereon, and then Writ of Error, it ſhall not diſcharge the Execution. And the ancient Opinions have been, that a Writ of Error is a Superſedeas from the actual purchaſing of the Writ, but that the Party ſhall not be puniſhed for executing it till Notice, but ſtill it avoided the Execution. 12 Mod. 501, 502. Paſch. 13 W. 3. B. R. Spurraway v. Rogers. 12 Mod. 517. S. C. in the ſame Term, but a D. P.

4. But note, Clark the Secondary told me, that a Writ of Error was *not* a Superſedeas *till a Certificate taken out from the Clerk* of the Errors, *and ſerved* on the Party. 12 Mod. 502. cites 6 Mod. 130. Parker v. Woollaſton.——[Quære if this was ſaid by Holt, or is a Note of the Reporter.]

(F) By Certiorari. Of what Thing a *Certiorari* ſhall be a Superſedeas.

1. IF a Man be bound in a Recognizance to appear at the next General Aſſiſes, and in the mean Time to be of the good Behaviour, and after the Recognizance is removed by Certiorari into the King's Bench, this ſhall be a Superſedeas in Law for the Good Behaviour. M. 37 El. B. R. by Fenner and all the Clerks.

Fol. 493.

2. So **this Certiorari ſhall be a Superſedeas** of his Appearance at the Aſſiſes. **M. 37 El. B. R. by Fenner and all the Clerks, but Popham e contra.**

In *Aſſumpſit to ſave harmleſs* the Plaintiff *from a Recognizance*, in which he was bound *for Defendant's Appearance at next Aſſiſes in S.* the Defendant *pleaded that he brought a Certiorari directed to the Juſtices of Gaol Delivery, which* Writ *was* delivered to them ſuch a Day, and *allowed by them.* Upon Demurrer this Plea was held ill; for tho' the Certiorari removes the Recognizance, yet it excuſes not the Appearance, but Defendant ought to have appeared, and procured his Appearance to have been recorded; and for his Non-appearance his Promiſe is broke. Cro J. 281, 282. pl. 2. Trin. 9 Jac. B. R. Roſſe v. Pye.——Yelv. 207. S. C. adjudged that the Action lies; for tho' the Certiorari be the Command of the King, yet the purchaſing it is the Act of the Defendant, who cannot by a Sleight ſave his Recognizance: And this was the Opinion of the whole Court.——Bulſt. 155, 156. S. C. adjudg'd. And tho' the Certiorari ties up the Hands of the Juſtices, yet they might very well have enter'd his Appearance.——2 Hawk. Pl. C. 294. cap. 27. S. 65. cites S.C. And the Serjeant ſays that this Opinion ſeems to be ſupported by the better Authority, and that the Opinion in Roll above would be highly inconvenient.

3. If *Juſtices of Peace receive a Certiorari, all* that which they do *after is without Warrant, but all which the Sheriff does* after upon their Warrant before, *is not erroneous*; and yet their Negligence is puniſhable by Attachment as Contempt. Mo. 677. pl. 921. Hill. 44 Eliz. B. R. Prince v. Allington.

If a Certiorari be directed to *Juſtices of Peace to remove an Indictment* found before them, they cannot proceed, altho' the Record is not removed.

4. *Stat.* 21 *Jac. cap.* 8. *S.* 5 *&* 6. *Whereas Indictments of Riot, Forcible Entry, or Aſſault and Battery found at the Quarter-Seſſions, are often removed by Certiorari, all ſuch Writs of Certiorari ſhall be delivered at ſome Quarter-Seſſions in open Court. And the Parties indicted, ſhall before Allowance of ſuch Certioraries become bound unto the Proſecutors in* 10*l. in ſuch Sureties as the Juſtices ſhall think fit, with Condition to pay to the Proſecutors within one Month after Conviction, ſuch Coſts as the Juſtices of Peace ſhall allow; and in Default thereof it ſhall be lawful for the Juſtice to proceed to Trial.*

The 21 Jac 1. cap. 8. *does not extend to Indictments of Felony, but only to* leſſer Acts againſt the Peace, as *Riots, Treſpaſs, Forcible Entry*, and the like: They may proceed in theſe Caſes, notwithſtanding ſuch Certiorari, if he that ſues out ſuch Certiorari does not enter into a Recognizance with Sureties, to proſecute it with Effect, and to pay Coſts to him againſt whom the Treſpaſs was committed, if the Defendant does not prevail. Jenk. 181. pl. 64.

Two Men and their Wives indicted upon the Statute of Forcible Entry, brought a Certiorari to remove the Indictment into B. R. Some of them refuſed to be bound to proſecute according to the Stat. of 21 Jac. cap. 8. and therefore, notwithſtanding the Certiorari, the Juſtices of Peace proceeded to the Trial. It was reſolved, That whereas the Statute is (the Parties indicted &c. ſhall become bound &c.) That if *one of the Parties offers to find Sureties*, altho' *the others will not*, yet the Cauſe ſhall be removed; for the denying of one, or any of them, ſhall not prejudice the other of the Benefit of the Certiorari which the Law gives unto them; and the Woman cannot be bound. Mar. 27. pl. 63. Trin. 15 Car. Anon.

And it was farther reſolved, that where the Statute ſays, That the Parties indicted *ſhall be bound in the Sum of* 10*l. with ſufficient Sureties, as the Juſtices of the Peace ſhall think fit*; That if the Sureties be worth 10 l. the Juſtices cannot refuſe them, becauſe the Statute preſcribes in what Sum they ſhall be bound. Like to the Caſe of Commiſſion of Sewers 10 Rep. 140. a. That where the Statute of 3 H. 8. cap. 5. enables them to ordain Ordinances and Laws according to their Wiſdoms and Diſcretions, that it ought to be interpreted according to Law and Juſtice. Mar. 27. pl. 63 Anon.

And here it was farther reſolved, that *after a Certiorari* brought, *and Tender of ſufficient Sureties*, according to the Statute, all the Proceedings of the Juſtices of Peace are Coram non Judice. Mar. 27. pl. 63. Anon.

5. A Certiorari was ſued out here, and *not delivered* to the Juſtices *before they had awarded Reſtitution* on the Statute of Forcible Entry 8 H. 6. *but before any Reſtitution was actually made upon their Warrant.* And by Twiſden, The Hands of the Juſtices are cloſed by the iſſuing of the Certiorari, tho' they be not in Contempt for what they have done before the Delivery of it, but they ought to have awarded a Superſedeas immediately upon the Receipt of the Certiorari, and becauſe they did not, the Party had a Reſtitution Niſi. 1 Keb. 93. pl. 79. Trin. 13 Car. 2. B. R. The King v. Spelman.

(G) What

(G) What Certiorari ſhall be a Superſedeas. How the King may grant.

1. D. 8 El. 253. 98. **The Queen granted the Cuſtody of the Heir of Kniveton to Cordel; Kniveton being ſeiſed in Fee of Land held in Capite, conveys it to the Uſe of himſelf for Life, Remainder to C. his Feme in Tail, Remainder over to the right Heirs of him and his Wife. And the Queen granted to the ſaid Cordel** Cuſtodiam omnium terrarum & tenementorum hæredi prædicto deſcendentium ſeu pertinentium ut Filio & hæredi dicti Kniveton. **Per Conſilium Wardorum, Grantee ſhall have the Ward of the Body** [and] **Marriage of the Heir by the firſt Words, Wardſhip being ſaved by the Statute for Alienation to his Feme. But the Grantee ſhall not have the Lands which appertain to the Queen, becauſe the Grant is of Lands which deſcend from Kniveton.**

This ſeems to be enter'd here by Miſtake of the Printers.

(H) By * *Audita Querela.*

* See (A) pl. 6. — And ſee Audita Querela.

1. **If a** Man bound in a Statute Merchant be taken in Execution, and his Land extended, and Liberate awarded, **and after he brings Audita Querela, he ſhall have a Superſedeas** for his Body; **for this does not diſcharge the Body abſolutely, but only for the Time; ſo that he may better proſecute the Suit; for he ſhall be in Execution again, if his Audita Querela does not aid him. M. 5 Ja. B. between** *Whidner and Conyers*, **Per Curiam adjudged.**

2. But **in the ſaid Caſe no Superſedeas ſhall be granted** for the Land and Goods, **becauſe they cannot grant a Superſedeas after the Execution ſerved and executed. M. 5 Ja. B. between** *Whidner and Conyers* **adjudged.**

3. But **upon an Audita Querela** before Execution had, **a Superſedeas may be granted, as well of the** Land and Goods as of the Body. **M. 5 Ja. B.**

4. **An Audita Querela** upon a Statute, **ſhall be a Superſedeas in Law of the Execution upon it. 24 E. 3. Audita Querela 11.**

Br. Superſedeas, pl. 18. cites 24 E. 3.

S. C. — The *Conuſee of a Statute-Staple purchaſed Part of the Land, and* the *Plaintiff another Part*, and yet *he ſued out Execution, and cauſed the Land of the Plaintiff to be extended*, and deliver'd to him in Execution. This was held to be a good Cauſe for an Audita Querela. Then a Superſedeas was moved for to ſtay Execution; for tho' the Lands were extended, yet they were not deliver'd by Liberate. The Court doubted, becauſe it was on a Statute-ſtaple, which was not returnable in this Court, but in Chancery; but it might well be upon a Statute-merchant, that being always returnable in this Court. But the Prothonotaries ſaying, that it well lies in this Court in this Caſe, and that a Superſedeas ſhould be awarded, as it was in Lord **Dudley**'s Caſe, and that divers other Precedents accorded therewith, the Court afterwards reſolved, that it well lay here, and a Superſedeas was thereupon awarded. Cro. E. 364. pl. 27. Mich. 36 & 37 Eliz. C. B. Charnock v. Sir Tho. Gerard.

5. **In an Audita Querela,** if there be any Ground for it of Record, or in Writing, **the Plaintiff ſhall have a Superſedeas to ſtay Execution againſt him**; But **otherwiſe it is, if it be** but only Matter in Fact, tho' **the Matter for which the Execution was ſued was** Uſurious, or upon an Eſcape. **P. 10 Ja. B. between** *Moſton* **and** *Parry*, **per Curiam.**

Note, that a *Man in Execution* ſhall not have a Superſedeas upon an Audita Querela, *unleſs* it be grounded upon a *Specialty*; but he ſhall have an Audita Querela upon a Surmiſe, if he put in Bail &c. but not a Superſedeas. Cook Ch. J. adviſed every Student to take notice of that; and after in many Caſes it was ruled accordingly. Noy 145. Anon.

E. *obtain'd a Judgment* againſt P. and *had Satisfaction* upon it, *and gave a Releaſe* to the Defendant; yet *afterwards takes out a Capias ad Satisfaciendum* againſt him, whereupon he brings his Audita Querela, and moves the Court, that he may have a Superſedeas to the Capias ad Satisfaciendum. The Court deſired to ſee the Releaſe, and upon View thereof the Rule was, that the Party ſhould proceed in his Audita Querela; but ſaid they would grant *no Superſedeas, becauſe the Releaſe was ambiguous.* Sty. 294. Trin. 1651. Pickering v. Emma.

6. If a Man be *nonſuited in* a Writ of Error, or *Audita Querela*, once, he ſhall not ever after have Superſedeas or Audita Querela to be a Superſedeas for him, but Writ of Execution may be executed upon him; for the firſt Writ is a *Superſedeas* in itſelf, but the other, which is purchaſed after the Nonſuit, is not a Superſedeas in itſelf; per Hobard. Br. Superſedeas, pl. 37. cites 6 H. 7. 16.

7. Pending an *Action* brought *by an Adminiſtratrix*, the *Son of the Inteſtate*, *by Covin* between the Debtor and him, *obtain'd other Letters of Adminiſtration to* be granted to the *Feme and him jointly*, without any Notice taken of annulling the former; *and* then, *after Judgment*, he *releaſed to the Debtor all Demands and Executions.* But the Adminiſtratrix ſued to Execution, and thereupon the Debtor brought an Audita Querela, with a Superſedeas in it; and whilſt that was depending, the 2d Adminiſtration was repeal'd, and the Repeal pleaded in Bar to the Audita Querela, and adjudged againſt the Plaintiff. D. 399. pl. 46. Hill. 17 Eliz. Anon.

8. *Mainpernors* were *in Action of Debt for Damages and Coſts*; and *Scire Facias iſſued de Debito & Damnis*, and *Judgment* was given *againſt the Mainpernors*; and now a Superſedeas, Quia erronice, was moved for, becauſe after Execution made; for *they were not Sureties for the Debt.* Doderidge J. told them, they were put to their Audita Querela. 2 Roll. Rep. 431. Trin. 21 Jac. B. R. Cole v. Yarnon.

(I) By *Habeas Corpus.*

S. C. cited per Holt Ch. J. 12 Mod. 646. in Caſe of Croſs v. Smith.--Cro. C. 261. pl. 7. Ellis v. Johnſon, S. C. accordingly, tho' it was objected not to be Error, becauſe the Habeas Corpus was not alledg'd to be upon Record, and ſo the Error aſſign'd not triable.

1. IN an Action upon the Caſe in an inferior Court, if after Iſſue join'd, **a Habeas Corpus to remove the Body and Cauſe is deliver'd by the Defendant in the Court there,** and pays the Fees for Allowance of it there; **and yet after they proceed there to try the Iſſue, and thereupon a Verdict and Judgment given, this is Error, and in Writ of Error it may be aſſign'd for Error; for the Habeas Corpus was a Superſedeas in Law. Trin. 8 Car. B. R. between *Johnſon* and *Ellis*, adjudged in Writ of Error, and Judgment given in Maidſtone revers'd accordingly.**

2. *Debt* was brought *in an inferior Court upon a Bond of* 200 *l. not made within the Juriſdiction.* After Iſſue join'd a Habeas Corpus was awarded thither to remove the Cauſe; but they proceeded notwithſtanding, and the *Judge of the Court was* an Attorney only, and *not an utter Barriſter.* And it was reſolved, that after the Habeas Corpus deliver'd, the Proceedings were ill, and not warranted by the Statute 21 Jac. cap. 23. And the proceeding after to Trial and Judgment were alſo void, and thereupon a Superſedeas was awarded; and the Judges of B. R. being inform'd thereof, agreed, that their Courſe in B. R. was to diſallow Proceedings in an inferior Court, after an Habeas Corpus deliver'd, unleſs it were a Cauſe ariſing in the Vill or Corporation. Cro. C. 79. pl. 1. Mich. 3 Car. C. B. Clapham's Caſe.

3. Per

3. Per Cur'. If a Habeas Corpus be directed to an inferior Court, *returnable 2 Days after the End of the Term*, yet the inferior Court cannot proceed contrary to the Writ of Habeas Corpus. North cited the Caſe of **Staples**, Steward of Windſor, who hardly eſcaped a Commitment, becauſe he had proceeded after a Habeas Corpus deliver'd to him, (tho' the Value were under 5 l.) and would not make a Return of it. 1 Mod. 195. pl. 27. Hill. 26 & 27 Car. 2. in C. B. Haley's Caſe.

(K) After an Arreſt.

1. IF a Man purchaſes Superſedeas, and is *taken by Capias* by the Sheriff in the ſame Suit, *before that the Superſedeas comes to the Sheriff*, *but* the Superſedeas *is deliver'd* to the Sheriff *before the Return* of the Capias, and after the *Sheriff return'd Cepi* corpus, there the Superſedeas ſhall not ſerve; contra if the Superſedeas had been deliver'd to the Sheriff before the Writ ſerved by the Arreſt. Br. Superſedeas, pl. 36. cites 19 H. 6. 43. Br. Impriſonment, pl. 21. cites S. C.

2. If a Man is *arreſted at the Suit of the King*, he ſhall not have Superſedeas in *C. B.* Per Babb. quod tota Curia conceſſit. Br. Superſedeas, pl. 1. cites 9 H. 6. 44.

3. 'Twas moved, that the *Sheriff* tho' he has a Superſedeas, yet is not bound, upon Pain of *falſe Impriſonment*, to allow thereof; but may return the Writ and the Priſoner with the Superſedeas, and the Court may diſcharge him; and therefore there is Difference where the *Arreſt is before the Superſedeas*, and where *after*; for that 'tis unlawful in the laſt, but not in the firſt Caſe, and cites 2 H. 7. 19. 19 H. 6. 43. 9 E. 4. 3. But all the Court held, that the Superſedeas was as good Cauſe to diſcharge him, as the firſt Proceſs was to arreſt him, and he *muſt obey it at his Peril*; and in regard he has not done it, he is chargeable with falſe Impriſonment; and the detaining him in Priſon is a new Caption, and he may well declare of Caption and Impriſonment. Cro. J. 379. Mich. 13 Jac. B. R. Withers v. Henley. 3 Bulſt. 96. S. C. accordingly.—Roll Rep. 240. pl. 10. S. C. and Judgment for the Plaintiff, by the Aſſent of Coke, Croke and Dodderidge, Haughton ſaying nothing.

(L) Out of what Court.

1. IN *falſe Impriſonment* the *Defendant was condemn'd, and* Ca. Sa. & *Exigent upon it iſſued in the County of O. and another Ca. Sa.* & Exigent upon it *iſſued in the County of E.* and therefore he came into the *Chancery*, and had Superſedeas upon Mainprize of 400 Marks, and for Fine of the King; and another Superſedeas to the Juſtices of Bank to ſurceaſe. And by ſome this Superſedeas is contrary to Law. But Finch ſurceaſed, becauſe it came out of a higher Court; and ſo there was no further Proceſs. Br. Superſedeas, pl. 5. cites 15 E. 3. 19.

2. In Debt the *Plaintiff recovers upon an Obligation in C. B.* and the *Defendant brings* Writ *of Error in B. R.* and *pending this the firſt Plaintiff brings Writ of Debt in London upon the ſame Obligation*; the Defendant ſhall have Superſedeas in B. R. and not in C. B. Br. Superſedeas, pl. 11. cites 11 H. 4. 73.

3. Where *a void Office* is *adjourn'd into the Exchequer-Chamber*, and there argued and found void, Superſedeas ſhall be awarded *in the Exchequer-Chamber*, and rehearſing the Patents granted to the Patentees,

and that they ſhall not intermeddle; quod nota. Br. Superſedeas, pl. 30. cites 5 E. 4. 7.

4. If *an Accountant in the Exchequer* be *impleaded in C. B.* the Exchequer may ſend Superſedeas to them to ſurceaſe. Br. Superſedeas, pl. 38. cites 9 E. 4. 57.

5. *And if* he be impleaded *in B. R.* thoſe of the Exchequer *will ſhew the Record of Account* &c. for they cannot make Superſedeas to the King; for there the Pleas are held Coram Rege, and not Coram Juſticiariis, and he ſhall be diſmiſs'd. Br. Superſedeas, pl. 38. cites 9 E. 4. 57.

6. A Man *ſued in Court Chriſtian*, and the other obtained *Prohibition*, and notwithſtanding *the other ſued forth* and *got Capias* and *Excommunicatum* againſt his Adverſary, by which he ſurmiſed this Matter in Court of Bank, and pray'd Superſedeas. Thorp bid him go to Chancery; Morrice ſaid, the Chancery cannot grant it, as long as this Court is open. Thorp ſaid, this is true; and thereupon he granted the Superſedeas. Br. Superſedeas, pl. 13.

7. *C. B.* after Execution awarded, and Writ of Error deliver'd there, may award a Superſedeas before Execution executed. Jenk. 93. pl. 80.

(M) In what Caſes and Actions.

1. *ACcount againſt W. N. where there were 2 of the Name*, and * *W. N. appear'd, and pray'd, that the Plaintiff count againſt him*; and the *Plaintiff ſaid, that he is another of the ſame Name, and not the Diſendant*; by which the Plaintiff had another Proceſs againſt the Defendant, and the other had Writ that he ſhould not be grieved, and that the Sheriff ſhould not take him; which was a ſpecial Superſedeas as it ſeems, and the Diverſity of the Names was alſo put in the Proceſs. Br. Superſedeas, pl. 35. cites 21 E. 3. 35.

* All the Editions are J. N. which ſeems to be miſprinted.

2. A Man *diſtrain'd 2 Sheep*, and the *Owner brought Replevin*; and the *Defendant by Covin affirm'd Plaint in Court of Franchiſe* againſt the Plaintiff, *to the Intent to have thoſe Goods attach'd, ſo that they ſhould not be replevy'd*; it was ſaid the Plaintiff ſhall not have Superſedeas for the Chattles, but for his Perſon; but, per Laicon, he ſhall have Superſedeas for both. Br. Superſedeas, pl. 34. cites 16 H. 4. 8.

3. Treſpaſs upon the Caſe againſt the Biſhop of Lincoln for *claiming the Plaintiff as Villein*, they *were at Iſſue*, and *pending this the Temporalities of the Biſhop were ſeiſed into the Hands of the King*, by which came Writ to the Juſtices rehearſing all the Matter and commanding them Quod non procedant Rege Inconſulto, by which the Juſtices ceaſed; quod nota. For if the Plaintiff be *Villein* he *is Parcel* of the Manor to which &c. and ſo a Loſs to the King. Br. Superſedeas, pl. 40. cites 2 R. 3. 13.

4. It was held for Law, that in Writ of *Attaint* a Man ſhall not have *Superſedeas to diſturb Execution*; for the Verdict ſhall be intended true Quouſque, &c. Contra in Writ of Error; for it may be intended that Error is, &c. Br. Superſedeas, pl. 24. cites 5 H. 7. 22.

5. And, by ſome, Superſedeas does not lie *upon Certificate of Aſſiſe, for the ſame Reaſon*, Quære inde. Br. Superſedeas, pl. 24. cites 5 H. 7. 22.

If a Man ſues out an Audita Que-

6. *But upon* Writ of *Audita Querela*, Superſedeas lies *to ſtay Execution*. Br. Superſedeas, pl. 24. cites 5 H. 7. 22. and 32 H. 8. accordingly;

cordingly; and that the Regiſter, which gave Superſedeas there, is not Law.

rela to avoid a Statute-Staple, or Statute-Merchant, he ſhall have a Superſedeas to the Sheriff not to do Execution, hanging the Plea &c. F. N. B. 240. (A) cites Regiſt. 113.

7. A Superſedeas lies *not to take a Man on an Excommunicato Capiendo*; or if he be taken, that then he deliver him Donec placitum dicti Attachiamenti fuerit diſcuſſum &c. F. N. B. 64. (D)

F. N. B. 239. (B) S.P. cites Regiſter 67. — The Court was moved to ſuperſede a *Writ de Excommunicato Capiendo*, for that it was too general. It was inſiſted upon, that the Motion for the Superſedeas was made too early, the Sheriff not having return'd the Writ; and cited 1 Sid. 181. Parker Ch. J. ſaid, If the Court of B. R. cannot grant a Superſedeas before the Return, the Conſequence will be, that a Subject may for a long Interval of Time, viz. between the Delivery of the Writ to the Sheriff and his Return, be wrongfully deprived of his Liberty, without Poſſibility of Redreſs. In Fact, theſe Writs have not been *ſuperſeded before their Return*; but I ſee no Reaſon why they may not. A Superſedeas was granted accordingly. 10 Mod. 350. &c. Hill. 3 Geo. 1. B. R. King v. Theed.

8. Superſedeas lay in a *Nativo habendo.* See F. N. B. 77. (C) (D)

9. If a Man be ſued and a Capias or *exigent* be *awarded* againſt him, he may by his Friend ſue forth a Superſedeas out of the Place where the Capias or Exigent was awarded againſt him, or out of the Term he may ſue forth a Superſedeas out of the Chancery directed to the Sheriff, that he take Sureties of him, and to appear at the Day &c. and that he let him at Liberty, or he may *find Sureties* in the Chancery *to appear at the Day of the Return* of the Capias or Exigent; And upon this he ſhall have a Superſedeas to the Sheriff, that he let him go, if he have arreſted him thereupon, and if he have not arreſted him, that then he do not arreſt him, but ſuffer him to go in Peace. F. N. B. 236. (A)

10. If one ſues a *Supplicavit* out of Chancery to arreſt another, to find Sureties of Peace, the Defendant who is arreſted may have Superſedeas in Chancery to the Sheriff, commanding him not to arreſt him. F. N. B. 238. (E)

F. N. B. 81. (A) S. P.

11. In a Court-Baron, or any other Court, as in London, in *Writ of Right*, if the *Tenant vouches a Foreigner to Warranty*, the Tenant who vouches ſhall have a Writ of Superſedeas directed to the Court, to ſurceaſe the Plea until the Warranty be determin'd. F. N. B. 239. (A) cites the Regiſter, 5. 11. & 13.

F. N. B. 39. (H) S. P.

12. It lies upon a Writ of *Homine replegiando.* F. N. B. 239. (C) cites Regiſt. 79. 80.

13. If *Treſpaſs vi & Armis* be brought *in the County*, a Superſedeas lies to the Sheriff &c. where the Plea is holden, reciting that a Plea of Treſpaſs Vi & Armis ſhall not be held in a leſs Court than before the King, or other Juſtices by his Command. F. N. B. 239. (D) cites Regiſt. 111.

14. If an *Order* or Rule be made by the Court, *that Execution ſhall not iſſue*, or if *Judgment be entered before it be pronounced*, altho' Execution be executed, in theſe Caſes it ſhall be ſet aſide by a *Superſedeas quia improvide* emanavit. Jenk. 93. pl. 80.

15. If the *Plaintiff in* a Writ of *Error be Nonſuit, or does not remove the Record before the Day of the Return* of the Writ of Error, *or if* there be *too long a Day between the Teſte and the Return* of the Writ of Error, no Superſedeas ſhall avail in theſe Caſes, becauſe of the manifeſt Delay of Juſtice. Juſtitia non eſt neganda non differenda. Jenk. 93. pl. 80.

16. It was reſolved by all the Judges, that Error is a Superſedeas *to the Writ of Enquiry.* Mar. 89. pl. 142. Paſch. 15 Car. Anon.

(N) For

(N) For what Cauſes.

1. DEbt *againſt* 2, the *one was at the Exigent*, and the *other at the Diſtreſs*, and *he at the Diſtreſs came and demanded the Plaintiff, and he did not come*, and *was nonſuited* ; by which the other had Superſedeas omnino, becauſe Nonſuit againſt the one in Action Perſonal, is Nonſuit againſt both. Br. Superſedeas, pl. 6. cites 1 H. 4. 4.

2. *Treſpaſs Vi & Armis* in B. R. againſt T. S. who pleaded Not guilty, and was *found Guilty*, and the Plaintiff had Judgment; and for the King *Capias pro fine was awarded* againſt the Defendant, and after *Exigent for the King iſſued* againſt the Defendant, and when 3 Counties were paſs'd *the King ſent Privy Seal to the Juſtices* of B. R. for the Defendant rehearſing the Matter, *commanding them to ſurceaſe* to make Proceſs for the King; and that if they had made Proceſs, that they ſhould make Superſedeas; and yet the Plaintiff pray'd Proceſs for the King, and the Defendant contra, and pray'd Superſedeas ; and upon good Argument in the End *he had Superſedeas* ; quod nota, upon Privy Seal; for tho' the Fine of the King aroſe upon the Suit of the Party, yet pending the Proceſs not ſerved, the King may ceaſe his own Proceſs at his Pleaſure; for the Party ſhall not compel the King to ſue againſt his Will, *but if he was taken by the Proceſs, the King ſhall not ſet him at large till the Party be ſatisfied* ; for per omnes, the Plaintiff may take this for his Execution, if he will. Br. Superſedeas, pl. 26. cites 4 E. 4. 16.

Br. Executions, pl. 96. cites S. C.—*So* where *Debt* is *againſt* 4, *upon one and the ſame Obligation*, and 2 *are condemned by Default*, and *Execution is ſued againſt them*, they ſhall have Superſedeas quia Erro nice, which Manner of Superſedeas ſhall not iſſue but *only upon a Record*; quod nota. Ibid, cites 5 E. 4. 5.

3. Superſedeas *Quia erronice emanavit was in Debt againſt* 3 *by ſeveral Præcipes*, and *Execution is againſt the one only*. Br. Superſedeas, pl. 28. cites 4 E. 4. 39. & 5 E. 4. 4.

4. If *Indictment be inſufficient*, the Juſtices ex Officio, by the Information ſhall ſend Superſedeas Br. Superſedeass pl. 30. cites 5 E. 4. 7.

* Orig. is (Bon)

5. *So* if *Exigent be awarded* * *where no Exigent lies*. Br. Superſedeas, pl. 30. cites 5 E. 4. 7.

6. In Aſſiſe it was ſaid, that if *Diem Clauſit extremum iſſues*, and after *Superſedeas comes to the Eſcheator* to ſurceaſe, this had been adjudged void; for the Diem Clauſit extremum *is the Suit of the Party*, and by other Way he cannot have his Land ; and therefore he ſhall be delayed of his Suit; and the Statute of 2 E. 3. cap. 8. wills, that by the Great Seal nor the Petit Seal, the Juſtices ſhall not ſurceaſe to do Right; but quære if the Superſedeas ſhall not be allowed againſt the Diem Clauſit Extremum? It ſeems that it ſhall. Br. Superſedeas, pl. 25. cites 5 E. 4. 132.

7. In Replevin *the Sheriff return'd* Quod averia *Elongata* ſunt, and the *Defendant appear'd, and notwithſtanding Withernam was awarded*, which was erroneous, by Reaſon of the Appearance of the Defendant, by which *Superſedeas iſſued to the Sheriff* to ſurceaſe &c. and if he had taken them to re-deliver them to the Defendant, and the Sheriff *returned that before the Superſedeas came, he had delivered the Beaſts of the Defendant to the Plaintiff in Withernam*; and he went to the Plaintiff to have Re-delivery, and he eſloign'd them; and the Defendant appeared and pleaded that he did not take the Beaſts, and pray'd Withernam &c. Br. Superſedeas, pl. 32. cites 7 E. 4. 15.

8. A. has *Judgment in Debt* againſt B. and a *Ca. Sa.* againſt him; *B. is taken* by Force of it ; his *Attorney informed the Court that he had a Writ of Error* in this Caſe *before the Execution executed, which* Writ of Error *he had*

had not with him at the Time of the Execution. B. was committed in Execution, ut ſupra; for B. *ought to have delivered the Writ* of Error *before the Capias* was *awarded*, *or* after it was awarded, and *before Execution to have a Superſedeas*. By the Juſtices of both Benches. Vigilantibus ſubſerviunt Jura. Jenk. 92. pl. 80.

9. A. has a *Ca. Sa.* againſt B.—B. has a Superſedeas thereto in his Pocket; *B. is taken* upon it by the Sheriff, *and immediately delivers* the *Superſedeas to the Sheriff*, this ſhall diſcharge him from Execution. Quæ fiunt incontinenti, ineſſe videntur. Jenk. 92. pl. 80.

10. Tho' the Statute 3 *Jac. cap.* 8. be general, yet it *is to be intended* in ſuch Caſes *where it is againſt the Party himſelf upon his Obligation*, *or* in Caſe *where the Judgment is general againſt the Executors*; but where the Judgment is ſpecial, that it ſhall be of the Goods of the Teſtator, and Damages only de Bonis propriis, it is not reaſonable, nor is it the Intent of the Law that the Party ſhould be inforc'd to find Sureties to pay the intire Condemnation with his own Goods. And according to this Difference Coke ſaid it had been ruled in C. B. when he was there. And Man the Secondary ſaid, that the Precedents of this Court ever ſince the Statute made were, that a Superſedeas had been allowed upon a Writ of *Error brought by the Executor or Adminiſtrator*. Cro. J. 350. pl. 2. Mich. 12 Ja. B. R. Goldſmith v. Plat.

11. Upon a Verdict a *Rule* was given for *Judgment upon the Thurſday*, and upon *Saturday after the Plaintiff died*. A Writ of Error was moved for becauſe, as was ſaid, the Party died before Judgment, in as much as of Courſe after Verdict and Rule for Judgment, there are 4 Days to move in Arreſt, and ſo he died before Judgment abſolutely given, and moved the Court for a Superſedeas. It was agreed to be *in the Diſcretion of the Ch. J. Ex officio, to allow a Writ of Error*, but becauſe it was a Cauſe of great Conſequence he took the Advice of the Court, and it was agreed, that a *Writ of Error is a Superſedeas in itſelf*, *yet it is good to have a Superſedeas alſo*; *And if* the Writ of Error had been *allow'd the Court could not deny the Party a Superſedeas*. But becauſe the Writ of Error was not allow'd, and alſo becauſe no Error appear'd to the Court, for where *Judgment* is *enter'd*, this *ſhall relate to the Time of the Rule given*, it was reſolved that no Writ of Error ſhould be allow'd, nor any Superſedeas granted. Poph. 132, 133. Mich. 15. Jac. B. R. the Earl of Shrewsbury's Caſe.

12. D. Acknowledged a *Statute Merchant* at Glouceſter in 300 l. and the Statute *did not limit any Day of Payment*, and yet an Extent was ſued, and upon Motion a Superſedeas was awarded; For that 'tis no Statute, becauſe they had not purſued the Authority given by the Statute; for the Statute of Acton Burnell, 11 E. 1. ſays, if the Debt be not paid at the Day &c. And though Debt upon an Obligation is payable preſently, if the Day be not expreſſed, yet here the Statute appoints a Day certain. Hutt. 42. Mich. 18. Jac. Davie's Caſe.

13. A. had Judgment againſt B. who paid part of the Money, and A. acknowledged Satisfaction of ſo much; and then they *agreed*, *That if B. did not pay the Reſidue by ſuch a Day*, *then it ſhould be lawful for A. to take out Execution againſt B. without ſuing any Scire facias*, *tho' after the Year.* The Money was not paid at the Time, and Execution being taken out without a Scire facias a Superſedeas was moved for, becauſe the Writ Improvide emanavit &c. And the Court held it good Cauſe to diſcharge him, but ſaid, it was in their Diſcretion to grant a Superſedeas, or put the Defendant to his Writ of Error. Win. 100, 101. Mich. 22 Jac. C. B. Hickman v. Fiſh.

14. The Defendant was *taken in London on a Ca. Sa. by a Bailiff of Middleſex*, and thereupon moved for a Superſedeas, for that the Arreſt was falſe. The Court agreed, that a Superſedeas cannot be granted quia Executio erronice emanavit, which it did not, becauſe the Execu-

tion was well granted, and if it be *returned* by the Sheriff *generally*, it ought to be intended well ſerved, tho' Affidavit be made to the contrary; But a Habeas Corpus was granted. Het. 30, 31. Trin. 3 Car. Mrs. Row's Caſe.

15. In *Caſe for Words ſpoke in London* the Defendant *juſtified for a Matter ariſing in Suffolk*; the Plaintiff *replied, De injuria ſua propria, and* upon Iſſue *procured a Scire facias to London.* A Superſedeas was moved for and granted, becauſe the Venire facias ought to have iſſued in Suffolk; and the Prothonotaries ought to enter upon the Roll Ideo præceptum eſt Vicecomiti Suffolk. Litt. Rep. 314. Mich. 5 Car. C. B. Harvey's Caſe.

16. When a *Procedendo* unduly vel *improvide emanavit*, 'tis uſual to grant a Superſedeas, but becauſe in the principal Caſe the Procedendo was well awarded; The whole Court denied to grant a Superſedeas. Cro. C. 486, 487. pl. 11. Mich. 13 Car. B. R. Bower v. Cooper.

17. The Court was moved, That a Writ of *Error* was *brought* to reverſe a Judgment, *and* that it *was received and allowed*, and notwithſtanding which, the *Plaintiff took out Execution*, and thereupon it was pray'd for a *S*uperſedeas to ſuperſede the Execution, and for an Attachment againſt the Party for his Contempt to the Court. It was urged, that the Writ of Error was not duly purſued becauſe the *Roll was not mark'd*, and therefore the Party might well take out Execution. But Roll Ch. J. anſwered, That the Writ was well purſued, tho' the Roll were not marked; yet if neither the Roll be marked, nor Notice given to the Attorney on the other Side of the bringing the Writ of Error, if the Party proceed to take out Execution, it is no Contempt to the Court; Otherwiſe it is a Contempt: And it is the Duty of the Clerk of the Errors to mark the Roll and not the Attorney's, and therefore take a *Superſedeas Quia improvide* emanavit to ſtop Execution. Sty. 159, 160. Mich. 1649. Mercer and Rule.

18. A *Peer* was *arreſted* by a Bill of Middleſex, *and in Cuſtody of the Marſhal* of B. R. and thereupon moved for a Superſedeas; Becauſe being a Peer he ought not to be arreſted. The Court directed him to plead his Privilege, and ſaid, they could not take Notice thereof upon a Motion. Sty. 177. Mich. 1649. B. R. The Earl of Rivers's Caſe.

19. After Error *directed to Twiſden, but never deliver'd, another* Writ *was* procured *directed to Hales Ch. J. by whoſe Creation the other ceaſed, and no Notice is given* of it, but within the four Days before Allowance Execution is taken, and per Cur. on 13 Car. 2 Stat. 2. c. 2. no Bail being yet given, and the four Days paſt, they cannot ſuperſede in Action of Battery, notwithſtanding **Bateman's** Caſe, which was between **Cotton and Daintry**; and per Hales Ch. J. Execution before Bail put in is good. 2 Keb. 770. pl. 55. Paſch. 23 Car. 2. B. R. Nichols v. Deacon.

After *Judgment reverſed by* Writ of *Error Defendant had a Superſedeas*, but *before ſhe was* thereby *diſcharged, ſhe was charged with a new Declaration* at Plaintiff's Suit, *and* upon Application to the Court *was diſcharged by Rule* from the new Declaration, and her Superſedeas was allowed; After her Diſcharge, *the Plaintiff cauſed her to be arreſted and held to Bail for the former Cauſe of Action*, whereupon ſhe moved the Court to be again diſcharged by Superſedeas upon entering a common Appearance,

20. The Defendant was *arreſted*, and *no Declaration* being *filed* againſt him *within two Terms after* the Arreſt, he procured a Superſedeas and *was diſcharged*, and immediately afterwards he was *arreſted again* by a Capias out of C. B. at the Suit of the ſame Plaintiff, and *for the ſame* Cauſe of Action; and upon a Motion to diſcharge theſe Proceedings becauſe irregular, the Court was of another Opinion, for that the Defendant had a Right to ſuperſede the Action becauſe no Declaration was filed againſt him in Time, and as he had a Right to ſuperſede that Action, certainly the Plaintiff muſt have Liberty to proceed in another; for his Debt is not loſt for want of declaring in Time, but only that Action is gone, and therefore a *new Action may be brought.* 8 Mod. 306. Mich. 11 Geo. 1725. Henley v. Roſſe.

pearance, and upon hearing Counſel on both Sides, the Court was divided in Opinion, Lord Ch. J. and Comyns J. looked upon the 2d Declaration to be no Charge, and that the Court took it ſo when a Rule was formerly made for her Diſcharge; And thereupon ſhe had the Benefit of her Superſedeas, and that after the Judgment reverſed and annull'd, Plaintiff had a Right, if he thought fit, to bring a new Action. Denton and Forteſcue J. were of Opinion, that after the Defendant had been diſcharged by Rule of Court, as to the 2d Declaration ſhe ought to be now diſcharged on entering a common Appearance, and that the Rule of Court amounts to the ſame Thing as a Superſedeas. No Rule. Notes in C. B. 266, 267. Eaſt. 9 Geo. 2. Peachey v. Bowes, Spinſter..

For more of Superſedeas in General, ſee **Audita Querela, Bail Certiorari** and other proper Titles.

Supplicavit.

(A) In what Caſes granted, and how.

1. IN *Supplicavit of the Peace* the Sheriff may make Precept to take the Body; for it is not like to Rediſſeiſin where the Sheriff is Judge and Officer; but when the *Bailiff* has taken the Body, he *ſhall not take Surety*, but the Sheriff himſelf ſhall do it; per Choke. For it is a judicial Power given to the Sheriff by the Writ of Supplicavit, which cannot be aſſigned over; For a Judges Power cannot be given over. Br. Office and Off. pl. 39. cites 9 E. 4. 31.

2. Several Perſons had made *Diſturbance in the Church*, and *pulled out the Miniſter reading the Divine Service* (viz. the Common Prayer) in the Church, *and carried him to the Compter*. Upon Articles exhibited the Court upon Motion granted a Supplicavit; And further adviſed to inform againſt them for a Riot. 1 Keb. 290. pl. 104. Paſch. 14 Car. 2. B. R. the King v. Douglas &c.

3. A Supplicavit was moved for on *Affidavit of great Peril of Life*, which per Curiam was granted *without ſpecial Articles*; but for the good Behaviour Articles muſt be exhibited; but per Twiſden Articles ſhould be in both, but the Clerks ſaid as before, and ſo it was granted. 2 Keb. 305. pl. 2. Hill. 19 and 20 Car. 2. B. R. Muſgrave v. Sir John Pullington.

4. A Writ of Supplicavit iſſued *upon a Petition and Articles* exhibited. The Defendant inſiſted, that the ſaid Writ iſſuing on Petition, and *not on a Motion* in Court, *nor any Indorſement made on the Back of the Writ*, as by the Form of the Statute is required, and but three of the ſaid Articles being ſworn to it is irregular; But the Court on reading Precedents, notwithſtanding the Objections aforeſaid, was fully ſatisfied, that the Supplicavit was well granted and warranted. 2 Chan. Rep. 68. 24 Car. 2. Fol. 390. Stoell v. Botelar.

5. M. was taken upon a Supplicavit out of Chancery, *and brought before Jones J. of B. R. by Habeas Corpus*, and bound by Recognizance to him to appear the firſt Day of the next Term which he did, and being in Court, Maynard *moved that the Articles ſworn in Chancery might be read here*, and that they would bind him here, *which the Court refuſed*, for that they

they have no Record before them, and the Record in Chancery is not duly tranſmitted hither; but if the Witneſſes that ſwore to the firſt Articles had been here and ſwore to them in Court they would have done it, otherwiſe not, and this was at two ſeveral Motions by Maynard; but the Opinion of the Court was contra. Skin. 61. Mich. 34 Car. 2. B. R. Mullineux's Caſe.

Lev. 53. S. P. Per Cur. but Foſter Ch. J. ſaid, if any

6. Upon Motion in B. R. for a Supplicavit, Withens J. ſaid, You muſt firſt exhibit your *Articles in Parchment*, and then move us. Comb. 28. Mich. 2 Jac. 2. B. R. Glover & Uxor. v. Glover.

ſued to him for a Warrant for the Good Behaviour, he would grant it. Hill. 13 & 14 Car. 2. B. R. Bill v. Neal ——— Sid. 67. pl. 42. S. C. by Name of Bill v. Field. And ſays, The Statute wills, that no Supplicavit ſhall be but upon Articles exhibited.

7. When a Supplicavit is moved for upon Articles exhibited to the Court in Parchment &c. the *Plaintiff ſwears* that he moves not for this out of Hatred &c. but for Fear of his Life &c. Comb. 28. Mich. 2 Jac. 2. B. R. The King v. Lewis.

8. Upon a Supplicavit the Parties are to give *Security by Bond* to the Sheriff to appear in this Court, and when they come here they enter into Recognizance. Comb. 427. Trin. 9 W. 3. B. R. Ruſſell's Caſe.

9. Upon Articles filed by A. againſt B. upon Oath of Aſſault and Battery, and that he went in Fear of his Life, Ld. C. Macclesfield granted the Writ, which commanded B. to find Sureties for a Twelvemonth, ordering it to be *indorſed for* 4000 *l. for the Party and his Sureties be bound in.* And upon Motion to diſcharge the Order, or at leaſt to leſſen the Sum, B. being *only Tenant for Life of his Eſtate*, and mention'd the Statute (of 21 Jac. 8) which gives Coſts in Caſe of a groundleſs and vexatious Complaint of this Nature, Lord C. Macclesfield refuſed, and ſaid if B. complains of Vexation, he comes too ſoon; let him ſtay till the Year is out, and behave himſelf quietly all that Time, and if the *Sum* be *too great for his Circumſtances*, there ought to be an *Affidavit* to prove this; and ſo denied the Motion. Mich. 1723. 2 Wms's Rep. 202. Clavering's Caſe.

10. After an *Impriſonment for 15 Months* upon a Supplicavit, and no Proſecution commenc'd againſt the Defendant in all that Time, the Party was *diſcharged* on very ſlender Security. Gibb. 268. Paſch. 4 Geo. 2. B. R. Groſvenor v. Edwards.

11. If a *Recognizance* be taken purſuant to a Writ of Supplicavit, it muſt be wholly governed by the Directions of ſuch Writ. 1 Hawk. Pl. C. 129. cap. 60. S. 15.

12. This Writ is *not much in Uſe* at this Day. 1 Hawk. Pl. C. 128. cap. 60. S. 10.

For more of Supplicavit in general, ſee **Good Behaviour**, **Return**, (C) **Surety of the Peace**, and other Proper Titles.

Surety.

(A) *In what Caſes* to be *found.*

See Bail &c.

1. IN *Writ of Right* after Battle join'd, the *Demandant and the Tenant ſhall find Surety of the Battle at the Day appointed*, viz. for their Champion, *each two Pledges*, and the Tenant ſhall firſt find Surety, *but upon no Pain.* Br. Surety, pl. 25. cites 1 H. 6. 7. 7.

2. Action upon the *Caſe for calling him Villein*, and the *Defendant claim'd him as his Villein, and had taken Part of his Goods*; by which it was awarded that the Plaintiff find Surety that he do not eſloign his Goods, and the Defendant find Surety that he ſhall not ſeiſe any more of the Goods of the Plaintiff, till it be tried if he be his Villein, or not. Br. Surety, pl. 30. cites 13 H. 7. 17.

(B) Surety. *Chargeable.* How far.

1. IN a Scire facias upon a *Recognizance for Rent and Farm of the Exciſe, as Farmer* thereof, he *pleaded the* Act of *General Pardon* 12 Car. 2. *which excepts the Rent but not the Security*; and *by an explanatory Act* made Anno 15 Car. 2. *the Securities of their Sureties were made liable, but nothing is ſaid of the Farmer's own Securities.* But the Court held, that a Fortiori the Farmer's own Securities ſhould be liable, becauſe the explanatory Act mentions the Securities of the Sureties only: And it is ſtrongly implied by omitting them out of the latter Act, that the Parliament had no Doubt upon them, but that they were excepted out of the Act of Oblivion. Beſides, the *Securities of Farmers and their Sureties are but the ſame* Securities in Law; *for all are Principals with Reſpect to the King.* And ſince the Sureties are bound, a Fortiori the Principals ſhall. And Judgment was given accordingly. Hard. 424. pl. 1. Trin. 18 Car. 2. in Scacc. The Attorney General v. Beſton.

2. The *Obligee in a Bond of* 20 *Years old, exhibits his Bill againſt the Adminiſtrator of the Principal, and the Surety (upon Loſs of his Bond.)* The *Adminiſtrator ſays* by his Anſwer, that *he has no Aſſets.* Upon hearing the Cauſe, it was directed to a Trial, whether the Surety had ſeal'd and delivered the Bond, and a *Verdict* had *paſs'd againſt the Surety*, (viz.) *That he had ſealed and entered into the Bond.* And the Cauſe coming back to this Court, and the Plaintiff's Counſel praying a Decree for the Plaintiff's Debt againſt the Surety, Serjeant Fountain (not of Counſel on either Side) ſaid it was doubtful whether Equity ſhould in this Caſe bind the Surety, who was not obliged in Law, but in Reſpect of the Lien of the Bond; and that being loſt, and the Surety having no Benefit by, nor Conſideration for, being bound, he thought Equity, after ſo long a Time, ſhould not charge the Surety. The Maſter of the Rolls ſaid he would ſee to moderate and mediate this Matter between the Parties, in order to which he was ſeveral Times attended by the Plaintiff; and the Defendant making Default, he decreed for the Plaintiff. And afterwards the Cauſe was upon a Caſe made brought before my Lord Chancellor,

The Reporter obſerves, that the Bond was for *Money lent*; and tho' the Surety had no Advantage, yet the Obligee had parted with his Money, and Loſs is as good a Conſideration for a Promiſe, as Benefit or Profit. Ibid.

cellor, who was of Opinion with the Maſter of the Rolls, and decreed it for the Plaintiff. Chan. Caſes 77, 78. Mich. 18 Car. 2. Underwood v. Staney.

3. J. S. was indebted to J. D. by *Bond of* 1000 *l. to perform an Award.* By the Award 250 l. was due to the Obligee; J. D. put the Bond in Suit againſt J. S. A Bill is exhibited here to be relieved againſt the Suit, and an *Injunction awarded on Recognizances to abide the Order on Hearing.* J. S. and F. as his Surety, are bound in the Recognizance, which *was penn'd to pay what ſhould be reported due by N. H. a Maſter named in the Defeaſance* or Condition; but the *Maſter died before any Report made*, and *ſo alſo did the Obligor*, who died inteſtate *worth nothing.* By the ſtrict penning of the Defeaſance *the Recognizance is not ſuable at Law, becauſe no Report was made by the Maſter*; but the great Queſtion was, if the Surety, who was not liable in Law, ſhould be made liable in Equity; for the Plaintiff had good Remedy for a juſt Debt, and juſtly proceeded to recover it; but the Court ſtaid his Suit, and takes ill Security, which proves ſo, and the Debt loſt thereby; and therefore the Court is bound to do us right; and the Intent of the Court was, that the Debt, if due, ſhould be ſecured, and the Intent was not with Reference to this or that Maſter's Report; for ſuppoſe that the Court had, during the Life of the Parties, transferr'd the References to another Maſter, and he had made a Report that ſhould have bound; and in Caſe of a Bond loſt, this Court have made a Surety to pay it. Yet the Lord Chancellor contra; for the Party is but a Surety not bound by Law. 2 Chan. Caſes 22. Hill. 31 & 32 Car. 2. Simpſon v. Field.

4. A. and B. Infants were made Executors: Adminiſtration during their Minority was granted to M. their Mother. *Upon granting* the *Adminiſtration* the Prerogative Court took the uſual Bond from M. in which J. S. and W. R. *Defendants were bound as* her *Sureties.* B. died, but made his Will, and A. Executor; A. brought his *Bill* for an Account of the Teſtator's perſonal Eſtate, and as to J. S. and W. R. *ſuggeſted that by Fraud and Covin they had got up their* ſaid *Bond, and procured inſufficient Security to be accepted by the Prerogative Court* in Lieu thereof. The Lord Keeper, upon the firſt opening the Matter, declared he would *not charge the Sureties further than* they were *anſwerable at Law*; and as to that Part diſmiſs'd the Bill. Vern. 196. pl. 193. Mich. 1683. Ratcliffe v. Graves & al'.

5. A Bond Creditor ſhall, in the Court of Chancery, have the *Benefit of all Counter-bonds or Collateral Security given* by the Principal *to the Surety*; *As* if *A. owes B. Money*, and *he and C. are bound for it*, and *A. gives C. a Mortgage*, or Bond, *to indemnify him*, B. ſhall have the Benefit of it, to recover his Debt. Abr. Equ. Caſes 93. Mich. 1692. Maure v. Harriſon.

6. A. is bound as a Surety in a *Recognizance dated 5 May* 1660. *for Payment of Money, which happened not to be made good by the Convention Act* for confirming judicial Proceedings, the Act not extending to that Day. A. being a Surety only, and having no Conſideration for entering into this Recognizance, the Court would not make it good, nor allow it to be ſo much as a Debt. The Lord Keeper diſmiſs'd the Bill. 2 Vern. 393. pl. 364. Mich. 1700. Sheffield v. Ld. Caſtleton & Uxor.

Sel. Caſes in Chancery, in Lord King's time, 80. Mich. 1730. S. C.—S. C. argued Gibb. 131. to 144. and there, in pag. 142. it was argued, that the Co-

7. A. *Tenant for Life, with Power to charge the Premiſſes by Leaſe, Mortgage, or otherwiſe, with* 6000 *l. mortgaged Part for* 1500 *l.* And afterwards, *upon Aſſignment over of the ſaid Mortgage, B.* eldeſt Son of A. and who was *the Remainder-man in Tail, covenanted to pay* the Mortgage-money; and the Aſſignee covenanted to re-aſſign to B.—A. died, and then B. died. It was agreed by Lord C. King, L. Ch. J. Raymond, and the Maſter of the Rolls, that the *perſonal Eſtate of B. is not liable to pay off this Mortgage, in Eaſe of the Lands mortgaged*; the Charge being made by A. in Purſuance of his Power, and therefore the next Remainder-man muſt be content to take the Land cum Onere; that this being the

the *original Debt of A.* his perſonal Eſtate, if any were, would be liable; but B.'s perſonal Eſtate ought not to be charged with A.'s Debt; and notwithſtanding B.'s Covenant to pay, this Covenant, ſince the *Land was the original Debtor*, will be conſider'd only as a Surety for the Land, and therefore a Bill by the next Remainder-man to charge the perſonal Eſtate of B. in Eaſe of the Land, was diſmiſs'd with Coſts. 2 Wms.'s Rep. 591. 596. Hill. 1731. Evelyn v. Evelyn.

Covenant of B. the Son, created a perſonal Debt, and conſequently ſuch a Debt as the perſonal Eſtate is to diſcharge,

and not the real Eſtate, according to the conſtant Courſe of Equity; and as to the Objection, that the real Eſtate is the principal Debtor, ſo it is in all Mortgages; and yet in all Caſes, where there is a Competition between the real and the perſonal Eſtate, that is preferr'd; which is the Reaſon that the Practice of the Court requires, that in all Caſes where the Heir is to be charged, the Executor muſt be brought before the Court. To this Point was cited the Caſe of Sir **John Napper** and the Lady **Effingham**, which was, That a great Part of Sir John Napper's Eſtate was in Mortgage: Then died Sir John, Sir Theophilus being his Heir, who, upon his Inter-marriage with the Lady Effingham, ſettled a Jointure upon her, and covenanted to pay Sir John's Debts. Then died Sir Theophilus, poſſeſs'd of a conſiderable perſonal Eſtate, which came to his Lady, the Lady Effingham; againſt whom Sir John Napper, the Heir at Law of Sir Theophilus, brought his Bill, to have the perſonal Eſtate of Sir Theophilus, upon his Covenant, applied in Diſcharge of the Mortgages; and ſo it was decreed. But to this it was anſwer'd, That the principal Caſe differs from that of Sir John Napper cited; the Reaſon of which was, that Part of the Eſtate of the Mortgagor was ſettled by a private Act of Parliament, in Truſt to pay his Debts; which Eſtate, ſo ſettled in Truſt, was diſpoſed of by Sir Theophilus, and then it was but juſt and equitable, that his perſonal Eſtate ſhould be applied to exonerate the mortgaged Eſtate deſcended to the Heir at Law, becauſe he was anſwerable for the Truſt Eſtate, ſettled for that Purpoſe. My Lord Chancellor, upon the laſt Argument, ſaid, It could not be expected the Court ſhould then deliver their Opinion; ſo that the Matter ſtood thus for the Judgment of the Court. Gibb. 142. 144. Mich. 4 Geo. 2. in Canc. in Caſe of Evelyn v. Evelyn, and Evelyn v. Booth & Uxor.

(C) *Diſputes between Sureties* themſelves.

1. A. *And B.* were *bound* with J. S. *as Sureties* in an Obligation. *A. was ſued* upon the Bond, *and the whole Penalty recover'd againſt him.* He exhibited an Engliſh Bill into the Court of Requeſts againſt B. to have Contribution. A Prohibition was moved for to the Court of Requeſts, and granted; becauſe by entering into the Obligation, it became the Debt of each of them jointly and ſeverally, and the Obligee had his Election to ſue which of them he pleaſed, and take forth Execution againſt him. And the Court ſaid, that if one Surety ſhould have Contribution againſt the other, it would be a great Cauſe of Suits, and therefore the Prohibition was awarded; and ſo it was ſaid, it was lately adjudged and granted in the like Caſe, in Sir **William Whorwood's** Caſe. Godb. 243. pl. 338. Hill. 11 Jac. in C. B. Wormleighton v. Hunter.

But where *A. and B.* were *bound with J. S.* for the proper Debt of J. S. *to W. R. who ſued A. only* on the ſaid Bond. A. brought his Bill againſt B. to make him contribute to pay the Debt and Damages, J. S. being inſolvent; and the Court was of Opinion, That *B. ought to contribute* a Moiety; and *decreed W. R. to aſſign over the Bond to A. and B.* to help themſelves againſt J. S. for the ſaid Debt. Chan. Rep 120. 13 Car. 1. Morgan v Seymour.

2. The Plaintiff and Defendant were *jointly bound* for a third Perſon, who died, leaving no Eſtate. *The Plaintiff was ſued, and paid the Debt*, and brought his Bill againſt the Defendant for Contribution, who was decreed to pay his proportionable Part. Per Lord Coventry. Nelſ. Ch. R. 10. Fleetwood v. Charnock.

Toth. 103. S. C.——Where *one Obligee*, that is a *Surety*, *is ſued alone*, by the *Cuſtom of the* City of *London* he *ſhall make his Co-Sureties contribute*. Vern. 456. pl. 429. Paſch. 1687. Layer v. Nelſon.

3. Three are bound for H. in 300 l. and agree, that if H. fail'd, to bear their reſpective Parts of the Money. *Two* of the Obligors borrow'd Money of A. on their Bond, and paid the 300 l. The other Obligor was

was insolvent; and now one of the two became insolvent, and the 3d paid A. the 300 l. The other Obligor *becomes able.* He shall be compell'd to pay a 3d Part, not a Moiety. Chan. Rep. 150. 17 Car. 1. Swain v. Wall.

Chan. Cases, 246 Hill. 26 & 27 Car. 2. S.C. decreed that B. should contribute a Moiety, and not a 3d Part only.——Fin. R. 203. the Case of Peter v. Rich.

4. *A. B. and C.* are *bound* in a Recognizance *for* J. S. *A. was sued, and paid the Money*, who afterwards *sued the principal* Debtor upon the Counter Bond, and had Judgment, and *took him in Execution*; *but he was discharged upon the* 10 *l.* Act. Then *A. exhibited a Bill against B.* to have Contribution, *C. being dead insolvent*; and it was decreed, that he should have Contribution. Fin. R. 15. Mich. 25 Car. 2. Hole v. Harrison.

S. C. decreed accordingly to pay a Moiety.—S. P. decreed 5 Car. 1. Chan. Rep. 34. in

(D) Surety. *How far relieved in* Equity.

1. A Man was *Surety* for another for Debt, and he and others were bound to save him harmless; and after the Surety *paid the Money*, and sued them who were bound; and pending this, *the original Debtor brought a Subpœna* in Chancery, *alledging that* before the Obligation made *he deliver'd Goods to the Surety for his Indemnification, and pray'd a Restitution*, and that he be not charged; and the Plaintiff pray'd an Injunction against the Defendant, that he shall not proceed at Common Law: But because the *Defendant said, that these Goods were deliver'd for another Cause*, and so made Title to them, the Injunction was denied. Br. Conscience, &c. pl. 20. cites 16 E. 4. 9.

A Surety relieved, where the *Bond* is *continued twelve Years, without the Plaintiff's Privity.* Toth. 280. cites 12 Jac. fo. 81. Hare v. Michell.

2. The Plaintiff became *bound with Defendant's Father for Payment of Money* at a Day, *which the Plaintiff supposed had been paid* accordingly, but it was not. The *Father dies* three Years after, upon whose Death the *Obligee puts the Bond in Suit against the Plaintiff*; but in respect the Bond was continued without the Plaintiff's Privity, the *Son* (having a good Estate from his Father) *and the Feoffees*, to whom the Son had convey'd those Lands *in Trust*, *were ordered to sell* those Lands for Payment of the Father's Debts. Toth. 279, 280. cites 10 and 11 Jac. li. a. fo. 664. and 728. Saunders v. Churchill and Smith.

Nelf. Chan. Rep. 9. S. C. reports it thus, viz. About 18 Years before the Bill filed, Moile the Father became *bound with one Rosecarrock* in a Bond of 200 l. condition'd for the Payment of 100 l. *to the* Lord Roberts, the *Defendant*, at a certain Day long since past. Afterwards the *Defendant purchased Lands of the said Rosecarrock*, to the Value of 500 l. which Purchase was made *about* 4 *Years before Rosecarrock's Death.* After his Death, the Plaintiff took out Administration to him; and being sued upon this Bond, exhibited his Bill for Relief. And in regard of the Antiquity of the Bond, and for that Rosecarrock himself was never sued in his Life time, it was *presumed that the Defendant did deduct the Debt out of the Purchase-Money*; and notwithstanding there were no Proofs made of the Payment of the Money, the Court decreed, that the Defendant should be restrain'd from proceeding at Law on the Bond.

3. The Heir of a Surety, where the *Bonds* are *continued without the Privity of the Surety*, relieved. Toth. 280. cites Mich. or Hill. 5 Car. Moile v. Dom. Roberts.

Where a *Surety pays* a Debt, and *has no Counter-Bond*, by the *Custom* of the City of *London* he shall maintain an Action against the Principal. Vern. 456. Pasch. 1687. Layer v. Nelson.

4. A. was bound as Surety for B. and the Debt was recover'd against A.——A. having *no Counter-bond*, brought his Bill to recover the Debt and Damages against B. which was decreed accordingly by Lord Coventry. N. Ch. R. 24. Ford v. Stobridge.

5. J. S Grandfather of T. S. the Defendant, and whoſe Heir and Executor the Defendant is, became *bound with A.* the Father of B. the Plaintiff, and whoſe Heir B. is, *in ſeveral Bonds, as* his *Surety for* 4000 *l. A. convey'd* the Manor of C. *by way of Mortgage to J. S. to counter-ſecure him againſt the ſaid* Bonds for 4000 *l. A.* prevail'd with J. S. to become *bound with him afterwards for* 2000 *l. more.* Then A. paid off 1500 l. of the 4000 l. The Bill was to be admitted to redeem upon Payment of what J S. or the Defendant himſelf had paid off, or been dampnified by the Bonds for the 4000 l. and what remain'd unpaid of the 4000 l. And the Queſtion was, Whether the Plaintiff, (inaſmuch as there was no Agreement proved, that the Mortgage was to be a Security to J. S. againſt the Bonds for the 2000 l. as well as thoſe for 4000 l.) ſhould be admitted to redeem upon Payment of the 4000 l. without the 2000 l. Decreed, That *if the Plaintiff will redeem, he muſt ſave harmleſs the Defendant, as well touching the* 2000 *l. as the* 4000 *l.* upon this Rule, That *he that will have Equity* to help where the Law cannot, *ſhall do Equity* to him againſt whom he ſeeks to be relieved. The Counſel for the Plaintiff ſaid, It was a juſt Decree. Hill. 1667. Upon an Appeal to the Lord Keeper Bridgman, the Decree was confirm'd. Chan. Caſes, 97. Hill. 19 & 20 Car. 2. in Canc. St. John, Eſq; v. Holford Baronet, and others.

6. Plaintiffs in 1694. were bound as *Sureties* for B. and *had Counter-Bonds.* B. the *Principal was* afterwards *arreſted, and the Defendant his Brother became his Bail,* and *Judgment was obtain'd againſt the Bail.* The *Plaintiffs being ſued on the original Bond,* were forced *to pay the Money; and* now *brought their Bill to have the Judgment* obtain'd *againſt the Bail aſſign'd unto them,* in order to be reimburſed what they had paid. Per Lord Chancellor: The Bail ſtand in the Place of the Principal, and cannot be relieved on other Terms than on Payment of Principal, Intereſt, and Coſts; and the Sureties in the original Bond are not to be contributary. And therefore decreed the Judgment againſt the Bail to be aſſign'd to the Plaintiffs, in order to reimburſe them what they had paid, with Intereſt and Coſts. 2 Vern. 608, 609. pl. 546. Paſch. 1708. in Canc. Parſons and Cole v. Dr. Briddock, & al'.

7. Per Cowper, C. Where a Perſon is Security in a Contract, *there is a joint Contract,* that the Principal ſhall indemnify his Security; and the Ground of Equity is, that when the Money is due, the Equity ariſes. But Sir Thomas Powis ſaid, that one may *exhibit his Bill before the time of Payment*; but where the Land, or *Land and Perſon are both Security,* the Eſtate ſtands at Stake to enable the Principal to owe it, as well as the Security to pay it, or borrow it thereon. And the Contract of the Security is, that he ſhall continue to owe it on the Credit thereof, and not to go to Gaol the next Day; for even in a *perſonal Security,* you muſt the next Day apply for a *Reimburſement,* for what was Equity one Day, is Equity the next. G. Equ. R. 69. Paſch. 7 or 9 Ann. in Caſe of Hungerford v. Hungerford.

(E) Surety *favour'd,* How; to enable him to *recover his Debt.*

See (C) (D)

1. A. Seiſed of Lands in Fee, was made Receiver by the Maſter of the Rolls of an Infant's Eſtate, and enter'd into a *Recognizance to the Maſter of the Rolls to account yearly,* and *B. and C. join'd as Sureties.* Afterwards *A. married, having ſettled Part of the Land on his Wife before Marriage* in Jointure, *without Notice of the Recognizance to her,* or

her Friends. A. deviſed all his real and perſonal Eſtate to B. and made him Executor, and died. It was decreed by the Maſter of the Rolls, That all the perſonal Eſtate of A. ſhould be firſt applied to ſatisfy the Recognizance, 2dly, The Land deviſed to B. the Surety, the Deviſe being voluntary, and the Wife a Purchaſer, 3dly, The Jointure Lands, the Jointreſs claiming under A. can be in no better Caſe than A. was. But if the Lands deviſed are ſufficient, then the Bona Paraphernalia ſhall be enjoy'd by the Widow; but if inſufficient, then the Bona Paraphernalia muſt be ſubject before the Sureties Lands ſhall be extended. 2 Wms's Rep. 542. Trin. 1729. Tynt v. Tynt.

2. *And tho'*, in Caſe of a Recognizance to another Perſon, *the Jointreſs ſhould get an Aſſignment, and extend it at Law*, it was held by the Maſter of the Rolls, That even at Law the Sureties might have an *Audita Querela*, inſiſting, that all the principal Cognizor's Lands, either in his own or the Hands of his Alienees, ought to be liable before any of the Sureties Lands be extended, notwithſtanding it was objected, that ſhe was a Purchaſor without Notice. 2 Wms's Rep. 543. Trin. 1729. in Caſe of Tynt v. Tynt.

3. *A. recover'd* in the Court of Lynn againſt B. *and* when he was *going to take out Execution*, B. *offer'd* to give him *a Note* for the Money, *and to get one to join in it as Security* with him; which was done accordingly. After this *A. commenced another Action againſt the Security, and recover'd.* Upon which the *Security paid the Money, and* now *brought* his *Action againſt the Principal for ſo much Money laid out to his Uſe.* This Matter appearing at the Trial, the Defendant's Counſel excepted, That the Action would not lie. But Lord Raymond, who ſat as Judge of Aſſize, was of Opinion, That it would. Accordingly the Plaintiff proceeded in his Evidence. 2 Barnard. Rep. in B. R. 26. Trin. 5 Geo. 2. Morrice v. Redwyn.

For more of Surety in General, ſee **Bail**, and other Proper Titles.

Surety of the Peace.

(A) Lies *for, or againſt whom.* And *in what Caſes.*

1. IF a Man is *afraid of being beat* by J. S. he ſhall have Surety of the Peace. *Contra* if he be afraid *of Impriſonment*; for he ſhall have Falſe Impriſonment. Br. Peace, pl. 22. cites 17 E. 4. 4.

Serjeant Hawkins ſays, It ſeems the better Opinion, that he who is threatened to be impriſoned by another, has a Right to demand Surety of the Peace; for every unlawful Impriſonment is an Aſſault and Wrong to the Perſon of a Man; And the Objection that one wrongfully impriſoned may recover Damages in an Action &c. and therefore needs not the Surety of the Peace, is as ſtrong in the Caſe of Battery as Impriſonment, and yet there is no Doubt but that one threatened to be beaten may demand the Surety of the Peace. Hawk. Pl. C. 127. cap. 60. S. 7.

2. The

2. The Writ of Surety of the Peace lies when a Man is *in Fear or Doubt that another will beat or aſſault him*, and lies properly where one Man does *threaten another Man to kill* him, *beat* him, *or aſſault him*; then may he come into the Chancery, and pray to have ſuch a Writ unto the Sheriff. F. N. B. 79. (G)

It ſeems agreed, that wherever a Perſon has juſt Cauſe to *fear that another will burn his Houſe, or do* him a *corporal Hurt*, as by Killing or Beating him, *or* that he will *procure others to do* him *ſuch Miſchief*, he may demand the Surety of the Peace againſt ſuch Perſon. Hawk. Pl. C. 127. cap. 60 S. 6.

3. If the *Husband threaten his Wife to beat or to kill her*, ſhe ſhall have this Writ. F. N. B. 80. (F)

Hawk. Pl. C. 127. cap. 60. S. 4. ſays,

It is certain that a Wife may demand it againſt her Husband threatning to beat her outrageouſly, and that a *Husband* alſo may have it *againſt his Wife*; and cites Dalt. cap. 98. Lamb. 78. Crompt. 133. b. F. N. B. 80 (F) and * 3 Lev. 128.

* This is miſprinted, and ſhould be 2 Lev. 128. Hill. 26 & 27 Car. 2. B. R. and is the Caſe of The King v. Ld. Lee, who upon a Habeas Corpus granted upon Affidavits of ill Uſage, Impriſonment, and Danger of her Life (as had been done before in Sir Philip Howard's Caſe) brought his Wife into Court, where they charged each other with Unkindneſs; and ſhe being in Court, made Oath that ſhe went in Danger of her Life by him, notwithſtanding ſeveral Affidavits were made in Court to the contrary, viz. of his good Uſage, the Court intended to have bound him with Sureties, according to F. N. B. 80 & 239. † (B) but they declared that they could do no more than to bind him, and not to remove her from him.

† This likewiſe ſeems miſprinted, and ſhould be 238. (E) the laſt Paragraph.

A Woman may have the Peace againſt her Baron for unreaſonable Correction. Mo. 874. pl. 1219. in Sir Tho. Seymour's Caſe. —— Godb. 215. pl. 307. Mich. 11 Jac. in C. B. in S. C. accordingly.

A Matter being before the Court of Chancery, relating to Husband and Wife, and the Court being informed of his ill Uſage of her, a Supplicavit de Bono Geſtu was granted. 2 Vent. 345. Trin. 32 Car. 2. Sir Jerom Smithſon's Caſe.

4. Serjeant Hawkins ſays, It ſeems agreed at this Day, That *all Perſons* whatſoever *under the King's Protection, being of Sane Memory, whether* they are *natural* and good *Subjects, or Aliens, or attainted of Treaſon &c.* have a Right to demand Surety of the Peace. But that it has been queſtion'd whether *Jews or Pagans, or* Perſons *attainted of Præmunire*, have a Right to it, or not. Hawk. Pl. C. 126. cap. 60. S. 2, 3.

5. There is no Doubt but that Surety of the Peace ought, upon a juſt Cauſe of Complaint, to be granted *by any Juſtice of Peace againſt any* Perſon whatſoever *under the Degree of Nobility, being of Sane Memory, whether* he be a *Magiſtrate or a private Perſon, and whether* he be *of full Age, or under Age* &c. But Infants and Feme Coverts ought to find Surety by their Friends, and not to be bound themſelves; and the ſafeſt Way of proceeding againſt a Peer, is by Complaint to the Court of Chancery, or King's Bench. Hawk. Pl. C. 127. cap. 60. S. 5.

(B) *How obtained* and granted. And Puniſhment of wrongfully obtaining it.

See (A) pl. 2. 5.

1. BY the ancient Courſe of Law, a Man ought to *take his Oath* upon a Book, before he have this Writ, *before a Maſter of the Chancery*; but now they uſe to ſue forth ſuch Writs by their Friends, who will ſue for them without any Oath made; and the ſame is ill done, becauſe they are many Times ſued more for Vexation than for any good Cauſe; and the Juſtices of B. R. will not grant any Writ for Surety of Peace, without making Oath that he is in Fear of corporal Damage. And the Juſtices of Peace ought not to grant any Warrant at the Suit of any one, to find Sureties of Peace, if the Party, who does require the ſame, will not take his Oath *that he requires the ſame not for Malice*, but for the Safety of his Body. F. N. B. 79. (H)

2. 21 *Jac.* 1. *cap.* 8. *S.* 2. Enacts, That *Proceſs of the Peace or Good Behaviour, to be granted out of the Chancery or B. R. ſhall be void, unleſs ſuch Proceſs be granted upon Motion made in open Court, and upon Declaration in Writing, upon their corporal Oaths by the Parties which ſhall deſire ſuch Proceſs, of the Cauſes for which ſuch Proceſs ſhall be granted, and unleſs ſuch Motion and Declaration be mentioned to be made upon the Back of the Writ, the ſaid Writing there to be entered and remain of Record; and if it ſhall afterwards appear to the Court, that the Cauſes expreſs'd in ſuch Writing be untrue, the Judges ſhall award Coſts and Damages unto the Parties grieved; and the Parties ſo offending may be committed until they pay the ſaid Coſts and Damages.*

S. 3. *All Writs of Superſedeas to be granted by either of the Courts aforeſaid, ſhall be void, unleſs ſuch Proceſs be granted upon Motion, and upon ſuch Sureties as ſhall appear on Oath to be aſſeſs'd at five Pounds Lands, or ten Pounds in Goods, in the Subſidy-books, which Oaths, and the Names of ſuch Sureties, with the Places of their Abode, and where they ſtand aſſeſs'd, ſhall be entered of Record; and unleſs it ſhall alſo appear to the Judges, that the Proceſs of the Peace or Good Behaviour is proſecuted by ſome Party grieved.*

S. 4. *The Judges of the Courts aforeſaid, upon Proof of any Miſdemeanors committed in the obtaining of Writs of Superſedeas, or procuring Surety, may likewiſe puniſh the falſe and inſufficient Sureties, and the Procurers thereof, ſo as ſuch Puniſhment extend not to Life or Member.*

3. It was ſaid by the Court, that if an Offender be brought before a Juſtice of Peace, *the Party ought to tender Sureties*; and it doth not behoove the Juſtice to demand it. Noy 70. Colme v. Frome.

4. Every *Juſtice of Peace is bound to grant it* upon the Party's giving him Satisfaction *upon Oath that he is* actually *under Fear* that ſuch a one will burn his Houſe, or do him corporal Hurt, or procure others ſo to do, as by killing or beating him; and that he *has juſt Cauſe to be ſo*, by Reaſon of the others having threaten'd to beat him, or lain in wait for that Purpoſe; *and that he does not require it out of Malice, or for Vexation.* Hawk. Pl. C. 127. cap. 60. S. 6.

(C) *Taken.* How, and by whom.

1. IT is a common Opinion, that the Security which the Sheriff ought to take of the Party who ought to find Sureties for the Peace, ought to be taken *by Bond*, that is to ſay, to bind the Party and his Sureties by Bond, that he keep the Peace, and that he burn not the Houſes &c. *But* now *after the Statute of* 1 *E.* 3. *cap.* 16. which appoints that certain Perſons ſhall be aſſign'd in the Chancery to keep the Peace, *there are other Forms of Writs* for the Eaſe of the People who will have the Peace againſt other Perſons, *which* Writs *ſhall iſſue out of the Chancery*; and *ſome* of them are *directed unto the Juſtices of the Peace, and* unto *the Sheriff, and ſome* are directed *unto the Sheriff only.* F. N. B. 80. (C)

5. If a Man be in Variance with other Men, and he is *in Doubt that Damage or Hurt will come unto him, or his Servants or his Goods, by Reaſon of* this *Variance*, then *he ſhall have* a *ſpecial Writ* againſt them, directed to *the Sheriff, that he cauſe them to find Security* that they do not damage or hurt the other in his Body, or his Servants, or other his Goods, in a certain Sum &c. And if they will not find Security, that then he arreſt them and keep them in Priſon until they will find Sureties; And that the Sheriff certify all that is done upon the ſame into the Chancery, upon Pain &c. as it appears by the Regiſter. And that Security ought to be taken *by Recognizance*, as it ſeems; Tamen quære. F. N. B. 80. (G)

(D) *Proceed-*

(D) *Proceedings after* the Writ granted.

1. WHEN a Man has purchaſed Writ of *Supplicavit*, *directed* unto the Juſtices of Peace, or the Sheriff, or both, then *he againſt whom the Writ is ſued*, *may come into the Chancery*, *and* there *find Sureties* that he will not do Hurt or Damage unto him that ſues the Writ, *and then he ſhall have a* Writ of *Superſedeas* out of the Chancery, directed unto the Juſtices of Peace, or the Sheriff, or one of them, *reciting* how *that he has found Sureties* in Chancery *according to the Writ of Supplicavit*, and reciting the Writ of Supplicavit, and the Manner of Security that he hath found, and the Sum of Money in which they are bounden, *commanding the Juſtices and Sheriff that they ſurceaſe to arreſt him* &c. *or compel him to find Sureties* &c. And if they have arreſted him for that Cauſe, and for no other, that then they deliver him &c. And if the Party who ought to find Sureties, cannot come into the Chancery to find ſuch Surety, then his *Friend may purchaſe a Superſedeas* in the Chancery *for him*, reciting the Writ of Supplicavit &c. and that ſuch a one and ſuch a one are bounden for him in the Chancery in ſuch a Sum, that he ſhall keep the Peace according to the Writ of Supplicavit. And the Writ ſhall be directed unto the Juſtices of the Peace and Sheriff, that they, or ſome of them, take Surety of the Party himſelf, according to the Writ of Supplicavit for to keep the Peace &c. and that then they ſurceaſe to arreſt him; and if they have arreſted him for that Cauſe, that then they deliver him. F. N. B. 81. (A)

If one who fears that Surety of the Peace will be demanded againſt him, finds Surety before any Juſtice of the Peace of the ſame County, either before or after a Warrant is iſſued againſt him, he may have a Superſedeas from ſuch Juſtice, which ſhall diſcharge him from Arreſt from any other Juſtice, at the Suit of the ſame Party for whoſe Security he has given ſuch Surety. Alſo it is ſaid, that an Appearance upon a Recognizance of the Peace, may be ſuperſeded by finding Sureties in the Chancery or King's Bench; but this Cuſtom having been often abuſed, therefore the Statute of 21 Jac. 1. cap. 8. was made, [which ſee at (B) pl. 2.] Hawk. Pl. C. 128. cap. 60. S. 14.

2. Sometimes the Writ of *Supplicavit* is made *returnable into the Chancery at a certain Day*; and if it be ſo, then *if the Juſtices do not certify* the Writ, nor the Recognizance, and the Security which is taken, *the Party* who ſued the Supplicavit *ſhall have a* Writ of *Certiorari*, directed unto the Juſtices of Peace, *to certify* the Writ of Supplicavit, and what they have done thereupon, and the Security which is found &c. and ſo the Party ſhall have ſuch Certiorari unto the Juſtices of the Peace, to certify the Security taken upon Supplicavit, altho' the Writ of Supplicavit be not returnable in the Chancery. F. N. B. 81. (B)

3. If a Man *demands Surety* of Peace *in the County* againſt any Man, he ſhall find Sureties in the County before the Juſtices of the Peace &c. He who demands the Security may ſue a Writ of *Certiorari*, directed *unto the Juſtices of Peace*, to remove the Surety of Peace, and the Recognizance taken thereupon, and *to certify* that Recognizance and Security taken, *under the Seals of the Juſtices of Peace*, or one of them. F. N. B. 81. (C)

(E) *Breach* what, and puniſh'd how.

1. SUrety *of the Peace is not broken without Affray made*, *or Battery*, but Surety *de bene Gerendo may be broken by a Number of People*, *and by their Harneſs* &c. Br. Surety, pl. 12. cites 2 H. 7. 2.

2. *But* it was held, that he who is bound *to the Peace*, ought to demean himſelf well in his Behaviour and in Company, *not doing any thing which ſhall be a Cauſe of breaking of the Peace, or of putting the People in Dread*, Fray or Trouble; And ſo it ſhall be intended of all concerning the Peace, but not in miſdoing of other Things which do not concern the Peace. Br. Surety, pl. 12. cites 2 H. 7. 2.

3. If a Man has ſued a Writ againſt one directed unto the Sheriff, and the Sheriff take Security of him to keep the Peace, and afterwards he *breaks the Peace* againſt him who demanded the ſame; he who demanded the Surety of Peace ſhall have *Attachment* againſt him who found this Surety. F. N. B. 80. (A)

4. And upon this Writ the Plaintiff ſhall *recover Damages, and* the *Defendant* ſhall be *fined for his Contempt*, if he be found guilty. F. N. B. 80. (A)

(F) *Caſes relating thereto.*

Br. Pledges pl. 17. cites S. C.

1. *Reſpaſs by Bill*, where the *Defendant came Verſus Curiam Regis* of C. B. *to have Anſwer in a Plea of Land*, there came the *Defendant* and *aſſaulted, wounded, and menaced him, ſo that hedurſt not carry his Charters and come without great Coſts, In contemptum Regis, contra Pacem & ad damnum* &c. & tam pro Rege quam pro ſeipſo ſequitur by Bill in C. B. and the Defendant pleaded Not guilty; and the Defendant was compelled to find Pledges of his Good Behaviour and the Peace, and that he ſhould do nothing to the Plaintiff privately nor openly, by himſelf nor by others &c. Br. Surety, pl. 11. cites 30 Aſſ. 14.

2. In Surety of the *Peace againſt a Prior or Abbot*, he *himſelf ſhall be bound with the Sureties*; But if it be *Chanon or Monk*, the Sureties only ſhall be bound for him. Br. Surety, pl. 9. cites 36 H. 6. 23.

3. Where a Man *finds Surety to keep the Peace, and has Day Menſe Paſchæ*, he ought to appear at the Day tho' the Party who demands the Peace does not appear; otherwiſe he ſhall forfeit his Bond; contra in Action between Party and Party; The Defendant who is bound to appear upon Capias to keep his Day, ſhall not forfeit his Bond by his Default, if the Plaintiff does not appear at the ſame Day. Br. Surety, pl. 10. cites 39 H. 6. 26.

4. In Writ of *Privilege at London out of B. R.* the *Sheriff* of London *return'd inter alia, that the Party was arreſted for Surety of the Peace*, and therefore *he who took the Peace was demanded in Bank*, and *if he did not come the Priſoner ſhould be diſcharged* of the Surety of the Peace; *But if he came and demanded Surety* of the Peace, the *Surety* of the Peace *ſhould be granted to him in Bank*; *But the Surety in London ſhould be diſcharged.* Br. Surety, pl. 13. cites 2 H. 7. 4.

(G) Pleadings.

1. WHEN a Juſtice takes Surety for the Peace, it is not ſufficient to *ſay, that I. N. invenit ſufficientem ſecuritatem* de Pace, *without naming the Names of the Surety and their Sums*, but he ought to name their Names and Sums. Br. Surety, pl. 13. cites 2 H. 7. 4.

For more of Surety of the Peace in General, ſee **Good Behaviour, Supplicavit**, and other Proper Titles.

Surmiſe

Surmiſe and Suggeſtion.

(A) In what Caſes ſufficient.

1. THO' *no Proceſs be awarded againſt the King's Debtor*, yet *if he be preſent* in the Exchequer, *he ſhall anſwer to the King immediately*; per Ludlow. Per Fitzjohn, in Caſe that it appears of Record that he is Debtor to the King, then he ſhall anſwer, but not upon Surmiſe or Suggeſtion; but there he ſhall come by Proceſs. Br. Surmiſe, pl. 26. cites 40 Aſſ. 35.

2. Suggeſtion was made in Chancery, *that the Prothonotaries of the King had given certain Land to R. C. Grandfather to the Lord C. that now is, in Tail, and that R. Father of the Lord purchaſed Licence to infeoff certain Perſons of the ſame Land, and retook to him and Joan his Feme in Tail, the Remainder to his right Heirs*, upon which Suggeſtion iſſued *Scire facias to T. M. who had eſpouſed the Feme of R. if he knew any thing to ſay why the King ſhould not have Reſtitution of the Iſſues of the Land during the Nonage of the Heir who is now Lord C. in Ward of the King*; who came *and ſaid, that the Scire facias is not founded upon any Record or Office but upon Suggeſtion, and tender'd a Demurrer*, Et non Allocatur; by which he would have taken Advantage of the Warranty made by the Feoffor, But it was *ſaid for the King, that becauſe the Licence was obtained in Deſceit of the King, he not perceiving his Right*, this cannot diſcontinue the Revenue of the King, and therefore the *King ſhall have the Ward, and the Meſne Iſſues*; and by Award the Baron was charged of Iſſues in Right of two Parts and diſcharged of the third part; For ſhe has thereof Cauſe of Dower: And ſo ſee that Suggeſtion or Information ſhall ſerve in Lieu of an Office. Br. Surmiſe, pl. 30. (bis) cites 40 Aſſ. 36. Br. Surmiſe, pl. 9. cites S. C. and 21 Aſſ. 15. accordingly.

3. *And if the Land tail'd* the *Reverſion to the King be recovered in Value againſt the Tenant in Tail*, and he dies, his Heir within Age, yet the King ſhall have the Ward of the Heir. Br. Surmiſe, pl. 30. (bis) cites 40 Aſſ. 36.

4. In Treſpaſs where the *Defendant is returned* in *Iſſues upon the Diſtreſs, a Man cannot Surmiſe that he is dead* and pray that the Proceſs ſhall ceaſe; But *this ought to come in by the Return of the Sheriff*, and not by Suggeſtion. Br. Surmiſe, pl. 15. cites 22 E. 4. 1.

5. In Appeal, the *Defendant confeſſed the Felony and took to his Clergy*, the *Plaintiff made Suggeſtion that he was taken at his freſh Suit in Middleſex*, whereupon the Court wrote to Middleſex to inquire of the freſh Suit and found it, and he had Reſtitution. Br. Surmiſe, pl. 21. cites 2 R. 3. 13.

(B) In

(B) In what Caſes ſufficient to ſupport Actions.

1. I. *N. ſued Execution upon a Statute Merchant*, and *Writ iſſued to Extend the Land*, which *Writ was not returned*, and the *Conuſor* came and *ſaid that Execution is made, and pray'd Venire Facias upon Audita Querelu*; Aud it was granted to him upon this Surmiſe, notwithſtanding the Writ was not return'd. Br. Surmiſe, pl. 11. cites 39 E. 3. 30.

2. If an *Obligation* is made *by two*, and the *Obligee brings Action againſt the one, he may ſurmiſe that the other is dead or is an Infant, or is a Feme Covert*, and *ſo* where the Obligation is made *to two, and the one brings the Action*, he may ſurmiſe that the other is dead, or a Monk profeſſed. Br. Surmiſe, pl. 20 cites 32 H. 6. 30. 31.

3. *Attaint upon Conſpiracy* brought *againſt* 2, and the *one pleaded Not guilty*, and the *other pleaded another Plea*, and the *Iſſue found againſt both*, and the *one alone brought Attaint*, and aſſign'd the falſe Oath in all that was ſaid againſt him *where they found Damages of* 100 *l. againſt both*, and there the *Plaintiff was compell'd to abridge his Demand of the Damages*, for thoſe are intire, and to proceed with his Attaint of the Principal. And there it was argued by diverſe, that he may make *Surmiſe that the whole Execution was levied upon him, and ſo to maintain the Attaint alone of the whole*; Et non allocatur; for it ſhall be intended that the Execution was made as the Judgment is, and as it is ſued; and therefore Judgment was as above, that he ſhall abridge his Demand of the Damages; quod nota. And ſo it ſeems that ſuch Surmiſe ſhall not ſerve. Br. Surmiſe, pl. 1. cites 34 H. 6. 30 & 35 H. 6. 19.

4. A Man ſhall not have Writ of *Melius Inquirendum* upon Surmiſe. Br. Surmiſe, pl. 17. cites F. N. B. 255.

(C) In what Caſes ſufficient to ſupport Action in a Foreign County.

1. IN Quare non Admiſit the Sheriff at the Diſtreſs return'd the Biſhop Nihil, by which the Plaintiff ſaid that he had Aſſets in London, and pray'd Diſtreſs there, and had it. Br. Surmiſe, pl. 2. cites 3 H. 4. 4.

2. In *Detinue* the *Defendant pray'd Garniſhment*, and had it, 2 *Nihils were return'd*, and the *Defendant ſurmiſed that the Garniſhee had Land in another County*, and pray'd Proceſs there, and had it upon his Surmiſe. Br. Surmiſe, pl. 13. cites 6 E. 4. 11.

(D) In what Caſes ſufficient to inforce the doing a Thing.

1. IF the *Tenant in Aſſiſe of Novel Diſſeiſin, obtains Writ to the Juſtices to ſend it into B. R.* and the *Juſtices deliver it to the Tenant, and he retains it*, there upon Suggeſtion the Plaintiff may have Writ to take the Body of the Tenant to deliver the Record. Br. Surmiſe, pl. 4. cites 1 Aſſ. 14.

2. Sug-

2. Suggeſtion was made in B. R. *that J. S. was indicted of Felony in the County of D. before the Juſtices of Peace, and was impriſoned for it in D.* and *pray'd the Court to ſend for the Body of the Record.* Knivet J. ſaid, We will not write without ſeeing the Record before us, but you may have Writ in Chancery to remove the Body and the Record before us. And ſo ſee that they would not grant his Prayer upon Suggeſtion. Br. Surmiſe, pl. 10. cites 41 Aſſ. 22.

3. Homine Replegiando; the *Defendant avowed the Impriſonment of the Plaintiff as his Villein regardant* &c. and the *other ſaid that Frank* &c. and ſo to Iſſue, and the *Plaintiff ſuggeſted that the Defendant had taken his Goods, and prayed Deliverance*; to which the *Defendant ſaid nothing*; by which *Writ iſſued to make Deliverance*, and the Defendant took Exception to the Allegation of the Plaintiff, ſaying that this is a Count without Original; Et non Allocatur; for it was ſaid that it was a Surmiſe, and not a Count, by which he had his Goods without Surety to re-deliver them to the Avowant, if the Iſſue paſs'd for the Defendant. And per tot. Cur. The Attorney of the Defendant ſhall gage Deliverance well enough. Br. Surmiſe, pl. 12. cites 5 E. 4. 8.

4. *Matters of Record* ought not to be *ſtay'd* upon the bare Suggeſtion or Surmiſe of the Party; but there ought to be an Affidavit made of the Matter ſuggeſted, to induce the Court to ground a Rule for ſtaying the Proceedings upon the Record. (Mich. 1650. B. R.) For the Law favours not the Stopping of the Proceedings in Law, except there be very good Cauſe for it. L. P. R. 537. Tit. Suggeſtion.

(E) In what Caſes ſufficient to inforce the doing a Thing. Pleading.

1. IN *Debt of 20 l. upon an Obligation*, the *Defendant pleaded Acquittance, that the Plaintiff had acquitted him of 20 l. due to him, for 20 s. Rent bought by the Defendant of the Plaintiff; and therefore* the Defendant *ſurmiſed in Fact, that the Plaintiff was ſeiſed of the 20 s. Rent in D. and ſold it to the Defendant for the 20 l. which 20 l. is the ſame 20 l. contained in the Obligation of which the Acquittance is made.* And good Matter in inforcing the Acquittance; per tot. Cur. And the Plaintiff ſaid that he ſold to the Defendant 20 Acres of Meadow in D. for the 20 l. for which the Obligation was made, abſque hoc that the Obligation was for the 20 l. which was for the 20 s. Rent, Priſt; and the others e contra, and a good Iſſue. Br. Surmiſe, pl. 22. cites 3 H. 7. 16.

(F) At what Time. After Judgment.

1. IN *Dower* the *Tenant confeſs'd the Action*, and the *Demandant recover'd*, and *after the Judgment the Demandant ſurmiſed that the Baron died ſeiſed*, and *pray'd Writ to inquire of the Damages*, and had it after Judgment; quod nota. Br. Surmiſe, pl. 16. cites 14 H. 8. 25.

Surpluſage.

(A) In Pleadings.

Br. Nugation, pl. 10. cites S. C.

1. FOrmedon in Deſcender, and *counted of a Gift* made to one *of a Reverſion by Fine in Tail*, the *Remainder to his Anceſtor in Tail*, and *alleg'd Seiſin in his Anceſtor* by Force of the Tail, and conveyed himſelf Heir, and the *Tenant pray'd that he ſhew the Fine*, becauſe he counted upon the Fine. But per Hill and Hank, He need not; for he has ſhewed the Fine *executed*; and therefore it is only Surpluſage, and a Thing to which you ſhall not have Anſwer; and ſo was the beſt Opinion. Br. Nugation, pl. 4. cites 11 H. 4. 39.

Surpluſage *on the Part of the Plaintiff or Defendant* ſhall abate the Writ *by the Common Law*; Per Paſton for Law; qnod non negatur. Br. Nugation, pl. 2. cites 9 H. 6. 1.

2. *Addition of Executor, Adminiſtrator, Carpenter* &c. *on the Part of the Plaintiff, where he is not Executor*, Adminiſtrator, or Carpenter, *or* if he be *named J. N. of D. where he is of S.* this is only Surpluſage, which ſhall not prejudice. Br. Nugation, pl. 11. cites 9 H. 5. 5.

3. *Contrary on the Part of the Defendant* in Action, *where Proceſs of Outlawry lies*; Note the Difference. Br. Nugation, pl. 11. cites 9 H. 5. 5.

But now in Action where Proceſs of Outlawry lies, he ought to give Addition to the Defendant; and this ſhall not abate the Writ. *Contrary on the Part of the Plaintiff* at this Day; Per Paſton for Law; quod non negatur. Br. Nugation, pl. 2. cites 9 H. 6. 1.

Action againſt J. N. and *Eſſoign was caſt by J. N. of D.* and therefore was diſallowed; And ſo ſee that Surpluſage ſhall hurt on the Part of the Defendant ſometimes. Br. Nugation, pl. 24. cites 18 E. 4. 4.

4. Debt by J. N. *Adminiſtrator* &c. *or Executor* &c. and *counts of a Duty due to himſelf*, it is well; for this Word Executor or Adminiſtrator is Nugation. Br. Nugation, pl. 18. cites 9 H. 5. 5.

5. Entry in Nature of Aſſiſe *of a Diſſeiſin done to his Father.* Fulthorp pleaded Actio non; for your *Father*, whoſe Heir you are, *infeoff'd* us *in Fee without Condition*, and gave Colour. Newton ſaid he infeoff'd you upon Condition &c. and for the Condition broken he reenter'd, and was ſeiſed till by you diſſeiſed; and held a good Plea and good Confeſſion, and avoiding, notwithſtanding that the Defendant alleg'd the Feoffment to be without Condition; for thoſe Words (*without Condition*) *are void, unleſs the Defendant claims by the Condition* to have the Land by the Performance of it; by which the Defendant *ſaid that he infeoff'd him ſimply, abſque hoc* that he infeoff'd him upon Condition, prout &c. Br. Confeſs and Avoid, pl. 45. cites 9 H. 6. 55.

Br. Obligation, pl. 47. cites 4 E. 4. 29. S. P.

6. *Solvendum to the Obligor* in an Obligation, is Surpluſage. Br. Nugation, pl. 19. cites 4 E. 4.

7. *Debt againſt the Provoſt and Scholars of a College in Cambridge, becauſe T. M. late Provoſt, Predeceſſor of the Defendant, and the Scholars by F. their Servant, bought 2 Bells of the Plaintiff* for 40 l. here at London, where the Action is brought, *which came to the Uſe and Profit of the College aforeſaid*; and after *T. M. was removed* from the Provoſtſhip, *and the Defendant was elected and made Provoſt*, and the Defendant, being often requeſted, did not pay. And, by ſome Juſtices, the Buying of the Provoſt and the * College cannot be good; nor by the Abbot and Covent,

* All the Editions of Brook are

Dean

Dean and Chapter, Baron and Feme; for it is only the Buying of the Dean, Provoſt, Abbot, or Baron, for the others ſhall not be but as dead Perſons in the Law. And by ſome Juſtices the Contract is good, and ſhall be intended the Bargain only of the Provoſt, and the Name of the Scholars is not but Surpluſage; for the *Contract of the Provoſt, and the coming to the Uſe of the College, is the Effect of the Matter.* Br. Corporations, pl. 53. cites 5 E. 4. 70.

(Contract); but it ſeems miſ-printed for (College) and that is agreeable to the Original. L. 5to E. 4. 73. b. 74. a.

8. Detinue of Charters againſt *J. N. Son and Heir of J. N.* and *counted of Bailment made by the Plaintiff to the Defendant*; who *ſaid, that he is Son and Heir of W. and not Son and Heir of J. N.* Per Moyle; this is no Plea, becauſe it is of his *Poſſeſſion, and not brought againſt him as Heir*, and ſo it is Surpluſage; as in Treſpaſs, De ſon tort Demeſne is no Plea. Br. Traverſe per &c. pl. 235. cites 10 E. 4. 12.

Contra in Debt againſt him as Heir, *or in Detinue againſt him as Heir.* Br. ibid.

9. Writ of Entry upon 5 *R.* 2. That *he enter'd into ſuch Land, which N. gave to him in Tail*; and by Award of the Court thoſe Words *(which N. gave to him in Tail)* were ſtruck out; quod nota, for Surpluſage. Br. Nugation, pl. 15. cites 15 E. 4. 24.

10. *But* where *in Aſſiſe of Rent*, if the *Plaintiff makes Title* in his Plaint *to a Rent-Charge*, the Defendant ſhall anſwer to it; for this is material. Note, the Difference. Br. Nugation, pl. 15. cites 15 E. 4. 24.

11. *In Debt upon a Bond*, if the *Plaintiff counts that the Defendant made it when he was of full Age*, the *Defendant may plead Nonage, without traverſing the full Age*; for this is not material, nor uſual in the Count; per Littleton. Br. Nugation, pl. 15. cites 15 E. 4. 24.

12. Surpluſage is *no Bar* nor *Eſtoppell.* Arg. Godb. 380. in Brooker's Caſe, cites 9 E. 4. 24. 7 E. 4. 19.

13. In *Treſpaſs* the Plaintiff declared, that the Defendant vi & armis broke his Cloſe and enter'd; and Blada tritici &c. conculcavit & conſumpſit, nec non herbam ſuam &c. pedibus ambulando conculcavit & conſumpſit continuando tranſgreſſion' præd' quoad depaſturationem, conculcationem &c. Herbæ &c. The Plaintiff had Verdict. And it was aſſigned for Error, that the Plaintiff *ſuppoſed a Continuance* of the Treſpaſs *in depaſturing of the Graſs, whereas nothing of that was mention'd before*; for the Treſpaſs was laid in conculcatione & conſumptione Herbæ, pedibus ambulando. But this was held to be Surpluſage, and the Judgment was affirm'd. Mo. 684. pl. 944. Mich. 32 & 33 Eliz. in the Exchequer-Chamber. Short v. Hellyar.

Cro. E. 183. pl. 6. Paſch. 32 Eliz. S.C. accordingly.

14. When a Man *meddles with a Thing which is but Surpluſage*, which he needed not to do, he *muſt recite the ſame ſubſtantially*; otherwiſe his Plea will be vitious. Per Coke Ch. J. Godb. 248. pl. 345. in Sir Chriſtopher Heydon's Caſe, cites 4 Rep. Palmer's Caſe.

2 Bulſ. 174. S. P. in Heydon's Caſe, by Coke; and that if he commits any Contrariety in this Recital, this Writ ſhall abate; and ſaid, that to this Purpoſe it appears at large in Pl. C. 84, 85. in Partridge and Croker's Caſe.

15. It is Surpluſage for a Plaintiff in *Treſpaſs* to make a *Title to himſelf* in his Declaration. 2 Bulſt. 288. Mich. 12 Jac. Willamore v. Bamford.

16. An Action of *Treſpaſs* brought, and a *Continuando* of the Treſpaſs *unto the* Day of the *ſuing forth the Plaintiff's Original, to wit, the 20th Day of November, which* Day *was after the ſuing forth of the Original.* And becauſe the Jury gave Damages for the whole time, which ought not to be, it was moved, that the Judgment upon the Verdict might ſtay; but by the whole Court the *Videlicet* was held *idle*, and Judgment given for the Plaintiff. Brownl. 234. Hill. 13 Jac. Forreſt v. Headle.

17. In *Treſpaſs* for taking his Horſe, the Defendant *pleaded, that J. H. was ſeiſed in Fee, and granted a Rent* &c. for which he diſtrain'd &c. The

Brownl. 235. S. C. ſays the Court

was of Opinion, that it was help'd by the Statute of Jeofails, and the Word (Pater) was idle, and Judgment was given for the Plaintiff.

The Plaintiff *replied, That before the Grant of the Rent, W. H. was ſeiſed, who had Iſſue J. H. the Elder, and J. H. the Younger; and that he deviſed his Lands to his ſaid 2 Sons in Tail*, and died; and *that J. H. the Eldeſt, died without Iſſue; and that J. H. the Younger had Iſſue A. H. and died; and* that the ſaid *A. H. gave Leave to the Plaintiff to put in his Horſe, abſque hoc, quod præd. J. H.* Pater, *was ſeiſed in Fee, prout &c.* Upon Iſſue it was found for the Plaintiff. It was objected, that here was no Iſſue at all, becauſe the Defendant had not pleaded quod J. H. *Pater* was ſeiſed in Fee, as the Traverſe was. But the Plaintiff had Judgment; for tho' Pater be added, yet the Words, without Pater, bind it to that Perſon, that the Defendant had pleaded; and that (Pater) is but John, and can do no Hurt, eſpecially ſince it may ſtand true that he was Pater, as if it had been travers'd *abſque hoc quid prædictus J. H. Generoſus*, &c. otherwiſe if it had been *abſque hoc quod præd. W. H.* which could not be taken for the ſame Perſon. Hob. 116. pl. 144. Trin. 14 Jac. Blackford v. Alkin.

So in Debt upon a Bond to perform or award, the Defendant pleads Nul agard. The Plaintiff replies, and ſets out an Award, *That the Defendant ſhould pay* to the Plaintiff 66 l. at the Houſe of the Plaintiff *apud Sevenoak prædictum*, and aſſigns a Breach in Non-payment. And Exception was taken to the Prædictum, becauſe there was *no Sevenoak mention'd before*; but reſolved, that the Prædictum was void. But the Plaintiff had Judgment notwithſtanding. Lutw. 561. Mich. 11 W. 3. Lambert v. Kingsford.——S. C. cited 2 Lord Raymond's Rep. 1183. Trin. 4 Annæ, in Caſe of the Queen v. Mackarty and Fordenburgh.

18. In an Action of Eſcape againſt the Sheriff, upon a meſne Proceſs, the Defendant pleaded, that he had taken the Party upon a Latitat; and that in bringing of him from *Iſlington prædicto* he was reſcued, and ſo returns the Reſcue; and Exception taken to the (Prædicto) becauſe there was *no Iſlington mention'd before.* But Coke Ch. J. held, that the (Prædict.) was Surpluſage, and idle; and Judgment was enter'd againſt the Plaintiff. 3 Bulſt. 198, 199. Trin. 14 Jac. Proby v. Lumley.

19. J. S. *granted a Rent-Charge to Baron and Feme, during the Life of the Feme.* The Baron dies. The *Feme ſurvives, and takes Adminiſtration to the Baron.* The *Rent was behind in Life of the Baron.* In Replevin the Defendant made *Conuſance, as Bailiff of the Feme, as Adminiſtratrix of her Baron*, ſetting forth the Grant. It was objected to the Conuſance as Bailiff to her, as Adminiſtratrix, when ſhe was intitled by Survivorſhip. But the Objection was over-ruled, becauſe the Conuſance as Adminiſtratrix is void, idle, and ſuperfluous. Brownl. 171. Hill. 15 Jac. Brown v. Dunry.

Cro. J. 549. 550. pl. 11. Mich. 17 Jac. B. R. S. C. by Name of Hall v. Bonythan. But ſays, that Haughton was contra. ——2 Roll Rep. 135. Halſe v. Bonithan. S. C. adjournatur. Mich. 17 Jac. But Mountague Ch. J. and Doderidge, were of Opinion as here; but Haughton contra. But they ſaid, That if the Replication had been *Non ſolvit* 14 *Die Auguſti*, leaving out the Word (*Prædicto*) then it had not been a good Iſſue join'd. And Doderidge J. relied much upon the finding of the Jury, becauſe they found the Non-payment the 14th Day of June; but had they found the Non-payment the 14th Day of Auguſt, the Caſe had been more dubious.

20. Debt upon *Bond*, condition'd *to pay* 10 l. *on the* 14*th* Day of *July*; the Defendant *pleaded Payment on the* 14*th* Day of *July*. The Plaintiff *replied, That he had not paid it prædicto* 14 *die Auguſti, quo eidem ſolvend. fuit.* The Jury found, that he paid it on the 14th Day of July. Upon a Writ of Error in B. R. the Error aſſign'd was, that the 14th Day of Auguſt was not mention'd before: But the Court held, that the Word (*Auguſt*) is only ſuperfluous, and that the Iſſue was not join'd upon that, but upon the aforeſaid 14th Day; and ſo affirm'd a Judgment given in C. B. Palm. 74, 75. Hill. 17 Jac. B. R. Halſie v. Bointon.

21. In *Action* upon the Satute *for Tithes De Viginti acris* terræ for three Years *de quibus quidem Triginta acris*, no Tithes were paid &c. After a Verdict for the Plaintiff it was moved that it might be amended and made (Viginti) as it was in the firſt Part of the Declaration, and as the Truth of the Matter really was; But ſince all the Rolls were (Viginti,)

it was held not amendable, but it being after Verdict the Court thought it well enough, and that the Word *(Triginta)* in the Declaration *was only Surpluſage*; for De quibus quidem acris is well enough, for it cannot be intended but of 20 Acres. Sid. 135. pl. 9. Paſch. 15 Car. 2. B. R. Fanſhaw v. Mildmay.

22. The *Diſtringas* againſt Jurors was *returnable tres Trin.* &c. *Niſi prius venerit M. Hale mil' capital' Baro*, &c. *on ſuch a Day ejuſdem menſis Junii*, whereas *no Month of June was mentioned before*; After Verdict this was moved in Arreſt of Judgment as a Diſcontinuance. The Chief Baron and the whole Court held that the Word (Ejuſdem) ſhall be void and the Word (Junii) ſhall be intended June next enſuing; As a Covenant to pay Money at Michaelmas, ſhall be intended Michaelmas next. Hard. 330. pl. 4 Trin. 15 Car. 2. Anon.

S. C. cited by Powell J. Ld. Raym. Rep. 195. Paſch. 9 W. 3. in Caſe of Reynoldſon v. Blake.

23. E. N. the *Adminiſtrator* of G. N. brought an Action of Debt upon a Bond due to the Inteſtate, and ſets forth that the Adminiſtration was granted to him, but in the Concluſion of his Declaration, he ſays, *Profert hic in Curia Literas &c. Præfato &c. G. inſtead of Præfato E.* The Defendant pleaded a frivolous Plea, and upon Demurrer it was inſiſted for the Defendant, becauſe of this *Variance of G. inſtead of E.* But per Cur. (Præfato G.) are *only Surpluſage*, and ſhall not vitiate the Matter preceding, which was ſufficient without them. And Judgment was given for the Plaintiff. 2 Jo. 219. Paſch. 34 Car. 2. B. R. Nonne v. Maxey.

24. In Debt the Plaintiff declared upon a *Bill Penal of* 60 *l.* dated 1 May, *for Payment of* 33 *l.* on 1 Nov. and *averred that the ſaid* 60 *l. was not paid*, and upon Demurrer one Exception among others was taken to the Declaration that the Plaintiff averred the Defendant had not paid Præd. Sexaginta Libras, when the Word *(Sexaginta) was not mentioned before*, and he *ſhould have alleged that the ſaid* 33 *l. were not paid*; for otherwiſe the Sum penal did not become due, and yet it is demanded in the Action; Curia Adviſare vult. But the Reporter ſays, Quære, if the Word (Sexaginta) ſhall not be taken to be void, and as if it had not been alleged, there being no ſuch Sum of 60 l. by the Bill to be paid upon the 1ſt Nov. and then it is all one as if he had ſaid that the Defendant Non ſolvit præd. Libras quas ſolviſſe debuit ſuper præd. primum diem Novembris, and cited ſeveral Caſes. Lutw. 445. 450, 451. Mich. 3 Jan. 2. Bell v. Bolton.

3 Nels. abr. 262. pl. 10. cites S. C. out of Lutw. and ſays it was held to be Surpluſage.

25. In Debt upon *Bond for Performance of Covenants* the Plaintiff aſſigned a Breach generally; the Defendant demurred, for that it is ſaid *(as in the aforeſaid Indenture is mentioned)* where *no Indenture was mention'd before*, but it was conceived [by ſomebody but ſays not by whom, but only that I conceive] that Utile per inutile non vitiatur, and that the Word (aforeſaid) is not only Surpluſage but void, as the Viz. was in Hob. 169. which in Stukely and Butler's Caſe was deem'd void. 2 Sid. 63. Hill. 1657. B. R. Longvil v. Damport.

26. Treſpaſs for an Aſſault and falſe Impriſonment for 40 Hours; the Defendant *pleaded that* the Plaintiff was outlawed, and that a *Capias utlegatum was proſecuted againſt Prædict' John Fowler (the Plaintiff) whereas his true Name was George*, and ſo juſtifies by Virtue of a Warrant on a Capias utlagatum, and upon Demurrer to this Plea the Defendants had Judgment; for the Plaintiff was named thro' all the Proceedings, but in this Place where it was ſaid, that a Capias utlegatum was proſecuted againſt prædict' Johannem, therefore the Word Johannes ſhall be rejected as Surpluſage, and then the Plea will be, that a Capias utlagatum was proſecuted againſt Prædict. Fowler. 3 Nels. a. 262 pl. 11. cites 2 Lutw. 919. Fowler v. Holmes & al'. 1 Lev. 428. S. P. 450. S. P. Yelv. 182. S. P.

I do not find that any Judgment given in this Caſe is mentioned in 2 Lutw. 919. &c. which ſays the Caſe was order'd to be argued again but that by its not being entered in the Prothonotarie's Book for Argument in ten Terms, it is probable it was never argued afterwards; and that as to the Point here no Authority was cited. —— And as to the Books mentioned to be S. P. there ſeems ſome great Miſtake.

5 Mod. 206. Paſch. 8 W. 3. S. C. and held that the Word (Molare) being inſenſible no Damages could be given for it, and that the Declaration had been good if that part of it had been left out, ſo that the Plaintiff had his Judgment.

27. The Plaintiff declares, that he was ſeiſed of an ancient Watercourſe and Mill, and that the Defendant being conuſant thereof *diverted the* ſaid *Watercourſe ſo that it could not flow to his Mill* for ſo long Time in certain, *eo quod molare non potuit* &c. After Verdict for the Plaintiff it was moved in arreſt of Judgment, that the Hindrance of the Grinding is deſigned to be the Git of the Action, and therefore it ought to be ſhewn expreſsly, but here it is not ſhewn intelligibly; for it ſhould be molere, which ſignifies to grind, but molare has no ſuch Signification. Sed non Allocatur; for per Holt Ch. J. & totam Curiam, where the *Act implies a Tort of itſelf*, a *per quod is not neceſſary to ſupport the Action, but* only *aggravates the Damages*. Now here it appears a Tort without the per quod; for it is ſaid that the Watercourſe could not flow to his Mill, and therefore it is good, eſpecially after Verdict. Judgment for the Plaintiff. Ld. Raym. Rep. 102. Mich. 8 Will. 3. Richards v. Hill.

3 Lev. 435. S. C.

28. The Plaintiffs brought Quare impedit for hindering them to preſent to the Church of St. Andrew's Wardrobe in London, and aver, that that the Indowment of the Rectory of the Church of St. Andrew's Wardrobe was of greater annual Value than the Indowment *Prædictæ Vicariæ* Eccleſiæ of St. Ann Black-frier's. It was objected by the Defendant's Counſel, that the Plaintiffs have not made a ſufficient Averment as to this Point; for the Plaintiffs have averred that the Indowment of the Church of St. Andrew's Wardrobe is of greater Value than the Indowment (Prædictæ) vicariæ eccleſiæ de St. Anne's Black-friers, whereas no *Mention was made of any Vicarage before*, to which this relative Word (Prædictæ) can refer; and ſo the Indowment, which is a ſubſtantial part, is not traverſable. But the whole Court reſolved, that the Averment was ſufficient, for they would reject the Word (Prædictæ) as Surpluſage. Ld. Raym. Rep. 192. &c. Eaſt. 9 W. 3. Reynoldſon v. Blake and the Biſhop of London.

29. In Treſpaſs the Plaintiff declared of *taking Cattle at D. parvum prædict. &c.* It was objected that the Declaration was ill becauſe no Mention was made of D. parvum before, and therefore it is a Declaration of a Treſpaſs in no Place, But the Court ſaid they would reject the (prædict.) as Surpluſage. Ld. Raym. Rep. 237. Trin. 9 W. 3. Lambert v. Cook.

30. In *Treſpaſs* of taking Cattle the Defendant *pleaded a Leaſe from J. S.* the Plaintiff *replied a former Leaſe ſtill in being to him*, and *traverſed the Leaſe to the Defendant*; the Defendant *demurr'd becauſe the Plaintiff, Non traverſat the laſt Leaſe &c.* The Court ſaid, That as to the Word (Non) ſince it is contrary to the Record, they would reject it as Surpluſage. Ld. Raym. Rep. 237, 238. Trin. 9. W. 3. Lambert v. Cook.

12 Mod. 510. S. C. accordingly. —— Ld. Raym. 669. S. C. accordingly.—

31. *Indeb. Aſſ.* for Money had and received by the Defendant for the Plaintiff *ad uſum of the Defendant*, and Verdict on Non Aſſ. for the Plaintiff. Held on Motion in Arreſt of Judgment, that thoſe Words (ad uſum of the Defendant) ſhould be *rejected* becauſe inſenſible and repugnant. 1 Salk. 24. pl. 7. Paſch. 13 W 3. B. R. Palmer v. Stavely.

5 Mod. 327. S, C. but S. P. does not appear. —— 2 Salk. 451. pl. 2. S. C. but S. P. does not appear.

32. In Debt brought by the College of Phyſicians Exception was taken, that it was ſaid in the *Declaration, that the Defendant by the Space of ſo many Months ante exhibitionem billæ ſcilicet the 23d of Auguſt practiced phyſick* &c. which was impoſſible; but it ought to have been from the 23d &c. To which it was anſwered and agreed by the Court, That the *Words 23d of Auguſt coming in after a Scilicet*, if they were *repugnant* to that which went before, *ſhould be rejected*, and then the Declaration would be good for ſo many Months ante exhibitionem billæ. 1 Ld. Ramy. Rep. 681, 682. Trin. 13 W. 3. in Caſe of the Preſident and College of Phyſicians v. Salmon.

33. In

33. In *Error* of a Judgment in C. B. the Plaintiff aſſign'd the Want of an Original, to which the Defendant *pleads a Releaſe of Errors* in the ſaid Judgment, *Et* hoc paratus eſt verificare unde *petit Judicium ſi* prædictus the Plaintiff Breve de Errore prædictum proſequi aut manutenere debeat *& quod idem judicium in omnibus affirmetur.* It was objected to this Plea becauſe the Concluſion of it pray'd that the Judgment might be affirm'd, whereas it was ſaid it ought to be upon the Eſtoppel; But it was reſolved, that the Beginning of the Plea and the Concluſion of it, till you come to thoſe Words, Et quod idem Judicium &c. was proper and right, and therefore the Addition of thoſe Words ſhould be rejected; and Powell J. ſaid he wonder'd how it could be fancied to be an Eſtoppel. 2 Ld. Raym. Rep. 1052. Mich. 3 Annæ. Davenant v. Raſter.

For more of Surpluſage in general, ſee **Abatement of Writs, Arbitrement, Avowry Judgment, Trial,** and other Proper Titles.

* Surrender.

* Surrender Surſum redditio properly, *is* a yielding up of an Eſtate for Life, or Years to him that has an immediate Eſtate in Reverſion or Remainder, wherein the Eſtate for Life or Years may drown by mutual Agreement between them. Co. Litt. 337. b. ——— † See (B)——(C) pl. 1, 2, 3, 4.

Fol. 494.

(A) † *What Perſons* [may ſurrender] Good *In Reſpect of their Eſtates.*

1. IF ‡ two Jointenants, and to the Heirs of one, **he who has for Life cannot ſurrender to his Companion for the Joint Poſſeſſion in them.** 22 H. 6. 51. **Curia.**

‡ S. P. But in ſuch Caſe *Tenant in common may.* Mo. 388. pl. 506. Arg. in Perrot's Caſe cites 22 H. 6.

If I *infeoff* two, Habend' *to them and the Heirs of the one*, there *he who has Franktenement cannot ſurrender to the other by Reaſon of the joint Poſſeſſion*; for there the *Franktenement cannot merge in the Reverſion*, by Reaſon that he who has the Fee is jointly ſeiſed of the Poſſeſſion with him who ſurrender'd, and *it is not properly* a Surrender, *but where he who ſurrenders gives Poſſeſſion* to him who takes by the Surrender. Per tot. Cur. except Port. Br. Surrender, pl. 13. cites 22 H. 6. 51.

2. Tenant for Life **may ſurrender** to him in Remainder for his Life; **for his Eſtate for his own Life is more high to him than the Eſtate for the Life of the Leſſee.** 24 E. 3. 32. b. Perk. S. 590. S. P. cites 22 H. 7. 11. and ſays, that in the ſame Manner as it is of Land it is likewiſe of all Rents, Commons, Corodies &c. mutatis mutandis &c.

3. **If** Baron and Feme Jointenants for Life **are, the** Baron may **well ſurrender** to him in Reverſion; **and this ſhall bind the Baron, tho' it ſhall** not bind the Wife, **nor ſhall be any Diſcontinuance to her; yet this is good Surrender during the Life of the Baron. Contra** 17 H. 7. **Kelloway** 42. It is not good, becauſe the Nature of a Surrender is to give abſolutely all the Eſtate for Term of Life; which cannot be here for the Intereſt of the Feme by Words of Surrender. Kelw 42. pl. 5. per Frowike.

Perk. S. 612. ſays, it is a good Surrender during the Coverture; and if the Husband dies before the Wife, or if they be *divorced, Cauſa præcontractus*, the Wife may enter and defeat the Surrender, notwithſtanding

withſtanding that he, to whom the Surrender was made, died ſeiſed of the Land in his Demeſne as of Fee, and his Heir be in by Deſcent. The ſame Law is, if the Surrender be made by the Husband and Wife, &c.

4. Scire Facias to execute a Fine by the Heir of S. who was in Remainder in Fee by the Fine. The Caſe was, that *Fine* was levy'd *to A. for Life*, the Remainder *to J. in Tail*, the Remainder *in Fee to S.* who were *three Brothers*; and after *A. ſurrender'd to J.* and then *S. died without Iſſue*, and after *J. died without Iſſue*; and the Plaintiff brought the *Scire Facias to execute the Fine, as Heir of S.* And the *Tenant pleaded, that A. after the Death of J. and S. enter'd, Que Eſtate he has, and ſo the Fine executed.* And Thorp held, that the Surrender of the Eſtate of A. to J. was only the Eſtate of A. and that J. had the Eſtate of A. but only during the Life of A. and that if J. had died, living A. quod Occupanti conceditur, which ſeems to be a great Error, for Finch contra, and that this was a full Surrender. And by this the *Eſtate of A. is merg'd in the Tail, and the Eſtate Tail of J. executed*, and his Feme ſhall be endow'd; and that J. might have vouch'd by the Warranty of the Tail in the Life of A. and therefore the Plaintiff made another Anſwer to the Plea of the Tenant; quod nota. Per Thorp; If A. had charged and ſurrender'd, J. ſhould hold charged during the Life of A. which ſeems to be Law. Br. Surrender, pl. 4. cites 24 E. 3. 9.

5. In Aſſiſe it was ſaid, that if *a Man leaſes Land for Term of Life*, and after *grants the Reverſion to J. N. for Term of Life*, and the *Tenant attorns*, and they *both ſurrender*, that this is no good Surrender to him in Reverſion for Term of Life. The Reaſon ſeems to be, inaſmuch as it does not lie in Grant, but by Deed. But Grene ſaid, it was a good Surrender; but he was not preciſe, but awarded the Aſſiſe for another Cauſe; quod nota. Br. Surrender, pl. 31. cites 47. Aſſ. 46.

6. A Surrender may be made *by Tenant for Term of Life to him in Reverſion*, upon Condition, well enough; and ſo it was, viz. *rendering Rent, and for Default of Payment a Re-entry.* It ſeems that this ought to be done by Deed indented. Br. Conditions, pl. 156. cites 14 E. 4. 6.

S. P. Br. Charge, pl. 1. cites 9 H. 6. 52.—— S. P. Perk. S. 612.

7. Where a *Feme has a Leaſe for Years, and takes Baron*, the Baron may give or ſurrender, or forfeit it, but he cannot charge it; but the Law ſhall charge it to the King for Debt. Br. Surrender, pl. 44. cites 22 E. 4. 37.

8. In Writ of Entry it was agreed, that the *Surrender of one Executor is good for both*; quod nota. Quære, of the Default of one Executor, upon Reſceipt after Plea pleaded. And the Caſe was, that 2 *Executors pray'd to be received to ſave their Farm by the Statute of Glouceſter, and after the one made Default*, and came, and would have ſurrender'd, and was not ſuffer'd; for the Court had no Warrant but to record his Default. The Reaſon ſeems to be, inaſmuch as he is not Party to the Original, but comes a Latere by the Reſceipt. Br. Surrender, pl. 22. cites 21 H. 7. 25.

9. If there be *Leſſee for Years* of Land, the *Remainder* of the ſame Land *to a Stranger for Life*, the Remainder *to another in Fee*, and *during the Years he in the Remainder for Life ſurrreders to him in Fee*, it is a good Surrender. Perk. S. 605.

10. If a *ſole Woman ſeiſed* of Land *in Fee*, *leaſes* the ſame *to a Stranger for Life, and takes a Husband*, and the *Leſſee grants his Eſtate unto the Husband*, this is no Surrender; and yet the Husband is ſeiſed of the Reverſion in Fee, which is immediate to the Eſtate of the Leſſee, viz. in the Right of his Wife, and not in his own Right, &c. Perk. S. 622.

Ow. 83. Paſch. 6 Eliz.

11. *Feme Tenant in Tail made a Leaſe for Years, and* then *took Baron*, and died. The Baron, being *Tenant by the Curteſy, ſurrender'd to the Iſſue.*

Iſſue. It was held per Curiam, that the Iſſue ſhall avoid the Leaſe. Mo. 8. pl. 30. Paſch. 3 E. 6. Anon. in C. B. Powtrell's Caſe, S. P. exactly, and ſeems to be S C. And Dyer doubted, whether this Surrender be good; becauſe Tenant by the Curteſy is but in Reverſion, and has nothing in Poſſeſſion, and it is dubious how he can ſurrender. But Weſton and Brown held, that he may ſurrender; for a Term, or Franktenement may be ſurrender'd to him that hath the Eſtate in Reverſion or Remainder, if it [there] be not a meſne Eſtate, as Tenant for Life, the Remainder for Life, the Remainder in Fee; the firſt Tenant for Life cannot ſurrender to him that has the Fee. But the great Point was, whether the Iſſue could avoid the Leaſe during the Life of the Tenant by the Curteſy; and the Court held he could not, for the Tenant is in as a Purchaſor.——Dal. 65. pl. 28. S. C.

12. Surrender can't be made, but *by one* that is *in Poſſeſſion*. Per Dyer. Dal. 32. pl. 17. Anno 3 Eliz. Anon. S. P. unleſs in ſpecial Caſes. Perk. S. 599.——And therefore if *Leſſee for Life, or* for *Years* of Land, be *ouſted* of the Land *by a Stranger*, and after the Ouſter, and before his Entry, he does ſurrender unto his Leſſor, it is no good Surrender; becauſe he has but a Right at the Time of the Surrender &c. Perk. S. 600.

So if a Woman has *Title to have Dower* by the Common Law, and ſhe *ſurrenders unto him, againſt whom ſhe ought to have Dower*, it is a void Surrender. Perk. S. 600.

13. A. leaſes to B. for 21 Years. B. makes an *Under-leaſe to C.* for 10 Years, and then *B. granted the Reſidue of the Term to D.*——A. leaſes to E. for 21 Years to commence after the Determination, Surrender, &c. of the Leaſe to B. Afterwards A. grants the *Reverſion to J. S.* C. and D. attorn'd; and afterwards *C. and D. ſurrender'd to J. S.* Per Cur. the Surrender by D. is good; for inaſmuch as the Intereſt, which D. had at the Time of the Surrender, was a Reverſion in B. after his Grant to C. and there it remain'd, and continued in its Nature, as to that Point, notwithſtanding that by the Grant it paſs'd in another manner than as a Reverſion. 3 Le. 95, 96. pl. 138. Trin. 26 Eliz. in B. B. Gurney v. Saer.

14. *Tenant at Will* cannot ſurrender. Per Gawdy, J. Cro. E. 156. pl. 39. Mich. 31 & 32 Eliz. B. R. in the Caſe of Sweeper v. Randal.

15. *A. had 2 Sons, B. and C.—A. was Tenant for Life, Remainder to B. and C. for Life. C. purchaſed the Reverſion in Fee*; and then *A. and B. ſurrender'd to C. without Deed.* Per Fenner J. the Surrender is void; for if it be good, it muſt firſt be the Surrender of him in Remainder, which cannot be without Deed; and it cannot be the Surrender of the firſt Tenant for Life to him in Remainder, becauſe there is no Word of Surrender between them. Cro. E. 269. pl. 9. Hill. 34 Eliz. B. R. Perkins v. Perkins. Le. 176. pl. 250. S. C. accordingly.

16. Tenant *by Extent* may ſurrender to him in Reverſion. Per Ventris J. 2 Vent. 328. in Caſe of Dighton v. Greenvill, cites 4 Rep. 82. Corbet's Caſe.

17. *Bargainee before Entry* may ſurrender, aſſign, or releaſe. Cart. 66. Paſch. 18 Car. 2. C. B. per Bridgman Ch. J. in Caſe of Geary v. Bearcroft.

18. Surrender of *Leaſes* (made by the Limitor of the Eſtate) *to Ceſty que Truſt* (being Remainder-man for Life in Poſſeſſion) according to a Power reſerved by the Limitor, was held not to paſs the Eſtate, the Surrenderee having only a Truſt, and not the legal Eſtate. Skin. 77. Mich. 34 Car. 2. B. R. Lady Stafford v. Luellin.

19. If after the *Leaſe and Releaſe* executed *to make* the *Tenant to the Præcipe*, the *Tenant ſurrenders to the Releaſor*, this is void; for he has no Reverſion for the Surrender to operate upon. Pig. of Recov. 50.

See (C) pl. 8, 9.

(A. 2) The *Force and Effect* thereof.

1. R*Eſignation by the Warden of a Chapel, Parſon, Prebendary*, or ſuch like pending the Writ, ſhall not abate the Writ, by the beſt Opinion there; And yet ſee elſewhere, that Leaſe of the Party who reſigns, is void thereby. Br. Surrender, pl. 27. cites 15 Aſſ. 8.

2. Where the *Tenant for Term of Life ſurrenders to him who Right has, or the Tenant to his Lord*, the Franktenement veſts without Livery; Per Shard. Br. Surrender, pl. 28. cites 27 Aſſ. 37. But contra Hank. 12 H. 4. 21. For the Tenant has Fee-ſimple; but it appears elſewhere, that where Tenant for Term of Life ſurrenders to him in Reverſion or Remainder, and he thereby enters that the Franktenement veſts without Livery. Br. Surrender, pl. 28. cites 27 Aſſ. 37.

3. If the *King gives in Fee, or in Tail, or for Life*, and the *Patentee leaſes it for Years, or* leaſes or *gives Part* of the Land *in Fee, and after ſurrenders his Patent by which it is cancell'd*, the Leſſee or Donee ſhall not by this loſe his Intereſt; for he may have a Conſtat out of the Inrollment, which ſhall ſerve him. But ſee now an Act of Anno 3 & 4 E. 6. cap 4 thereof. And quære if the Common Law ſhall not ſerve; for it appears in Libro Intrationum, that a Man may plead a Conſtat. Br. Surrender, pl. 51. cites 13 R. 2.

Br. Briefs, pl. 240. cites S. C.

4. Tenant by the Curteſy and the Heir within Age were, and *Aſſiſe* was brought *of Rent* againſt them, and the *Tenant by the Curteſy ſurrender'd to the Heir pending the Writ*; And per June, He ſhall not be adjudg'd in by Deſcent as to the Plaintiff to abate his Writ, becauſe the taking of the Surrender was his own Act; and if the Tenant by the Curteſy had charg'd, the Heir ſhall hold charg'd during his Life; Per Rolfe, If *Writ of Entry* be *brought againſt the Heir after the Surrender*, he ſhall be ſuppoſed in by his Mother, and not by the Tenant by the Curteſy. Br. Surrender, pl. 24. cites 1 H. 6. 1.

5. If the *Tenant breaks Covenant in Reparations*, or ſuch like, and *after ſurrenders*, and the *Leſſor accepts it*, yet he may have Action of Covenant. Br. Surrender, pl. 47. cites 27 H. 6. 10.

6. If *Tenant in Tail of the Gift of the King ſurrenders his Letters Patents*, this ſhall not extinguiſh the Tail; for the Inrollment remains of Record, out of which the Iſſue in Tail may have a Conſtat, and recover the Tail, in Caſe of **The Earl of Rutland**, by which they made another Deviſe, that the *King ſhould grant to him the Fee-ſimple alſo, and then Recovery againſt him would bar the Tail*; Et e contra, the Reverſion being in the King. Br. Surrender, pl. 51. cites T. 32 H. 8.

7. A Surrender *determines the Intereſt of all Parties but* of *Strangers*. But as to themſelves it is determined to all Intents and Purpoſes; Per Croke J. Het. 21. Mich. 3 Car. C. B. in Caſe of Sir Edward Peyto v. Pemberton, cites 3 H. 6.

3 Lev. 284. in Trin. 2 W. & M. in C. B. the ſame Caſe, Pollexfen Ch. J. and Powell and Rooksby J. held that the Eſtate did

8. The Court held, That a Surrender *immediately deveſts the Eſtate* out of the Surrenderor, and veſts it in the Surrenderee; for this is a Conveyance at Common Law, to the Perfection of which no other Act is requiſite but the bare Grant; and tho' it be true, that every Grant is a Contract, and there muſt be an Actus contra actum, or a mutual Conſent, yet that *Conſent is implied*. A Gift imports a Benefit, and an Aſſumpſit to take a Benefit may well be preſumed; and there is the ſame Reaſon why a Surrender ſhould veſt the Eſtate before Notice of Agreement, as why a Grant of Goods ſhould veſt a Property, or ſealing of a Bond to another

another in his Abſence, ſhould be the Obligee's Bond immediately without Notice. 2 Salk. 618. Hill. 9 W. 3. B. R. in Caſe of Thompſon v. Leach.

not paſs by the Surrender; and for this they relied upon the conſtant Form of pleading Surrenders, in which the Precedents always are not only to plead the Surrender, but to plead it with an Acceptance, viz. to which the Surrenderee agreed, unleſs one or two in Raſtall; and diverſe Authorities were cited in the Caſe pro & con. And they held, that after Acceptance it ſhall not be ſo referr'd to the making the Deed, as to make it by Relation a Surrender to the Prejudice of a 3d Perſon, as to deſtroy the Eſtate of an After-born Son. But Ventris J. held, that the Eſtate veſted immediately by the making the Deed of Surrender, but to be deveſted by Refuſal of the Surrenderee afterwards to accept it, but that till ſuch Refuſal the Eſtate is in the Surrenderee; but that if it ſhould not veſt by the Delivery, yet by Acceptance after it ſhall be by Relation a Surrender from the firſt, and ſo deſtroy a Contingent Remainder of an After-born Son; and that this Relation does no Wrong to a 3d Perſon, becauſe ſuch Son was not in Eſſe at the Time of the Surrender. But Judgment was given according to the Opinion of the 3. Whereupon Error was brought in B. R. and Hill. 3 W. & M. the Judgment given in C. B. was affirm'd by the whole Court. After which Error was brought in the Houſe of Lords, and in December 1692, upon hearing of the Judges, who were all of Opinion as before, except Atkins Ch. B. then Prolocutor of the Houſe of Peers, the Judgment was revers'd by the Lords, Atkins and Ventris concurring with them.——2 Vent. 198 to 209. S. C. with the Argument of Ventris J. at large.——3 Mod. 296. S. C. argued in B. R. on the Writ of Error, and the Judgment affirm'd there; but ſays that in 4 W. & M. it was revers'd in the Houſe of Lords. ——Show. 296. Mich. 3 W. & M. S. C. argued ——Carth 211. S. C.

The Caſe in Hill. 9 W. 3. B R. was upon another Ejectment brought afterwards by the ſame Plaintiff againſt the ſame Defendant, in which the Queſtion was upon the Surrenderor's being alleg'd to be Non compos; and that being found, the Surrender was adjudg'd void. See Carth. 435. Comb. 438. 468. And upon Error in the Houſe of Lords upon that Judgment, the ſame was affirm'd. See 3 Mod. 301. 311. Show. Parl. Caſes 150. Ld. Raym. Rep. 313. 316. S. C. and 2 Vent. 208. Comyns's Rep. 45. S.C. but imperfect. Adjornatur.

It appears by Carth. 211. that after making the Surrender in Queſtion, the Surrenderor continued in Poſſeſſion, as before, for 5 Years, and the Surrenderee knew nothing of the Deed till 5 Years after the Execution, and then it was conſented to, and not before, within which 5 Years the After-born Son (who was the Plaintiff) was born.—— 3 Mod 296. much to the ſame Purpoſe.——3 Lev. 284 ſays he knew nothing of it till 5 Years after the Birth of the Son.

(B) *What Eſtate.* [And *to whom.*]

See (C)

1. THE very Tenant **cannot ſurrender** to the Lord. 12 H. 4. 21. 13 H. 4. 13. **adjudged.** 50 Aſſ. 1. **Contra** 49 E. 3. 5. 27 Aſſ. 37. S. P. Br. Confeſſion, pl. 15 cites 12 E. 4. 20, 21.

2. **The** very Tenant **of the** King **cannot ſurrender to him. Contra** 50 Aſſ. 1. See (L. 3)

3. **An Eſtate** for Life **may be ſurrender'd.** 49 E. 3. 5. 13 H. 4. 13. b. 50 Aſſ. 1.

4. If Tenant in Tail diſcontinues in Fee, Diſcontinuee **cannot ſurrender** to the Iſſue in Tail. **Contra** 34 Aſſ. 2. **adjudged.** Perk. pl. 598. S. P. cites 20 H. 4 21. and 34 Aſſ. 11.

5. In a Præcipe, **or other Action, where the Land is demanded,** the Tenant **who is ſeiſed** in Fee, **may ſurrender in Pais the Land to the Plaintiff without Livery; for he does this by the Command of the Writ.** 27 Aſſ. 37. Br. Surrender, pl. 28. cites S. C.

6. Where a Man *leaſes Land for Term of Years, the Remainder over for Life*, the *Remainder over in Fee, or reſerving the Reverſion*, there, *he in Remainder for Life may ſurrender to him in Reverſion, or to him in Remainder in Fee*, and the Eſtate for Term of Years is no Impediment; for tho' this cannot give the Poſſeſſion of the Land, yet it gives the Poſſeſſion of the Franktenement, which is in the thing which was ſurrender'd. Br. Surrender, pl. 55. cites 5 E. 4.

7. A Surrender *of a Leaſe, void on Non-payment* according to Covenant, is no Surrender. Per Manwood, 2 Le. 143. pl. 178. 33 Eliz. in the Exchequer, in Sir Moyle Finch's Caſe.

8. *Intereſſe Termini* can't be expreſsly ſurrender'd. 10 Rep. 67. b. in Caſe of the Church-Wardens of St. Saviour's, Southwark, cites 37 H. 6. 16.

S. P. by Holt Ch. J Skin. 580. S. C.—2 Salk. 565. S. C. & P. by Holt Ch. J

9. An *Eſtate at Will of Lands between common Perſons* is not a ſurrenderable Eſtate; becauſe it is at Will of both Parties, and either Party may determine his Will, without the Formality of a Surrender; and therefore there is no Surrender at all in Law of an Eſtate at Will between common Perſons. Per Holt Ch. J. 12 Mod. 79. Trin. 7 W. & M. in Caſe of the King v. Kemp.

Cumb. 334. S.C.--2 Salk. 565. S. C. There ought to be the *Will of the King declared under the Great Seal, that he accepts his Surrender*; otherwiſe he is finable, if he ſurceaſes to execute

10. *But* when the *King grants an Office at Will*, that is not at the Will of both Parties; it is only at the Will of the King to determine the Intereſt in the Office that Grantee holds of the King, without any Surrender; for if it be an *Office of Truſt for the Profit of the King*, he is puniſhable by Fine for Refuſal of it, and of that he cannot *deveſt himſelf without an actual Surrender*, tho' it need not be proved. So it was done by 2 Chief Juſtices, Hale and Pemberton, who had an Eſtate at Will in their Offices, and made an actual formal Surrender *by Deed enroll'd in Chancery*. And if the King determines his Pleaſure, it muſt be by *Writ of Diſcharge under the Great Seal*, or by conſtituting a new Perſon. 12 Mod. 79. Trin. 7 W. & M. in Caſe of the King v. Kemp.

his Office without ſuch a Diſcharge; and it was ſo done in the Caſe of Hide and Hale, Chief Juſtices, who actually ſurrender'd their Offices of Chief Juſtice, and had a Diſcharge under the Great Seal. Per Holt, Skin. 581. in Caſe of the King v. Kemp.——2 Salk. 466. pl. 2. S. C. & P. per Cur.

See (A)(B)

(B. 2) *To whom.*

So if *two* Men *are ſeiſed, and leaſe for Life*, and the *Tenant for Life ſurrenders to the one*, this is good to both, and the other may enter. Br. Surrender, pl. 39. cites 5 E. 4. 4.——S. P. But Brooke ſays, it ſeems to him that he may grant his Eſtate to the one, and the other cannot enter. Br. Reſervation, pl. 48. cites 5 E. 4. 4.——S. P. Perk. S. 615. *But if* the Leſſee for Life has *ſurrender'd* the Lands *unto both* the Leſſors, *or to one* of them *for* 20 *Years*, the ſame ſhall not take Effect by way of Surrender: for then *there remains an Intereſt* in the Leſſee, *which is as a mean Remainder between the Eſtate* which is *ſurrender'd, and their Reverſion* &c. Perk. S. 615.

1. IF *two* are ſeiſed, and *leaſe for Term of Years*, and after the *Tenant ſurrenders to the one*; this is a good Surrender, and thereby both may enter. Br. Surrender, pl. 54. cites 26 E. 3. 16.

If a Man does *enfeoff J. S. and T. K.* of certain Land, to have and *to hold to them, and to the Heirs of T. K.* and

2. *Particular Eſtates*, as *for Life*, or for *Years*, may be ſurrender'd *to him who has the immediate Remainder or Reverſion* to the particular Eſtate *in his own Right*; if the Eſtate in Remainder or in Reverſion be ſuch an Eſtate, *wherein the particular Eſtate may be drown'd*, unleſs he who ſurrenders had a joint Eſtate in the Freehold, or in the Term for Years, with him to whom the Surrender is made; and in other ſpecial Caſes &c. Perk. S. 584.

J. S. ſurrendereth his Eſtate unto T. K. it is a void Surrender; notwithſtanding that J. S. had that Freehold, and T. K. had a Fee-Expectant to be executed in Poſſeſſion, immediately after the Death of J. S. And the Reaſon is, becauſe that T. K. had a joint Poſſeſſion in the Freehold with J. S. and every joint Tenant is ſeiſed of the Whole; ſo that *the Surrender cannot be the Cauſe that he has the Poſſeſſion of any Part of the Land*; and alſo his Eſtate cannot drown in the Eſtate of T. K. for either of them has an Eſtate of Freehold in Poſſeſſion, in and through the whole Land. Perk. 586. cites 12 H. 6. Sur. 6.

3. It has been holden, that an Eſtate in Fee of Lands or Tenements may be ſurrender'd by the Tenant *unto his Lord, who has Cauſe to have*

an

an Action of Ceſſavit of the ſame Land. Quære. Perk. S. 585. cites H. 13 H. 4. S. 10.

4. If *Donee in Tail of a Rent* &c. *ſurrenders* his Eſtate *to his Donor, who has the Reverſion* of the ſame Land *in Fee*, it is a void Surrender. Perk. S. 590. cits 12 H. 7 11.

5. If J. S. makes a *Leaſe for Life* of Land to A. the *Remainder* of the ſame Land *to B. for Years*, and A. *ſurrenders* his Eſtate *to B.* it cannot take Effect as a Surrender; becauſe an Eſtate for *Life cannot drown in* an Eſtate for *Years*. Perk. S. 589.

6. *One Termor* cannot ſurrender *to another Termor*; per tot. Cur. Le. 303. pl. 420. Trin. 30 Eliz. C. B. in Caſe of Pory v. Allen. Cro. E. 173. S. C.—Ow. 97. S. C.

7. *Leſſee for* 20 *Years makes a Leaſe for* 10 *Years*. The 2d Leſſee can't ſurrender to the firſt; for 10 Years cannot be drown'd in 20. Cro. E. 173. Hill. 32 Eliz. in Caſe of Porey v. Allen. Per Gawdy J. 'tis good to convey his Intereſt, but not to drown the Eſtate. Cro. E. 302. Trin. 35 Eliz. B. R. in Caſe of Hughes v. Robotham.

8. A Surrender of a Leaſe cannot be but *to him that has the immediate Reverſion*, as an *Under-leſſee for Part of the Term* cannot ſurrender to the firſt Leſſor. Arg. Vent. 359. Hill. 33 & 34 Car. 2. B. R. in Caſe of Moor v. Pitt. Ow. 97. Perrin v. Allen, S. P.

(C) What Thing or Eſtate they may [ſurrender.]

See (A)(B)—Grant(M)(N)

1. LEſſee for Years leaſes to Leſſor Part **of his Land, he may ſurrender** the Reſidue, **for it is Reverſion.** 20 E. 4. 13.

2. One Jointenant in Fee **cannot ſurrender to his Companion.** 40 E. 3. 41. **Curia admitted contra. (But it ſeems that the Book ſhall be intended, that it ſhall** enure as Releaſe.) So of Jointenant of Franktenement, or of a Leaſe for Years. See Perk. pl. 584.

3. A Deviſee of Land till a certain Sum be levied **may ſurrender it, yet he has not any Eſtate, but only a Chattle, ſcilicet, the Perception of the Profits.** 4 **Rep.** 82. b. **Sir Andrew Corbet's Caſe.**

4. Tenant by Statute Merchant, Staple, **and** Elegit, **may ſurrender.** 4 **Rep.** 82. b. **Sir Andrew Corbet's Caſe.** S. P. and C. cited by Ventris J. 2 Vent. 328. in Caſe of Dighton v. Greenvill.

5. A Leaſe for Years to commence at Michaelmas, **cannot be ſurrender'd** before Michaelmas. 22 E. 4. 37. 4 H. 7. 10. b. **Perkins** S. 601. D. 35 H. 8. 58. **Contra** 37 H. 6. 18. S. P. For nothing is in him in Poſſeſſion till Michaelmas, nor the Leſſor has not Reverſion before, but is poſſeſs'd of the Demeſne; but Grant of it before Michaelmas is good. Contra of Releaſe made by the Leſſor to the Leſſee before Michaelmas. Br. Surrender, pl. 43. cites 20 E. 4. 13. Per Brian and Nele J.——S. P. Perk. S. 601.——S. P. Br. Surrender, pl. 38. cites 4 H. 7. 10. Per Keble and Rede.——S. P. Co. Litt. 338. a. But tho' in ſuch Caſe a Surrender in Deed is not good before Michaelmas, yet if before Michaelmas he takes a new Leaſe for Years, either to begin preſently or at Michaelmas; this is a Surrender in Law of the former Leaſe.—— S. P. By Coke Ch. J. 6 Rep. 69. b. in Sir Moyle Finch's Caſe, and cites 37 H. 6. 17. b. 18. a——S. P. 10 Rep. 67. b. in the Caſe of the Churchwardens of St. Saviour's, Southwark, cites 37 H. 6. 16.

Debt upon *a Leaſe for Years made at Lammas, to commence at Michaelmas next*, to endure *for* 20 *Years rendring Rent*, the Rent was Arrear, and the *Leſſor brought Debt*, the *Defendant pleaded another Leaſe the next Day to commence at the ſame Michaelmas for ſuch a Number of Years upon Condition broken of the Part of the Plaintiff*; and ſo the ſecond Leaſe void, and a Surrender of the firſt; and ſo both Leaſes void. And per Moile and Davers, It is no *Surrender*, becauſe it was made *before that the firſt Leaſe commenc'd*; but if the ſecond Leaſe had been after the firſt Leaſe commenc'd, this had been a Surrender;

der; but per Priſot, All is one; But 22 E. 4. 37. contra per Priſot; for a Surrender gives Poſſeſſion, which cannot be before the firſt Leaſe commenc'd, and he granted that Releaſe is not good before Michaelmas, nor the Leſſee ſhall not have Treſpaſs or Ejectione firmæ before it. Br. Surrender, pl. 21. cites 37 H. 6. 17.

6. A Man leaſes for Years, Leſſee **cannot ſurrender** before Entry. **Contra** 22 E. 4. 37.

7. But **in ſuch Caſe**, if Leſſor waives the Poſſeſſion, **the Leſſee may ſurrender before Entry.** **Perkins S.** 603.

Br. Surrender, pl. 42. Fol. 495. cites 14 E. 4. 6. Per Brian.

8. If Leſſee **for Years** leaſes to the Leſſor Part of his Term, and after ſurrenders the Reverſion **of it**, the Rent is gone. 20 E. 4. 13.

9. **If there be** Leſſee for Years **rendring Rent, and** Leſſor grants the Rent to another, and after accepts Surrender **of the Leſſee, yet the** Rent continues to the Grantee. 20 E. 4. 13. b.

S P. Br. Cuſtoms, pl. 2. cites 3 H. 6 45. where it is admitted

10. In diverſe Places there is a Cuſtom, that the *Franktenant* who is *ſeiſed in Fee*, when he will alien, ſhall *come into the Court and ſurrender the Land.* Br. Cuſtoms, pl. 17. cites 14 H. 4. 1. Per Hank J.

a good Cuſtom to ſurrender the Franktenement. —— Tho' it be incident to the Eſtate of a Copyhold to paſs by Surrender, yet ſo forcible is Cuſtom, that by it a Freehold may paſs by Surrender. Co. Litt. 60.

As where a Man grants *Rent to another for Term of Life* out of his Land, the Grantee may ſurrender, and yet the Grantor has no Reverſion of the Rent. Br. Surrender, pl. 16. cites 14 H. 7. 2.

11. A Surrender is good *of a Thing of which there is no Reverſion*; Per Coningsby. Br. Surrender, pl. 16. cites 14 H. 7. 2.

S. P. 2 Mod. 288. Arg in Caſe of Moor v. Pitt. —— Right nor Condition cannot be given or determined by Surrender, but by Releaſe. Cro. J. 36. Trin. 2 Jac. B. R. Hull v. Sharbrook; and cites 4 Rep. 25. b. Kite v. Quinton.

12. A *Right* cannot be ſurrender'd. Co. Litt. 338. a.

13. Tho' a *future Intereſt* cannot properly be ſurrender'd, yet it may be *merg'd.* Arg. 2 Roll. R. 171. in the Caſe of Price v. Butts, cites 37 H. 6. 21 H. 4.

14. *Dignity of Peerage* cannot be ſurrender'd. Show. Parl. Caſes 1. The King v. Lord Purbeck.

See (B) pl. 5.

(D) At what *Place.*

Br. Surrender, pl 2. cites S. C.

1. **Leſſee for Life of Land in one County, may ſurrender** in another County. 40 E. 3. 43.

per Belk. Quod nemo Negavit. —— S. P. Br. Surrender, pl. 8. cites 11 H. 4. 61. Per Cur.

Br. Confeſſion, pl. 15. cites S. C.

2. In Formedon, or other Præcipe quod reddat, the Tenant cannot ſurrender *in Pais.* Br. Surrender, pl. 9. cites 12 H. 4. 21.

(E) At

(E) At what *Time* they may [ſurrender.]

See (C) pl. 5, 6, 7.

1. IF A. leaſes to B. Land for Years, **and afterwards** before B. enters, or A. waives **the Poſſeſſion, B. ſurrenders to A. this is a void Surrender, inaſmuch as he has not any** actual Eſtate **till Entry or Waiver of the Poſſeſſion by Leſſor.** Perk. S. 602. S. P. ſays, It ſeems to be a void Surrender, if *any other Perſon* be *in Poſſeſſion* of the Thing leaſed *at the Time* of the Surrender, unleſs he has Parcel of the Term of the Leſſee by Force of the Grant of the Leſſee &c.

If a Man ſeiſed of Land *leaſes* the ſame *for* 10 *Years to begin preſently*, and the *Leſſor waiveth the Poſſeſſion*, and *before any Entry made* into the ſame Land *by any Perſon*, *the Leſſee ſurrenders* his Eſtate unto his Leſſor, it is a good Surrender, and yet the Leſſee ſhall not have an Action of Treſpaſs for a Treſpaſs done upon the Land before his Entry; and alſo a Releaſe made unto him by his Leſſor is void before his Entry &c. Perk. S. 603.

2. **If A.** leaſes **Land** to B. for Years, **and** B. enters, **and after** B. aſſigns it to C. C. may ſurrender to A. before any Entry made by him or waiver of the Poſſeſſion by B. **becauſe this was an actual Eſtate in B. ſever'd from the Reverſion by the Entry of B. and C. has an** actual Eſtate **by the Aſſignment made to him before Entry, B. not being any Ejector. P. 11. Car. B. R. per Cur. adjudged upon a ſpecial Demurrer between** *Prance and Titley*. **Intratur, Hill. 11 Car. Rot. 70. But Judgment was e Contra upon another Point.**

3. If there be *Leſſee for* 10 *Years* of Land, and he *grants Parcel of the Years unto a Stranger*, and the *Grantee enters* &c. and the *Leſſee ſurrenders to his Leſſor*, it is a good Surrender; *but if* the *Grantee* of the Leſſee had *ſurrender'd to the Leſſor* of his Grantor *before the Surrender* made *by the Leſſee*, the ſame ſhall not take Effect as a Surrender. Cauſa Patet. Perk. S. 604. cites 14 H. 7. 3.

4. If two *Jointenants of a next Avoidance* are, the one of them cannot ſurrender to the other *after the Avoidance* happens. D. 283. Marg. pl. 29. cites p. 31. Eliz. Brockbie's Caſe. See Releaſe (G) pl. 12.

5. If I make a *Leaſe* to J. S. *for ſo many Years as I. K. ſhall name*, I. S. may not ſurrender his Term before that I. K. names the Years; per Popham. Goldsb. 168. pl. 98. Hill. 43 Eliz. in Caſe of Hoo v. Marſhall.

6. *Bargainee before Entry* may ſurrender, aſſign or releaſe. Cart. 66. per Bridgman Ch. J. for he has actual Poſeſſion.

(F) *By Acceptance* of Leſſee for Years [&c.]

1. IF Leſſee for Life **accepts** by Parol a Feoffment in Fee **of the Land, and** Livery **upon the Land from him in Reverſion or Remainder, this is a Surrender and afterwards a Feoffment. D. 19. El. 351. 48. 40 E. 3. 24. 37 H. 6. 18. per Priſot.** And. 51. pl. 126 Lancaſter v. Aller, S. C. that the Feoffment was good. —— Bendl. 288. pl. 288. Langaſtell v. Aller, S. C. and the Special Verdict.

2. **If Leſſee** for Years agrees **that his** Leſſor ſhall make a Feoffment **to a Stranger, it ſeems that this is a Surrender; for it cannot be intended but that he intended that the Feoffee ſhould have the Land in Demeſne. Dubitatur, D. 29 H. 8. 33. 14.** If *Leſſee for Years* the *Remainder for Life* are, and he in *Reverſion in Fee makes Feoffment* and Livery *to Leſſee for Years*, tho' this Acceptance of the Feoffment cannot enure as a Surrender becauſe of the Eſtate for Life in Remainder, yet it ſhall enure as a Grant of his Eſtate for the Time to the Feoffor, or at leaſt a Licence to him to make Livery and ſo a good Feoffment. P. 40 El. B. R.

B. R. between Eedes and Knotsford; But Mich. 40 & 41 El. B. R. this was adjudged to the contrary. See Feoffment (L) pl. 8. and see Ow. 66. Trin. 41 Eliz. B. R. Knotts v. Everſtead.

If Leſſor by Aſſent of Leſſee for Life, and in his Preſence makes Livery, this Aſſent will make a Leaſe at will, or a Surrender for the Time, and ſo the Livery good. 2 Roll. Feoffment (L) pl. 17 cites 40 El. per Cur. between Shepherd and Gray.

3. If a Leſſee gives Licence to the Leſſor to make a Feoffment of the Land to a Stranger, this is not any Surrender but only a Grant of his Term for a little Time for the Licence ſhews that he does not intend to paſs his Eſtate. D. 29 H. 8. 33. 14. 5. per Fitzherbert ſaid it was ſo held in 5 H. 7.

4. So if Leſſee licences the Leſſor to make Livery, a fortiori this is not any Surrender. Tr. 4 Ja. B. R. per Cur. in the Caſe of Sible v. Searle.

S P Agreed And. 247. Mich. 31 & 32 Eliz. in Caſe of Batty, alias Petty v. Trevillian.—S. P. For he does not make the Livery in his own Right but as a Servant or Miniſter to the Leſſor, and by his Authority; And when the Leſſor made a Feoffment, he gave nothing but what he might rightfully paſs, which is only the Reverſion that is in him, and the Livery of the Leſſee gives nothing to the Feoffee but only a Means to paſs what the Leſſor might lawfully paſs; As if the Tenant makes Feoffment of his Tenancy and the Lord as Attorney makes Livery, this does not extinguiſh his Seigniory; For he does nothing but by Authority given. Mo. 11. pl. 41. Hill. 4. E. 6. Anon.

5. So if Leſſee for Years makes Livery as Attorney to the Leſſor, this is not any Surrender. Tr. 5 Ja. B. R. per Cur. in the Caſe of Sible v. Searle.

So if *Leſſee for Life delivers Seiſin upon a Letter of Attorney*, this is no Surrender; Per Periam. D 33. b. Marg. pl. 14 & 13 cites Mich. 51 & 32 Eliz. C. B. Trevellian's Caſe.

(G.) pl. 11. S. C. —— A *Woman ſole takes a Conſideration for making a Leaſe for* 21 *Years and* then *marries*, and ſhe and her Husband made the promiſed Leaſe. Before the 21 Years End the *Leſſee ſurrenders and takes a new Leaſe* for 21 Years more; the Husband dies; the Wife ouſts the Leſſee, who ſues in Chancery to have the firſt Leaſe continued for the Remaiuder of the firſt 21 Years, and not remedied here, the Surrender being voluntary. Cary's Rep. 29. cites 44 Eliz. Anon.

6. The Acceptance of a Voidable Leaſe will be a Surrender of a good and ſure Leaſe. D. 3 & 4 Ma. 140. 43.

A. and M. his Wife were Tenants for Life, afterward, the *Leſſor* by Indenture betwixt him, and A. and M. and B. their Son, dated 30 July, 21 Eliz. *leaſed it to A. M. and B. Habendum a die datus* Indenturæ for their Lives, and made Livery 23 Eliz. Secundum formam Chartæ, and it was reſolved by all the Court that the 2d Leaſe was void; For as much as it is Habendum a die datus, and the Livery made ſo long Time after it will not help it; But yet they held, that it was a Surrender of the firſt Leaſe, for the Acceptance of the Indenture in the contracting, and Agreement to have a new Leaſe, made a Surrender of the firſt Leaſe; And it was adjudged accordingly. Cro. E. 873, 874. pl. 12. Hill. 44 Eliz. in C. B. Mellows v. May. —— Mo. 636. pl. 876. S. C. Reſolved that the taking the ſecond Leaſe was a Surrender of the Eſtate of the Feme being Covert during the Coverture only.

Acceptance of a *void Leaſe* is not a Surrender of a good Leaſe. Hutt. 105. in Caſe of Watt v. Maydwell, cited per Cur. as the Caſe of Baker v. Willoughby.

Jo. 405. pl. 2. Trin. 14 Car. B. R. Lloyde v. Gregory. S. C. accordingly. —— Cro. C. 502. pl. 2. S. C. but the Diverſity of void and voidable Leaſes does not appear there.

7. If a Leſſee for Years of a Dean and Chapter made before the Statute of 13 Eliz. after the Statute accepts a new Leaſe for the Reſidue of the Term by Force of the Proviſo of the Statute of 13 Eliz. but this new Leaſe is not good within the Proviſo but merely void; This ſhall not be any Surrender of the firſt Leaſe; But otherwiſe 'tis if the new Leaſe be only voidable and not void. Mich. 13. Car. B. R. per Curiam between *Fludd and Gregory* upon Evidence at the Bar, but this among other Things found ſpecially.

D. 177. b. pl. 35. Hill. 2 Eliz. S. C. —— If a *Feme Leſſee for Years marries, and* then *takes a new Leaſe for Life* this extinguiſhes the Term; but if *Husband diſagrees*, then 'tis revived; but if the *new Leaſe* had been made *to the Husband and Wife*, then it had been queſtionable, for the Eſtate paſſed by Implication, viz. by a Surrender in Law by the accepting a new Leaſe; per Hobart. Ch. J. Hutt. 7, 8. Trin 14 Jac. in Caſe of Swaine v. Holman.—Hob. 179. pl. 212. Swain

8. If Feme Leſſee for Years takes Baron who after accepts a new Leaſe for their Lives, this is a Surrender of the firſt Leaſe. Pl. C. 199. per Curiam Wrotesly v. Adams.

Swain v. Hollam S. C. but S. P. does not appear. —— Ibid 203. pl. 257 S. C. Hobart Ch. J. ſays, if the ſecond Leaſe had been made to the Husband and Wife both, as it was but to her alone, yet upon his Death ſhe might have claim'd again by her old Term. —— Ibid. 226 S. C. cited by Hobart in Caſe of Anne Needler v. the Biſhop of Wincheſter that the Eſtate was not totally ſurrendered as to the Feme.

9. **If Leſſee for Years accepts** a new Leaſe to commence preſently, **this is a Surrender; For by this he admits the Leſſor to have ſufficient Power to make this new Leaſe, the which he cannot do without a Surrender.** * 37 H. 6. 18. If a Man *leaſes* Land *and after makes another Leaſe to the ſame Leſſee of the ſame Land*, the Acceptance of the Second Leaſe is a Surrender of the firſt Leaſe; per Brudnell Ch. J. and Brooke J. which none of the other Juſtices denied, quod nota; and it is not expreſſed there if the ſecond Leaſe was for more Years than the firſt or not; quod nota. Br. Surrender, pl. 14. cites 14 H. 8. 15.

* S. C. cited 6 Rep 69. b. in Sir Moyle Finch's Caſe.

10. So tho' the 2d Leaſe be for fewer Years **than the firſt.** D. 3 & 4 Ma. 140. [b.] 43. **[Whitley v. Gough.]** If A. leaſe to B. for 100 Years, and then grants the Reverſion to C. for two Years, and C. leaſes to B. for two Years, and B. accepts the Leaſe for two Years, this is no Surrender; for a Term of 100 Years cannot be drown'd in a Reverſion for two Years, and yet the firſt Leaſe is determined; per Anderſon, which Periam granted, Le. 322, 323. pl. 454. Hill. 31 Eliz. C. B. in Caſe of Willis v. Whitewood.

This is a Surrender of the firſt Leaſe, and is as if the firſt Leſſee had taken a new Leaſe for 2 Years of his Leſſor. Cro. E. 302. pl. 1. Trin. 35 Eliz. B. R. in Caſe of Hughes v. Robotham.

11. **If** Leſſee **for Years** by Indenture accepts **a Leaſe for Years** by Parol; **this is a Surrender of the firſt Leaſe.** D. 3 & 4 Ma. 140. 43. **[Whitley v. Gough.]** And where a Leaſe is by Parol, and after is made by Indenture, Brook makes a Quære if this be not a Surrender. Br. Reſervation, pl. 17. cites 21 H. 7 37.

12. **If Leſſee for Years accepts** a future Leaſe to commence within the firſt Term, **this is a Surrender immediately.** * P. 40 El. B. R. between *Majon and Hutchins.* 5 **Rep.** 11. b. † *Ive's* **Caſe reſolved, becauſe he by his Acceptance has affirm'd the Leſſor to have Ability to make the Leaſe, the which he cannot do without Surrender, and there cannot be a** Fraction of the Eſtate, **ſcil. to be a Surrender for Part of the Years.** *Cro. E. 605. pl. 3. Hutchins v Martin, S. C. accordingly; and the Leſſor may enter in the Interim, and take the Profits. —— † Cro. E. 521. pl. 49. Mich. 38 & 39 Eliz. C. B. Ives v. Sammes, S. C. accordingly. —— 2 And. 51. pl. 38. S. C. accordingly. —— S. C. cited per Cur. Hutt. 105. in Caſe of Watts v. Maydwell.

13. **The Acceptance** of one future Intereſt **is not any Surrender** of another future Intereſt. 3 H. 6. 18. Prior and Convent of N. made a *Leaſe to B. for 24 Years*; and *about 2 Years after made a Leaſe to C. for 99 Years*, to commence at a Day before. About 4 *Years after* the Leaſe to C. the Prior and Convent were tranſlated into a Dean and Chapter, and their Poſſeſſions confirm'd, and they then *made a new Leaſe to C. for 99 Years*, to commence at a Day before. The *Leaſe of 24 Years was ſtill in Being.* Within a Year after, the Statute of 31 H. 8. of Diſſolutions was made. Afterwards in 2 E. 6. they ſurrendered their Poſſeſſions, and a new Corporation was eſtabliſhed, reſerving to the King the Land in Leaſe, which he granted to W. in Fee. The Queſtion was, if W. might enter and avoid the 2 Leaſes of C. or either of them? And the Court, prima facie, thought he might; and that the firſt 99 Years Leaſe was drown'd, and ſurrender'd in Law by the taking the 2d, tho' he had no Poſſeſſion of the Land at that Time, according to 37 H. 6. 4. and that the 2d Leaſe was void by Statute 31 H. 8. it being made within a Year before the Act, and the firſt Leaſe being in Eſſe &c. Tamen Curia adviſare vult. D. 279. b. 280. a. Mich. 10 & 11 Eliz. Corbet's Caſe als. the Prior and Convent of Norwich's Caſe. —— See 2 Rep. 49. a. in the Archbiſhop of Canterbury's Caſe, Trin. 38 Eliz. B R. where this Caſe is ſaid to be denied by Popham Ch. J. and ſome other Juſtices. [But, as it ſeems, this was with reſpect to the avoiding the Leaſes of Colleges, Deans, and Chapters &c. by the Statute of 31 H. 8]

If a *Leaſe* be made *to begin at Michaelmas*, and before that Time the Leſſor makes a *new Leaſe* to the ſame Leſſee *to commence preſently*, the ſame is not any Surrender, and yet thereby the ſame is determined. Per Windham, which Anderſon granted, but Periam doubted. Le. 323. pl. 354. Hill. 31 Eliz. C. B. in Caſe of Willis v. Whitewood.

14. **If** Leſſee for Years [of Part] accepts a Leaſe **from the Leſſor** of All his Land **in D. (where the Land lies) yet this is not any Surrender;** It ſhall be conſtrued as a Leaſe of

render; for peradventure be intended other Land. Tr. 5 Jac. B. R. Per Curiam in Sible and Searl's Case.

the reſt of his Land in D. Cro. J. 177. Gibſon v. Searle, S. C.

15. If Leſſee for Years accepts a Grant of a Rent of him in Reverſion, payable at ſuch Feaſts, without limiting when it ſhall commence; this is not a Surrender, becauſe * it does not appear that they intend that it ſhall iſſue out of the Reverſion. Tr. 5 Ja. B. R. Per Curiam in Sible and Searle's Case.

* And becauſe he may have the Benefit of it after the Leaſe is determined.

Cro. J. 177. in Caſe of Gibſon v. Searle.——If *Leſſee for Life takes* a Grant of a *Rent-charge* out of the ſame Land *for Life*, it is a Surrender, according to 21 H. 7. 6. For otherwiſe the Rent-charge cannot take Effect; but if ſuch Leſſee for Life takes it *for Years*, it is no Surrender. Cro. J. 177. in Caſe of Gibſon v. Searl.—If the Rent-charge is to *commence preſently*, 'tis an immediate Surrender of the Eſtate for Life. Cro. E. 874. Hill. 44 Eliz. C. B. in Caſe of Mellows v. May.—S. P. Mo. 637. pl. 876. in Caſe of Mellow v. May.

16. But if the Rent be granted to commence at a certain Time within the Term, this is a Surrender. Tr. 5 Ja. B. R. in Sible and Searle's Caſe; Per Curiam. 27 H. 7. 5.

17. If Leſſee for Years of Land accepts a new Leaſe of Veſtura Terræ; this is a Surrender. Tr. 5 Ja. B. R. Per Curiam in Caſe of Sible v. Searle.

So of *Herbage*, becauſe it cannot conſiſt with the Leaſe.

Cro. J. 177. in Caſe of Gibſon v. Searle.

18. So if Leſſee accepts a Grant of a Common out of the ſame Land; this is a Surrender. Tr. 5 Ja. B. R. Per Cur. in Caſe of Sible v. Searle.

Becauſe *inconſiſtent* with the Leaſe. Cro. J. 177. in S. C.

19. If Leſſee for 21 Years of a Manor accepts a Grant of the Office of the Bailiwick of the Manor for the 21 Years; this is not any Surrender of the firſt Leaſe, becauſe this Office is not any Intereſt in the Thing leaſed, but only an Authority; and peradventure it was intended that he ſhould be Baily of the Reverſion, to pay the Rent due by himſelf to the Leſſor. Tr. 5 Ja. B. R. adjudged between Sible and Searle.

S. P. debated Cro. J. 84. Gibſon v. Searles.—— Adjudged no Surrender. Cro. J. 176. pl. 16. Trin. 5 Jac. B. R. S. C.

Leſſee for Years of a *Manor takes a Leaſe of the Bailiwick* of the Manor; this is no Surrender of his Term, becauſe it is of a Thing which is *collateral*. Godb. 153. Gage v. Peacock.——Noy 12. S. C.

The *Bailiff of Weſtminſter* is commonly a great Man, who hath alſo Leaſes in Weſtminſter of the Demiſe of the Dean and Chapter, and yet it was never intended to be any Surrender. Cro. J. 177. in the Caſe of Gibſon v. Searle.

20. So the Acceptance by Leſſee for Years of a Manor of the Stewardſhip of the Manor, is not any Surrender for the Cauſe aforeſaid. Tr. 5 Ja. B. R. cited to be adjudged.

Cro. J. 177. cites it to have been ſo adjudged in the Caſe of Sir Valentine Brown.

21. So if Leſſee for Years of a Park, accepts a Grant of the Keepership of the Park, this is * not any Surrender, becauſe a Keeper has no Intereſt in the Park. Tr. 5 Ja. B. R. cited to be one *Sir John Chamberlain*'s Caſe, for Preſtbury Park in Glouceſterſhire.

* S. P. Becauſe it is an Office *collateral to the Land.* Cro. J. 177. in Caſe of Gibſon v. Searl, cites S. C.——King H. 8. granted the *Cuſtody of the Park of O.* with reaſonable Herbage, *to G. and alſo the Manor* of O. *cum pertinentiis, and* 100 *Load of Wood* (*excepting the Park, the Deer, and the Wood*) *for* 50 *Years, if the Grantee ſhould ſo long live.* G. *ſurrender'd the Letters Patents in Chancery to be cancell'd*, (and ſo they were) to the Intent the King might grant a new Leaſe to P. and accordingly a *new Leaſe was granted to P.* of the Manor of O. *as* it was *before* granted *to G.* And afterwards Anno 5 & 6 Ph. & Mar. the *Office of Keeper of the Park was granted to the ſame P. without the Proviſo of his living* 50 *Years*, *or* ſaying *reaſonable Herbage.* The Reporter concludes with a Nota, that

that he heard Sir H. Yelverton ſay the Judges were of Opinion, that he had but the Cuſtody of the Park, and no Intereſt in it; for that by the Acceptance of the Cuſtody of the Park, when he had a Leaſe of it before, it was a Surrender of his Leaſe. Godb. 413, 414, 425. pl. 491. Trin. 21 Jac. B. R. Lord Zouch v. Moore.

22. A *Prioreſs leaſes to T. for Term of Life, who takes Feme*, and after the Prioreſs comes to T. and *T. ſays to her that his Will is that ſhe enter into the Land*, by which ſhe enters; this is a good Surrender; Quod nota; and then ſhe leaſed again to him and his Feme. Br. Surrender, pl. 1. cites 40 E. 3. 24.

23. If *Tenant for Life ſurrenders to him in Reverſion out of the Land*, to which *he agrees*, the Franktenement by this is in him immediately, and he is Tenant to bring Action by Præcipe quod reddat without Entry, but he ſhall not have Treſpaſs without Entry. Br. Surrender, pl. 50. cites 21 H. 7. 7.

24. If *Leſſee for* 10 *Years* of Land *takes a new Leaſe* of the ſame Lands of his Leſſor *for* 20 *Years*, it is a Surrender of the firſt Leaſe &c. Perk. S. 617.

But if *Leſſee for Years of the King takes a* 2*d Leaſe for more Years* of the ſame Land of the King, this ſecond Leaſe is meerly void; and therefore an Acceptance of it ſhall not cauſe a Surrender of the other Leaſe. Agreed by the Barons; and they ſaid it was ſo held in Harris and Wing's Caſe. Lane 22. The Caſe of St. Saviour's in Southwark.

25. If a Man make a *Leaſe for* 40 *Years*, and the *Leſſee* afterwards *takes a Leaſe for* 20 *Years upon Condition, that if he does ſuch an Act*, that then *the Leaſe for* 20 *Years ſhall be void*; and after the *Leſſee breaks the Condition*, by force whereof the 2d Leaſe is void, notwithſtanding the Leaſe for 40 Years is ſurrender'd; for the Condition is annex'd to the Leaſe for 20 Years, but the Surrender was abſolute. 2 Inſt. 218. b.

So it is if a Man make a *Leaſe for* 40 *Years*, and the *Leſſor grants the Reverſion to the Leſſee upon Condition*, and after the Condition is broken the Term was abſolutely ſurrender'd. 2 Inſt. 218. b.

And the *Diverſity* is when the *Leſſor grants the Reverſion to the Leſſee upon Condition*; and when the *Leſſee* grants or *ſurrenders his Eſtate to the Leſſor*; for a Condition annex'd to a Surrender may reveſt the particular Eſtate, becauſe the Surrender is conditional. But when the Leſſor grants the Reverſion to the Leſſee upon Condition, there the Condition is annex'd to the Reverſion, and the Surrender abſolute. 2 Inſt. 218. b.

26. Leaſe for Years to A. Afterwards a Leaſe is granted to B. *to commence at the End of the Leaſe to A. A. takes a new Leaſe.* This is a Surrender of his other Leaſe, and B. may enter. Pl. C. 198. b. Wroteſley v. Adams.

27. *Leſſee for Years of a Houſe, accepts* the Office of *the Cuſtody of the ſame Houſe for Life*, with a Fee for Exerciſe of the ſaid Office. If this be a Surrender? No Judgment was given, but the Matter was left to the Determination of ſome of the Privy Council &c. D. 200. b. pl. 62. Paſch. 3 Eliz. Earl of Arundel v. Lord Grey.

By 4 againſt 2, 'tis a Surrender. Ibid. Marg. S. C. — Adjudg'd, that 'tis a Surrender.

Ibid. in Marg. cites 3 Jac. Gibbs v. Searles. ——— S. P. cited as adjudged a Surrender; for 'tis another Intereſt, and cannot ſtand with the firſt Leaſe. Cro. J. 177. in Caſe of Gibſon v. Searl.

28. *A. Tenant for Life, Remainder to B. in Tail. B. levies* a Fine, *with Proclamations ſur Conceſſit, to A. and C. for their Lives.* This Fine bars the Intail during the ſaid 2 Lives only, and is not a Diſcontinuance omnino; for B. was ſeiſed by force of the Tail, and the Fine is Sur Conceſſit. It ſeems that *A.'s Acceptance* of this Eſtate to him and C. *is a Surrender* of the former Eſtate which he had; as in caſe of a Leaſe for Years made to A. and, during the Years, he accepts a Leaſe for Years of the ſame Land to him and B. Jenk. 321. pl. 28.

29. *Leſſee for Years deviſed his Term to J. S. and made his Wife Executrix*, and died. The *Widow enter'd, and proved the Will, and married again*; and this 2*d Husband takes a Leaſe from the Leſſor. J. S. enter'd, and grants all his Eſtate to the Husband and Wife.* The Opinion of the Court

Mo. 358. pl. 487. Carter v. Love. S. S. accordingly.

Court was clearly, without Argument, that by this Acceptance of the new Leaſe by the Husband, the Term, which the Feme had to another Uſe, viz. to the Uſe of the Teſtator, ſhall be deem'd a Surrender. Owen. 56. Trin. 27 Eliz. Carter v. Lowe.

30. *Leſſee for* 21 *Years took a Leaſe* of the ſame Lands *for* 40 *Years, to begin immediately after the Death of J. S.* This is no preſent Surrender of the firſt Term; but if J. S. die within the Term, then 'tis a Surrender; for it may be J. S. may ſurvive the firſt Term. 4 Le. 30. pl. 83. Paſch. 30 Eliz. in B. R. Anon.

Ow. 97. S. C. by Name of Peryn v. Allen.——Cro. E. 173. S. C. but ſome what differently ſtated

31. *A. Leſſee for* 30 *Years leaſes for* 19 *to B.*——*A. agreed with C.* by Articles in Writing, *That B. ſhould have a Leaſe for* 3 *Years more in the ſame and other Lands, and that it ſhould not be a Surrender of his other Leaſe. B. afterwards agreed to the Articles.* Per Cur. This is no Surrender. Le. 303. pl. 420. Trin. 30 Eliz. C. B. Pory v. Allen.

; and there adjudged, that Words and *Acts between Strangers* can make no Surrender, as an Agreement between A. and B. that C. ſhall hold for 3 Years Lands, of which C. had a Leaſe for 17 Years, and other Lands at a greater Rent, cannot make an After-agreement of C. to be a Surrender of his Term for 17 Years.

4 Le. 161. pl. 267. S. C. in totidem Verbis.—— Le. 322. pl. 454. S. C. by the Name of Willis v. Whitewood

32. Tenant in Socage leaſed his Land for 8 Years, and died, his Heir within the Age of 8 Years. The Mother being *Guardian in Socage*, leaſed by Indenture to the ſame Leſſee for 14 Years. Per Cur. The firſt Leaſe is ſurrender'd; but otherwiſe on a Leaſe made by *Guardian by Nurture.* Le. 158. pl. 226. Mich. 31 Eliz. C. B. Anon.

; and Anderſon ſaid, That ſurrender'd it cannot be; for the Guardian has not any Reverſion capable of a Surrender, but only an Authority given to her by the Law to take the Profits to the Uſe of the Heir; but yet perhaps it is determin'd by Conſequence and Operation of Law.—— Ow. 45. S. C. accordingly, by Anderſon. ——4 Le. 7 pl. 31. S. C. by Name of Willet v. Wilkinſon, ſays, it was adjudged, that this was a Surrender of the firſt Leaſe; and ſays, Note, the 2d Leaſe was made in the Name of the Guardian.——S. C. cited, Arg. in Caſe of Watts v. Maidwell, by the Name of Mills v. Whitewood; and that it was adjudged no Surrender. Hutt. 105.—— Litt. Rep. 282. Arg. in Caſe of Maydwell v. Watts, cites S. C. by Name of Wills v. Whitewould, and that it was adjudged no Surrender, becauſe Guardian in Socage cannot take a Surrender, for he has no Reverſion.

2 Le. 188. pl. 286. Trin. 32 Eliz. S. C. adjournatur.

33. Magdalen-College in Oxford 20 Dec. 8 Eliz. leaſed a Meſuage *to W. S. for* 20 *Years from Mich. next.* And after, on the 25 *October*, 21 *Eliz.* they did *leaſe the ſame Meſuage to W. S.* the ſame Perſon, *for* 20 *Years from Mich. next.* Afterwards on the 31 Auguſt, the 30 Eliz. they leaſed to J. N. for 20 Years. The Acceptance of the 2d Leaſe by W. S. is a Surrender of the firſt, and is ſo immediately on the Acceptance, and not good to the Michaelmas following; and ſo the 2d Leaſe is but a *Leaſe to begin in futuro.* Poph. 9. Hill. 35 Eliz. Thomſon v. Trafford.

* Hutt. 104, 105. S. C. inſtead of Jan. mentions the 2d Leaſe to B. to be dated the 14 Nov. 16 Jac. to commence from 17 Nov. 1619; and that B. accepted it, and afterwards enter'd.—— † Hutt. ſays, that the

34. A. made a Leaſe by Deed to B. 14 *December*, 14 *Jac.* [which was in 1617] *to commence at Lady-Day* 1619, *for* 41 *Years.* Afterwards upon the 3 *December*, 15 *Jac.* [which was 1618.] A. *leaſed* the ſame Land *to C. for* 99 *Years, to commence* † *preſently.* Afterwards 14 * *Jan.* 16 *Jac.* [which was Jan. 1619] *A. made another Leaſe to B. for* 41 *Years* of the ſame Land, *to commence* 17 *November* 1619. All which Leaſes were by Indenture. The ſole Queſtion was, Whether the taking of the 2d Leaſe of the ſame Land by B. the firſt Leſſee, be a Surrender. It was reſolv'd, that the firſt Leaſe was not ſurrender'd or determin'd; that the 2 Terms which C. took can never meet or claſh together, and conſequently it cannot be a Surrender; and Judgment was given accordingly. Litt. Rep. 268. Paſch. 5 Car. & 279. Trin. 5 Car. C. B. Watts v. Maydwell.

Leaſe to C. was to commence from the Annunciation laſt; and that C. enter'd, and was thereof poſſeſs'd, and that afterwards (ut ſupra) A. made the ſaid 2d Leaſe to B.——Hutt. 105. ſays, it was adjudg'd for the Plaintiff, becauſe by the Leaſe made to C. for 99 Years, and her Entry, A. had but a Reverſion,

ſion, and could not by his Contract made afterwards with B. give any Intereſt to B. This Leaſe made to B viz. his former Leaſe, was good in Intereſt, being to commence at a Day to come, and is grantable over, and may be ſurrender'd or determin'd by Matter in Law before the Commencement thereof, As if he take a new Leaſe to commence preſently, which ſee in 37 H. 6. 29. 22 E. 4. for it inures in Contract. And in this Caſe it had been without Queſtion, that the taking of the new Leaſe had been a Surrender of the former, if it were not by reaſon of the Leaſe for 99 Years, which is for ſo great a Number of Years, that diſables him to contract for 41 Years.

35. Where an *Officer for Life accepts* of another Grant of the ſame Office to him and another, it is not any Surrender of the firſt Grant. Reſolved. Cro. C. 259. Trin. 8 Car. B. R. Walker v. Sir John Lamb.

S. C. cited Vent. 297. but there it is mentiond that if an Officer for Life accepts of a new Grant it is no Surrender of his former Grant without mentioning the 2d Grant being to him and another. ——— *But* where *two were joint Officers for Life, and to the Survivor, and they ſurrendered* in Order that a new Grant might be made to one of them and a Stranger, the Acceptance of the new Grant by that one would be a Surrender. Vent. 297. Trin. 28 Car. 2. B R. Woodward v. Aſton.———2 Mod. 95. S. C. accordingly.

36. A. was *Leſſee* of H. 8. *by Patent for 21 Years, the Reverſion to B.* Afterwards *B. by Deed reciting the Lands, but miſ-reciting the Dates of the ſeveral Letters Patents, grants all the Lands to* the ſaid *A. for 21 Years after the Expiration hujuſmodi Literarum Patentium.* This Acceptance of the 2d Leaſe ſeems to be a Surrender of the firſt, the Commencement being referr'd to the Expiration of the ſaid Letters Patents, and not of the Term, and ſo the 2d Leaſe ſhall commence immediately. See Grants, (Q) pl. 6. But ſee Prerogative (Q. b. 2.) pl. 4. and the Notes.

37. *Leſſee* for Years of Lands held of a Prebendary for 99 Years by a Leaſe made in 4 E. 6. to commence after the Expiration of former Leaſes, *employ'd ſome Friends to take new Leaſes* of the ſucceeding Prebendaries, *in Truſt for him*, who accordingly did ſo. The Doubt was, whether this was good Evidence of the Surrender of this old Leaſe; and the Court inclin'd that it was. But the next Day the Jury found that it was no Surrender. Sid. 75. pl. 6. Paſch. 14. Car. 2. B. R. on a Trial at Bar, Gie v. Rider.

Ibid. it is ſaid, [which ſeems to be an Addition, or Remark of the Reporter] viz. And it ſeems not reaſonable that a Leaſe in Truſt, which is in another Perſon, and made in Majorem Cautelam, ſhould be a Surrender.

38. *Leſſee for Life accepts a Leaſe for Years.* This is a Surrender of his Eſtate for Life; agreed. All. 59. Paſch. 24 Car. B. R. in Caſe of Bernard v. Bonner.

So if he accepts *a Leaſe at Will.* Mo. 637. in Caſe of Mellow v. May.———Cro. E. 874. in Caſe of Mellows v. May.

39. Jointenants of a Houſe *join in a Leaſe*, to commence the next Day. Afterwards the ſame Day 2 *of the* 3 *demiſe the ſame Houſe to the ſame Leſſee for the ſame Term, to commence from the ſame Day.* This is a Surrender of the firſt Leaſe, and a new Leaſe of their 2 *Parts*; and the old Leaſe continues as to the 3*d Part* of him that did not join in the 2d Leaſe, and the Leſſee's Entry and Poſſeſſion was by both Leaſes, viz. of the 3d Part by the firſt Leaſe, and of the 2 Parts of the 2 others by the 2d Leaſe. 3 Lev. 117. Paſch. 34 Car. 2. in Cam. Scacc. Turbervill v. Stockton.

See (F) pl. 2, 3, 4, 5.— Remitter (E)

(G) *What Act or Thing* ſhall be ſaid a Surrender.

1. IF there be Leſſee for Life, **the Reverſion to an Infant, and the Leſſee** makes Feoffment in Fee to him in Reverſion, **this is a Surrender.** 39 E. 3. 29.

Co. Litt. 42. a. S. P.—— Ibid. 252. a S. P.——Perk. pl. 616. S. P. And ſo if he infeoffs him in the Remainder for Life.

2. **If Tenant for Life makes** Feoffment **in Fee** to him in Reverſion, tho' **he be** of full Age, **yet this is a Surrender.** 39 E. 3. 29.

If *Tenant for Life infeoffs* him in *Remainder*; this is a Surrender; Per Perſey, Kirton and Clopton, in a Scire facias; and yet Belk. awarded contra. Br. Surrender, pl. 7. cites 50 E. 3. 6.

3. But **otherwiſe it is, if Tenant for Life** infeoffs him in Remainder in Tail; **for this deveſts the Remainder, and ſo paſſes as a Feoffment.** 41 Aſſ. 2. **adjudged.**

4. **If Leſſee for Life** infeoffs Baron and Feme in Reverſion in Right of the Feme, **this is a Surrender, (admitting that it is not a Forfeiture.) Dubitatur.** 39 E. 3. 29. **Contra** 39 Aſſ. pl. 7.

* Br. Surrender, pl. 23. cites S. C.—— It ſhall enure by *Way of Grant.* Perk. S. 82.——Where a Man *leaſes Land for Life, and has Iſſue two Daughters, and dies*, and the *one takes Baron*, and the *Tenant grants to her and her Baron all his Eſtate*, this is no Surrender; Per Vaviſor clearly. Br. Summons and Severance, pl. 14. cites 21 H. 7. 40.——S. P. Perk. S. 623. cites 2 H. 7. 14.

5. But **if the Leſſee for Life** grants his Eſtate to the Baron and Feme in Reverſion in Right of the Feme, **this is not any Surrender for the Benefit of the Baron.** * 21 H. 7. 40. **Curia.** 14 H. 7. **Rent reviv'd. 2 Curia. Contra** 11 E. 2. **Age** 144. **adjudged.**

Fol 497. *So* where a Man *leaſed* Land *for Term of Life*, the Remainder *to W. in Tail*, and the *Tenant for Life leas'd it to him in Remainder for Term of Life of him in Remainder*, who took Feme and died, and the firſt Leſſee enter'd, and the Feme was barr'd of Dower; and ſo this is no Surrender. Br. Surrender, pl. 49. cites 50 E. 3. 27. and Fitzh. Dower 55.

6. **If Leſſee for Life be the** Reverſion to a Baron in Fee, **and** Leſſee leaſes the Land to the Baron for the Life of the Baron, **and then the** Baron dies, **and then the** Leſſee dies; **the Wife ſhall** not be endow'd **of this, becauſe there was a Poſſibility of Reverſion during the Coverture, as to the Franktenement, (which proves that this was not any Surrender)** 1 E. 3. 16. **Per Cond.**

So where A. was *Tenant for Life*, the *Remainder to W. in Fee, and A. alien'd to W. for the Life of W.— W. died*, and *A. re-entered*, and the Feme of W. brought Writ of Dower, and was barr'd; for this Alienation is no Forfeiture nor Surrender, becauſe it was to him in the next Remainder; Quære Legem inde. Br. Forfeiture de Terres, pl. 91. cites 13 R. 2. and Fitzh. Dower.

7. **If** Baron and Feme **ſeiſed** in Right of the Feme for the Life of the Feme leaſe **by Indenture** to him in Reverſion for the Life of the Baron, **this is not any Surrender; for by this taking he affirms the Reverſion in him in Reverſion.** 29 Aſſ. 64.

So of ſuch Leaſe to him in Remainder. Br. Eſtates, pl. 67. cites H. 13 R. 2 ——*But* if *Tenant for Life aliens to him in Reverſion for Term de Auter Vie*, 'tis a good Surrender. Br. Forfeiture de Terres, pl. 83. cites 24 E. 3. 68.

8. If Leſſee for Life leaſes to the Leſſor for the Life of the *Leſſor*, **it is not any Surrender; for he has a Poſſibility to have it again, ſcil. if the Leſſor dies before himſelf.** 1 E. 3. 15. **adjudged.**

So if Leſſee for Life of Land *leaſes the* ſame *Land to him in the Reverſion for Life*, the *Remainder unto a Stranger in Fee*, the ſame is no Surrender; Cauſa patet. Perk. S. 620.

9. [But]

9. [But] **if Leſſee for Life leaſes to the Leſſor** for the Life of the Leſſee, **this is a Surrender, becauſe he** has not any Poſſibility of Reverſion, **tho' there be a Poſſibility of an** Occupancy; **for this is all one with a Grant of his Eſtate.**

If *Tenant for Life leaſes* the ſame Lands *to him in Reverſion*, Habendum

to him *during the Life of the Tenant for Life rendring Rent.* Adjudged this is not good without Livery of Seiſin; nor is this Leaſe any Surrender either in Law or in Deed, to him in the Reverſion. By all the Juſtices of C. B. Bendl. 152. pl. 211. Paſch. 8 Eliz. Brown v. Kinſwell.—Ibid. 33. pl. 81. Browne v. Kingſton, S. C. but ſtates it of a Leaſe made by Tenant *Pur auter Vie*; and that he made the Leaſe to the Reverſioner, Habendum to him during the Life of the Leſſor rendring to him certain Rent. And the Juſtices were of Opinion, that this is not good without Livery, nor is it any Surrender.

10. **So if Leſſee for Life leaſes to the Leſſor** for the Life of the Leſſor and Leſſee, **this is a Surrender, becauſe there is not any Poſſibility of Reverſion. P. 16 Ja. in the Exchequer Chamber, upon an Engliſh Bill, adjudged by all the Barons, between the King and the Lord Dudley.**

11. **The** Acceptance of a voidable Leaſe **will be a Surrender of a good and ſure Leaſe. D. 3 & 4 Ma. 140. 43.**

(F) pl. 6. S. C.——This is the Caſe of Whitley v. Gough.——A *Guardian* in Chivalry *took a Feoffment of the Infant within Age* that was in Ward, and the Infant brought an Aſſiſe, and the Guardian ſhall be adjudged a Diſſeiſor; which proves that the Feoffment, as againſt the Infant, was void; and yet *by Acceptance* thereof *the Intereſt of the Guardian was ſurrendered.* 2 Inſt. 218. b.

12. **If there are** 2 Coparceners, **of whom** one is within Age, **and in Ward,** and the other aliens to B. **who purchaſes the Ward of the Land and Body of the Lord, and after** at full Age **of the Ward** it is agreed between them, that Partition ſhall be made; and **upon this they** put themſelves in Arbitrement, **and the Arbitrator** awards a Severance, and aſſigns their Parts, **to which the Ward does not agree, yet this is a Surrender, ſcil. the Submiſſion and Award.** 31 Aſſ. 26. adjudged.

Br. Surrender, pl. 32. cites S. C. accordingly.

13. **If a** Leſſee grants Part of his Eſtate to the Leſſor, **by which a Reverſion continues in himſelf, this is not any Surrender. By Reports. 14 Ja.**

Roll. Rep. 387, 388. pl. 8. Trin. 14 Jac. Bacon v. Waller.—(I) pl. 1. S. C.——But if Leſſee for Life *grants his Eſtate* to him who has the Reverſion in Fee in his own Right, and immediate to the particular Eſtate, this ſhall enure by Way of Surrender. Perk. S. 82.

14. As if Leſſee for 20 Years **grants** all his Eſtate **to the Leſſor,** except a Month or a Day **at the End of the Term, this is not any Surrender, becauſe the Leſſee has a Reverſion. By Reports. Adjudged Bacon v. Waller.**

Roll. R. 387. Trin. 14 Jac. B. R. S. C.——3 Bulſt. 204. S. C. & S. P. by Coke Ch. J. accordingly; and ſaid it is very clear he ſhall have it in ſeveral.——(I) pl. 2. S. C.

15. **If** Leſſee for Life grants all his Eſtate to the Leſſor, **this is a Surrender. 7 H. 6. 4. b.**

But if *Leſſee for Life grants* his Eſtate to Leſſor *rendring Rent*, it is no Surrender. Arg. 2 Roll. R. 474. cites Bendl. Rep.——This ſhall not enure as a Surrender, becauſe there wants Words of Surrender, but ſhall enure by Way of Grant only. 4 Le. 237. cites it as adjudged 44 Eliz. in B. R.

16. **If Leſſee for Life** leaſes to the Leſſor in Reverſion, and to the Heirs of his Body for the Life of the Leſſee, **this is not any Surrender; For peradventure there may be an Heir of the Body, who ſhall not be Heir general, and the Eſtates divided.** 18 E. 3. 45. admitted.

17. **If Tenant for Life** be contented and agreed with him in Reverſion, that he ſhall have the Land and his Intereſt for a certain annual Rent, **and** that if Tenant for Life ſurvive **him in Reverſion,** that he ſhall have the Land again; **This is not any Surrender clearly, becauſe**

cauſe he ſhews that the Leſſor ſhall not have all his Eſtate. D. 8. Eliz. 251. 93.

It was agreed in the Caſe of Brown and Kingſwell, that a *Leaſe for Years* may be determined *by Words* implying a

18. So if the Tenant for Life be contented and agreed with him in Reverſion that he ſhall have the Land and his Intereſt for a certain annual Rent; This Agreement being by Parol is not any Surrender; For if it ſhould be a Surrender, then the Reverſion of the Rent ſhould be void, this being by Parol, and his Intent is apparent to have the Rent. And therefore it ſeems that this is but a Leaſe at Will no Livery being made and ſo the Rent well reſerved. D. 8. El. 251. 93. per Curiam. But the Juſtices of Aſſize e contra.

ing a Contentment of Leſſee, that the Leſſor ſhould have the Lands again: But 'twas there doubted if a *Leaſe for Life* may be ſo determined, and where in the principal Caſe the Leſſee *delivered the Indenture* containing the Demiſe *to a Stranger to deliver Simul cum toto Statu & Intereſſe* termini prædicti to the Leſſor, upon the Leſſor's Agreement to pay to Leſſee 70 l. And that Superinde the Stranger deliver'd &c. accordingly, and the Leſſor accepted thereof, and plucked away the Seal; And all this was found by the Verdict, and further, that the *Leſſee was content*, and afterwards the Leſſor made a new Leaſe; This is a good Surrender as if it had been found that he had uſed ſuch Words. Cro. E. 487 pl. 4. Mich. 38 & 39 Eliz. B. R. Sleigh v. Bateman.

When Leſſee *for Years agrees* with Leſſor, and is *content that the Leſſor ſhall have the Land again*, 'tis a good Surrender of a Term for Years. Cro. E. 448. Sleigh v. Bateman.

19. If a Man *leaſes for Years* the *Remainder over for Years*, and after the *firſt Termor grants his Intereſt to the Leſſor*, this is no Surrender by Reaſon of the Meſne Intereſt of the Term in Remainder. Br. Surrender, pl. 52. cites 31 H. 3. & lib. Perkins tit. Surrender.

20. *And* if *Termor makes his Leſſor his Executor and dies*, this is no Surrender; For he has it to another Uſe; Contra Whorwood. Br. Surrender, pl. 52. cites 31 H. 3. & lib. Perkins tit. Surrender.

Br. Aſſize, pl. 136. cites S. C.

21. Where a Man *leaſes for Years rendering Rent*, and the *Leſſee waives the Poſſeſſion for Greatneſs of the Rent*, and takes away his Goods, and the Leſſor enters, his Entry is not lawful; For this is no Surrender. Br. Surrender, pl. 25. cites 8. Aſſ. 20.

If the *Leſſee waives the Poſſeſſion* this is no Surrender by the Opinion of the Court unleſs the *Leſſor agrees* to it, *and enters*, & quære inde; for the Waiver does not expreſs the Intent of the Leſſee. Br. Surrender, pl. 45. cites 7 H. 6. 1.

22. *Tenant by the Curteſy* was, the *Reverſion to Baron and Feme*; the *Tenant by the Curteſy infeoffed the Baron and Feme*. This was adjudged a Surrender to the Feme, and no Feoffment; and ſo ſee that if the Feme dies without Iſſue, the Heir of the Feme may enter upon the Baron; quod nota. Br. Surrender, pl. 26. cites 11 Aſſ. 14.

If a Man ſeiſed of Land *leaſe* the ſame Land *for Life* and *grants the Remainder unto a Stranger for Life*,

23. Formedon againſt *Tenant for Term of Life* the *Remainder to W. for Term of Life*, and this ſame *Tenant for Term of Life grants or Leaſes his Eſtate to him in Remainder for Term of Life, Habend. to the Grantee in Remainder for Term of Life of the ſame Grantor*; and per Wilby J. clearly this is only a Surrender; Contra if the Tenant for Life had leaſed to a Stranger for Term of Life of the Stranger, this had been a Forfeiture. Br. Surrender, pl. 17. cites 24 E. 3. 32. 68.

nd the *Leſſee for Life grants his Eſtate to him in the Remainder for Life*; the Law ſays, That this ſhall anure by way of Surrender. Perk. S. 616. cites 14 H. 8. 15.

24. Aſſize; *Feme Tenant in Tail after Poſſibility* of Iſſue extinct, the *Reverſion to R. in Fee took Baron, the Baron and Feme alien'd to him in Reverſion, rendering Rent for Life of the Baron*, by Deed indented *with Clauſe of Re-entry for Non-payment by* 8 *Days*. The *Alienee alien'd over*; the Rent [was] arrear; the Baron and Feme enter'd for the Rent arrear, and the Entry adjudged Lawful by Reaſon of the Rent arrear, and not of the Alienation of the Alienee, and it cannot be adjudged a Surrender, becauſe it was by the Baron for his Life, and the Feme may ſurvive him. Br. Conditions, pl. 112. cites 29 Aſſ. 64.

25. A. bound by *Statute* to B. His Land is *extended*. C. recovers againſt B. in Debt, and the *Land extended by B. is now extended by Elegit to C.* A. grants his Eſtate to the Conuſee; 'tis no Surrender. 3 Le. 156. pl. 205. in Caſe of Cadee v. Oliver, Arg. cites 29 Aſſ. 64. by Seton.

26. In Aſſiſe; Land was *given to A. a Baſtard, and to E. his Feme, and the Heirs of A.* who *had Iſſue C.* and after *A. died*, and *C. took J. to Baron*; after which *Tenant for Term of Life gave the Land to the ſaid J. and C. his Feme, and to the Heirs of J.* and after C. *died without Iſſue*, by which the *Lord enter'd for Eſcheat*, and J. the *Baron brought Aſſiſe*, and upon Argument and Adjournment, the Opinion of the Court was againſt the Plaintiff; by which he was nonſuited; for becauſe C. the *Feme was within Age and alſo Covert Baron*, this was taken as a Surrender and not a Gift to the Baron; and then becauſe he is not Heir of the part of the Father of C. ſcil. of the part of A. who was a Baſtard, to whom the Land was given in Fee, and E. who is yet alive had only for term of Life, therefore 'tis a Surrender; quod mirum mihi! by Reaſon that the Baron was join'd. Br. Surrender, pl. 34. cites 39. Aſſ. 7.

27. Land was *given to R. and J. his Feme and the Heirs of R.* and *R. died having Iſſue a Daughter C. who took to Baron O.* and after *J. who ſurvived, gave the Land to C. and O.* her Baron *in Tail*, the *Remainder in Fee to O.* Quære, if it be a Surrender? It ſeems that it is not by Reaſon that the Baron is joined with her. Br. Surrender, pl. 20. cites 39 E. 3. 29.

28. Land was given to *Baron and Feme*, the *Remainder to J. S.* the *Baron diſcontinued and retook to him and his Feme* the *Remainder to W. N. and died*; The *Feme claim'd in by the ſecond Eſtate, and ſurrendered part to W. N. in the laſt Remainder*; and becauſe the Feme by the *taking of the ſecond Eſtate was remitted*, and the firſt Remainder alſo, therefore this Gift *is no Surrender to the ſecond Remainder, but only a Grant of his Eſtate*: For the Remainder is in J. S. by Award. Br. Surrender, pl. 36. cites 41 Aſſ. 1.

29. If my *Termor agrees that I ſhall make Feoffment to a Stranger*, this is a Surrender; per Frowick Ch. J. who ſaid that this Caſe is adjudged in our Books. Brooke ſays, Quære, where? becauſe he believes that it is not Law. Br. Surrender, pl. 48. cites 41. Aſſ. 2.

Naked Conſent of Tenant for Life, that Reverſioner in Tail *ſhould make a Feoffment*, amounts not to Surrender of the Eſtate for Life. Reſolved per Cur. Hill. 2 W. 3. B. R. Carth. 110. Swift v. Heath.

30. A. leaſed to *B. for Life* the *Remainder to C. in tail*, the Remainder *to D. in Fee*, and after *B. aliens to C. and his Feme*; this is no Surrender, by Reaſon *that the Feme was Jointenant*. Br. Forfeiture de terres. pl. 84. cites 41 Aſſ. 2.

31. If the *Tenant in Dower leaſes* her Eſtate *to the Heir*, rendering Rent, *for Term of her Life*, the Heir ſhall have his Age in the Life of the Tenant in Dower; for this is *a Surrender*, and the Heir is in by the Anceſtor. Br. Age, pl. 8. cites 45 E. 3. 13. Per Finch.

Br. Voucher, pl. 30. cites S. C.——Perk. S. 623. cites S. C.—Br. Surrender, pl. 5. cites S. C.

32. In Scire Facias upon a Fine, it ſeems by the Argument, that where *Fine* is levied *to Baron and Feme in Tail*, the Remainder *to W. in Fee*, and the *Baron dies without Iſſue*, and the *Feme leaſes her Eſtate to W.* who has Iſſue, and dies, the Iſſue ſhall not have Scire Facias to execute the Fine; becauſe the Leaſe to W. the Father was a Surrender. Br Surrender, pl. 6. cites 45 E. 3. 18.

33. *Fee Simple cannot be* ſurrender'd *without Livery of Seiſin.* Br. Confeſſion, pl. 15. cites 12 H. 4. 20. 21.

34. If a Man *leaſes* his Land *for* 20 *Years*, and after *grants a Rent-charge of* 20 *s. out of it*, and after the *Termor grants his Term to the Leſſor within* 4 *Years*, the Leſſor ſhall hold charged within the 20 Years; for

Br. Charge, pl. 10. cites S. C.

this Grant is a Surrender, and the Leſſor is in Fee, and not in by the Termor. Br. Surrender, pl. 10. cites 5 H. 5. 8.

35. It *is not properly* a Surrender, *but where he, who ſurrenders, gives Poſſeſſion* to him who takes by the Surrender. Br. Surrender, pl. 13. cites 22 H. 6. 51. per tot. Cur. except Port.

36. If a Man, ſeiſed of an Acre of Land, *leaſe* the ſame Acre *for Life*, the *Remainder for Life unto a Stranger*, and the *Leſſee grants his Eſtate unto his Leſſor*, that ſhall enure by way of Grant; and yet the Grantee is ſeiſed of the whole Reverſion at the time of the Grant; but the ſame Reverſion is not to take Effect immediately after the Eſtate of the Leaſe determined, if he in the Remainder be living, as he is at the Time of the Grant. Perk. S. 83.

37. If Leſſee for Life of Land *grant his Eſtate unto him in the Reverſion, and to two other Men*, it is a Surrender for no Part. Perk. S. 618.

See (H) pl. 4. 38. *Releaſe of Leſſee for Years to Leſſor*, does not amount to a Surrender; for Releaſe ſuppoſes Leſſor in Poſſeſſion. Jenk. 30. pl. 58.

Bendl. 35. pl. 59. Anon. S. C. accordingly. 39. A Leaſe is granted *to a Feme ſole for Life, Remainder to her for* 20 *Years*, and after Leſſor makes a *Leaſe for* 40 *Years to J. S. to commence after the Death of the Feme, and the Term of* 20 *Years*; and afterwards *J. S. marries the Feme*, and the Feme dies. The Baron has both the Terms, and his laſt is not ſurrender'd nor determin'd; for Surrender can't be before the ſaid Term commenced in Poſſeſſion. And. 32. pl. 80. Mich. 5 E. 6. Anon.

40. 3 Things are *incident* to a Surrender. 1. An *actual Poſſeſſion* in him who ſurrenders. 2. An *actual Remainder or Reverſion* in him to whom the Surrender is made. 3. * *Conſent* and Agreement between the Parties. Arg. Owen. 97. in Caſe of Perrin, al.' Porey v. Allen.

* See (A. 2) pl. 8.

41. *Leaſe for Years*; after the Leaſe made Leſſor ſays to Leſſee, Tho' I have not excepted it in my Leaſe, yet I *mean to have the Chamber* over the Kitchen to put my Stuff in, *till* my Son comes of Age: To which *Leſſee anſwer'd, He was well content* with that. On which Leſſor put his Stuff there. Per Popham, Att. Gen. This does not amount to a Surrender, but is only a Permiſſion for a Time. 3 Le. 223. pl. 301. Trin. 30 Eliz. in the Exchequer, Queen v. Littleton.

42. *Tenant for Life levied a Fine Come ceo &c. to him in Reverſion in Fee*, and declared the *Uſes to the Cognizee, and his Heirs upon Condition that he paid the Tenant for Life the yearly Sum of* 4*l. during his Life*, and *in Default* of Payment thereof, *then to the Cogniſor for his Life, and for one Year over.* The Annuity being not paid, nor demanded, the Tenant for Life enter'd. The Queſtion was, whether this Fine was a Surrender; but it was held, that it was no Surrender; for a Fine implies a Gift in Fee Simple, and every Party to it ſhall be eſtopp'd to ſay the contrary. Cro. E. 688. pl. 23. Trin. 41 Eliz. C. B. Smith v. Warren.

43. The King ſeiſed in Fee of the Rectory of St. Saviour's in Demeſne as of Fee, as in Right of his Crown, *demiſed* the ſame *to the Church-Wardens* of St. Saviour's *for* 21 *Years. Afterwards* by Letters Patents *reciting the ſaid Leaſe, and that the ſaid Church-Wardens modo habentes*, & ad præſens poſſidentes, *the ſaid Eſtate, Intereſt &c.* yet to come in the ſaid Rectory, *had ſurrender'd* the ſame, *he, in Conſideration of the ſaid Surrender, and of* 20*l. demiſed it to them for* 50 *Years.* Reſolved, that there was no Occaſion of any actual Surrender, becauſe the Words Modo habentes &c. proved, that at the Time of the making the ſaid new Demiſe the other was in Being; and that inſtead of their making any Surrender before the new Demiſe, the Acceptance of the new Demiſe ſhould be a Surrender of the old. 10 Rep. 66. b. Trin. 11 Jac. in the Exchequer, Church-Wardens of St. Saviour's, Southwark.

44. *Before Remotion* of the Clerk, the *King cannot preſent the ſame Clerk* who is in by Uſurpation; for this cannot enure as a Surrender and new Preſent-

Preſentment. See Preſentation, (Q. a) pl. 5. and Roll Rep. 236. in Caſe of the King v. the Biſhop of Norwich.

45. R. S. brought Waſte againſt H. and E. his Wife, and declared, that the *Queen* by Letters Patents *granted* the *Lands to E. for Life, Remainder to the Plaintiff*, and that H. *the Defendant married the ſaid E. and committed Waſte.* The Defendants by their Plea confeſs the Leaſe and Marriage; but farther ſay, that 2 Feb. Anno 40 Eliz. *they ſurrender'd the Eſtate of the ſaid E. to the Queen*, to the Intent *that ſhe ſhould grant a new Leaſe to the ſaid E. and 2 others* for their Lives; *which* Surrender *the Queen accepted, and* 3 Feb. *made a new Leaſe.* Iſſue being taken thereupon, the Jury found the new Leaſe made 3 Feb. *reciting, that ſhe ſurrender'd* the Eſtate and the Grant, and that the Queen, in Conſideration of Money, &c. *and that the new Leaſe was made with the Conſent of H.* the Husband, *and that he and E. agreed to it, and held claiming by the ſaid new Leaſe*; adjudged, that the Conſideration which procured the new Leaſe was the Surrender of the old Leaſe, which Surrender was not abſolute, but defeaſible, if E. ſurvive, or H. diſagree, and then the old Leaſe is revived. Beſides the Freehold for Life, which H. had in Right of E. his Wife, could not be given away by his bare Aſſent; but if that Leaſe had been made *De novo* to him and his Wife, then it had been queſtionable; becauſe the Eſtate paſs'd by Implication, viz. by a Surrender in Law, by the Acceptance of the new Leaſe. Hutt. 7. Trin. 14 Jac. Swaine v. Holman.

Hob. 203. pl. 257. S. C. the Husband could not be ſaid to ſurrender to the Queen but by Record; whereas his Aſſent was not of Record, but was a Matter Dehors, as it was found by the Jury.

46. It was held, that if the *Indenture of Leaſe be given up* to the Leſſor, and accepted by him, this is a Surrender in Law. Clayt. 131. pl. 236. March 1648. before Thorpe Serjeant at Law Judge of Aſſiſe. Anon.

Grantee of Rent delivers up the Deed to the Grantor, this is no Surrender, but he may ſue for his Rent, if he can *recover his Deed again*; for a *Choſe en Grant* muſt be ſurrender'd by Deed; Per Cur. Vent. 297. Trin. 28 Car. 2. B. R. in Caſe of Woodward v. Aſton.

47. Where a Surrender may be made, and *both Eſtates come into the ſame Hands*, this amounts to a Surrender. Arg. Skin. 263. in Caſe of Knight v. Greenvill, cites Co. Litt. 41. 42. Poph 30. For no Man can have an Eſtate in Poſſeſſion and Reverſion alſo, without an intermediate Eſtate in ſome other.

A *Grant by Operation of Law* turns to a Surrender, becauſe a Man cannot have 2 Eſtates of equal Dignity in the Law at the ſame Time. Arg. 3 Mod. 301. in the Caſe of Thompſon v. Leach.

(H) By what *Words* it may be.

1. THE Word Surrender is not neceſſary **to make a Surrender, if * there are other** Words which tantamount. 40 Aſſ. 16. adjudged,

* Fol. 498.

Br. Surrender, pl. 35. cites S. C. *that he in the Remainder or the Reverſion ſhall have the Thing which he has* or holds, they are Words ſufficient to make a Surrender, if he to whom the Surrender is made do agree thereunto. Perk. S. 607.

When the Words *prove a ſufficient Aſſent* and Will *of* him who is *the particular Tenant*,

2. If Leſſee for Life ſaith **to the Leſſor, that** he grants that he ſhall enter **into the Land, and that** he will that he ſhall have the Land, **[this amounts to a Surrender.]** 40 Aſſ. 16.

Br. Surrender, pl. 35. cites S. C.— If Leſſee for Life, or for Years, of Land, ſay to his Leſſor, that *his Will is that his Leſſor ſhall enter into the Land which he holds for Life*, or for Years, *and ſhall have the ſame*, and *by Force thereof the Leſſor does enter into the ſame*, it is a good Surrender; and ſo ſhall it be, if he ſay unto his Leſſor, or unto him in the Remainder or Reverſion, that *he wills that he have the Land*, and the *Leſſor does enter by Force thereof*, or agrees thereto, it is a good Surrender; but if the Leſſor &c. does not enter by Force thereof, nor agrees thereto, the Surrender

Surrender is not good; for he cannot ſurrender to him againſt his Will. But *if he to whom the Surrender is made do once agree* to the ſame, he cannot afterwards diſagree thereto And in the Time of King E. 1. the Leſſor did enter into the Land leaſed for Life, with the Aſſent of the Leſſee; and becauſe it was not in the Preſence of good Men of Credit, it was holden to be a void Surrender. But the Law is otherwiſe at this Day &c. Perk. S. 608.

If the *Leſſee* comes to him in the Remainder, or in the Reverſion, and *ſays* to him that *he will occupy the Land no longer*, and *he in the Remainder by Force thereof does enter*, it is a good Surrender. And if the Leſſee does ſay to his Leſſor, *I do ſurrender unto you the Land which I hold of your Leaſe*; or if he ſaid, I hold ſuch Land or Houſe &c. and ſhews certain the Land or Houſe &c. of your Leaſe, and *I do ſurrender the* ſame *Land* or Houſe &c. *to you*, and the *Leſſor doth agree* thereto, the ſame is a good Surrender. Perk. S. 609.

3 In Aſſiſe; *Tenant in Tail diſcontinued*, and the *Diſcontinuee died ſeiſed, and* 3 *Heirs after him*, and the 3*d Heir on his Death-bed ſent for the Iſſue in Tail, and bail'd to him the Deed of Entail; and ſaid to him that he had Right to the Tenements, and ſurrender'd them to him by Parol, and died in the Houſe of the Tenements*; and the Iſſue in Tail enter'd by the Surrender upon the Heir of him who ſurrender'd, who interrupted him: And the Surrender awarded good, and the Entry lawful. Br. Surrender, pl. 33. cites 34 Aſſ. 2.

S. P. Jenk. 30. pl. 58. If *Tenant for Life releaſes to him in Reverſion*, it is *void*; becauſe it cannot enure as a Releaſe, for he is in Poſſeſſion; nor can it enure as a Surrender for Want of apt Words. So of Leſſee for Years; Per Anderſon Ch. J. But Snagg ſaid he knew it ruled in a Caſe of great Importance, that tho' the Words did not amount to a Surrender, yet the Conſent and Agreement of the Leſſee, which is proved by the Deed, will *amount* to a Surrender. Cro. E. 21 Trin. 25 Eliz. C. B. pl. 2. Anon.

4. *Releaſe* of Leſſee for Years to Leſſor, does not amount to a Surrender, becauſe of the Repugnancy; for the Leſſee is in Poſſeſſion, and the Releaſe ſuppoſes the Leſſor in Poſſeſſion. Jenk. 195. pl. 2.

Tenant for Years *remiſes*, *releaſes*, *diſcharges*, and for ever *quits Claim* to him in Reverſion. The Court inclined that it was a good Surrender; Sed adjornatur. 1 Lev. 145. Mich. 16 Car. 2. B. R. Mason v. Tredway.

5. *A.* was *Leſſee for Years rendring Rent*, and afterwards the *Reverſion* was granted *to B. for Life*, Remainder *to C. in Fee.* A. attorn'd to B. Afterwards *B.* by Deed *releaſed to C. all his Right* &c. with Words *excluding him to make any Claim for the future. C. reciting all this* Matter, *granted his ſaid Reverſion and Remainder to J. S. in Fee*, to whom *A. paid the Rent*; and *B.* likewiſe *releaſed to J. S.* and his Heirs &c. all his Right, *with like Words* as in the other Releaſe. Dyer, Weſton, and Welſhe J. held, That nothing paſs'd by this Releaſe, becauſe there were *no Words of Surrender* in the Deed. And Saunders Ch. B. and Browne accorded, but Catlyn and Whiddon e contra. D. 251. a. pl. 91. Paſch. 8 Eliz. Stepkin v. Lord Wentworth.

6. Tenant in Tail leaſes for Years; afterwards *Leſſor covenants and grants* with Leſſee, that he *ſhall* have and *hold the* Land *to him and others during the Life of Leſſor*; but no Livery and Seiſin was made. By the Opinion of 3 Juſtices, This is neither Surrender nor Confirmation to enlarge his Eſtate, and is only a Covenant, notwithſtanding the Word Grant; but Weſton J. ſeem'd e contra, by Reaſon of the Word Grant. D. 272. pl. 34. Paſch. 10 Eliz. Cardinall v. Sackford.

Cro. E. 156. pl. 39. Mich. 31 & 32 Eliz. B. R. S. C. accordingly.

7. *Tenant at Will* cannot ſurrender; and if he ſays, *I agree to ſurrender my Lands*, this by 3 Juſt. againſt 1, is not any Thing in preſent, but an Act to be done in futuro. Le. 177. pl. 250. Trin. 31 Eliz. B. R. Sweeper v. Randal.

Poph. 125. S. C. by the Name of Bennet v. Weſtbeck, but ſtates it

8. *Leaſe for Life*, *Remainder for Life*; and afterwards he in *Remainder for Life*, during the Life of the Tenant for Life in Poſſeſſion, and in his Preſence *upon the Land*, ſurrenders to Reverſioner by theſe Words, viz. *I ſurrender and yield up the Tenements to you*, and then delivers up the Leaſe to the Reverſioner, by whom the Leaſe was granted to him. Per 3 Juſt.

Juſt. this is not good, but it ought to be by Deed; but Mountague J. contra. Et adjornatur. 2 Roll. Rep. 20. Paſch. 16 Jac. B. R. Bennet's Caſe.

to be done by Aſſent of the Tenant for Life, but to

a Stranger upon the Land in the Abſence of the Leſſor; and that he ſaid he ſurrender'd to him in Reverſion. It was objected that this Surrender could not enure to him in Reverſion, being abſent. Sed non allocatur; for the ſole Point in Queſtion was, Whether he in Remainder for Life can ſurrender without Deed? And as to that this Rule was taken, viz. That what cannot commence without Deed, cannot be granted without Deed, as a Rent, Reverſion, Common, Advowſon &c. But in this Caſe this took Effect by Livery, and not by Deed; and therefore might be determined without Deed. Mountague and Haughton agreed, that it might be ſurrender'd without Deed, but that it could not be granted over without Deed; but Doderidge J. ſaid it could not be ſurrender'd without Deed, but that Tenant in Poſſeſſion may, or Tenant for Life, and he in Remainder together may ſurrender to him in the Reverſion; but this ſhall enure as 2 ſeveral Surrenders, firſt of him in Remainder to the Tenant for Life, and then by the Tenant for Life to him in the Reverſion. And Croke J. agreed with Doderidge, becauſe the Eſtate of him in Poſſeſſion is an Eſtoppel to the Surrender; ſo that it could not be ſurrender'd without Deed.

(I) In what Caſes a Surrender ſhall be *hinder'd by other Eſtate.*

See (F) (G)

1. IF Leſſee for 20 Years grants 10 of the ſaid 20 Years to the Leſſor, yet this is not any Surrender, becauſe he himſelf has a Reverſion meſne. Tr. 14 Ja. B. R. adjudged between Bacon and Waller.

See (G) pl. 13, 14. S. C.

——The Leſſor has but a future Intereſt;

Per Doderidge and Haughton J. Roll. R. 388. S. C.

2. If Leſſee for Years grants all his Eſtate except one Day at the End of the Term to the Leſſor, yet this is not any Surrender; for this Day is a Reverſion, and ſo ſhall hinder the Surrender as ſtrongly as if it had been 20 Years. Tr. 14 Ja. B. R. adjudged between Bacon and Waller.

See (G) pl. 14. S. C.

3. Leaſe was made *to W. for Life*, the Remainder *to P. in Tail*, the Remainder *to T. in Tail*, the Remainder *to the right Heirs of W.* and after *W. infeoff'd P. and his Feme in Fee*, now *T. cannot enter; for he has note the immediate Remainder.* Br. Surrender, pl. 3. cites 41 E. 3. 21.

But if P. dies without Iſſue, now T. may enter for the Alienation

to his Diſinheritance; Per Wiching, quod non negatur. And ſo ſee that *it is no Surrender, becauſe the Feme was join'd with P.* who was in the Remainder; but if ſhe had not been join'd, then it ſeems it had been a Surrender; for Tenant for Life cannot infeoff him in the Reverſion or Remainder. Br. Surrender, pl. 3. cites 41 E. 3. 21.

4. In Debt the Defendant pleaded Surrender, and the Caſe was, that an *Abbot leas'd* Land *for Term of 20 Years to B. C. who leaſed over to E. for 5 Years*, who *leaſed his Intereſt by Indenture to W. N. rendring 20 Marks per Annum*; and *in Debt brought by E. againſt W. N. the Defendant pleaded that the ſaid E. and this W. N. now Defendant his Leſſee, before any Rent arrear, ſurrender'd their Eſtates*, which they had in the Land, *to the Abbot firſt Leſſor, who agreed to it*, Judgment &c. And by all the Juſtices, except Brian, This is no good Surrender; for there was *no Privity between the 2d and 3d Leſſees, and the firſt Leſſor*, and therefore a void Surrender; and alſo the third Leaſe, with Reſervation of the Rent had been void, but by Reaſon of the Deed indented; becauſe the *ſecond Leſſee had no Reverſion in him*, and alſo the Surrender in ſuch Caſe is not good without Deed; for of a Rent &c. which cannot paſs without Deed, nor commence without Deed, there the Surrender of ſuch a Thing is not good without Deed. And note alſo here, that *there is not any immediate Re-*

verſion or Remainder between the 2d Leſſee and the 3d Leſſee, and the 1ſt Leſſor; and ſo void, by the beſt Opinion. Br. Surrender, pl. 16. cites 14 H. 7. 2.

5. If a *Leaſe for Life* be made of Land by A. to B. the *Remainder* to *C. for Life*, the Remainder to D. in Tail, and B. *ſurrenders to C. or* to A. *his Leſſor* (*who has the Fee in Reverſion*) leaving out him in the Remainder for Life, this Surrender is void to take Effect as a Surrender; becauſe he unto whom the Surrender is made, has not the immediate Eſtate in Remainder to him that makes the Surrender. *But* if he who made the Surrender had but an *Eſtate for Years, and in the Surrender* there *be Words which amount unto a Grant of his Eſtate*, then the Surrenderee ſhall take the ſame by Way of Grant of his Eſtate &c. Perk. S. 588.

But if an after made Leaſe to C. by another Indenture of the ſame

6. A. Leſſee for Year's Remainder for Years to B. This *Remainder for Years* hinders the Surrender of Leſſee for Years to Leſſor; Secus of an *after made Leaſe* to commence after the firſt Leaſe. Jenk. 256. pl. 49.

Land had *commenced with the Leaſe to B.* then 'tis only a Leaſe *by Eſtoppel*, and does not hinder the Surrender of B. For 'tis not one and the ſame Eſtate with the Leaſe of B. and conjoin'd. But in this Caſe if B. ſurrender, C. ſhall enjoy his Leaſe, and if in the laſt Caſe B. *attorns* to C. then C. ſhall have it as a Reverſion, and the Rent as Incident, and ſuch *Reverſion hinders* Surrender by B. to A. the firſt Leſſor, for he is *not immediate* to him. Jenk. 256. pl. 49.

7. *Leſſee for Life makes a Leaſe for Years* rendering Rent, and after ſurrenders to the Leſſor on Condition. *Leſſee for Years takes a new Leaſe for Years of the Leſſor*; Leſſee for Life *performs the Condition* and puts out the Leſſee for Years, who re-enters, and the Leſſee for Life brings Debt for the firſt Rent reſerved, and ruled that it does not lie; For the Leaſe out of which it was reſerved is gone and determined. Cro. E. 264. pl. 4. Mich. 33 & 34 Eliz. B. R. Brewſter v. Parrot.

(K) *How* a Surrender may be made.

*Br. Dower, 1. pl. 74. cites S. C.

A **Surrender may be** upon Condition. * 14. E. 4 6. **adjudged.** **Perkins. S. 624. 44 E. 3. 3.**

S. P. Br. Surrender, pl. 41. cites 7. E. 4. 26. —— S. P. Co. Litt. 218. b.

You muſt know, that a Surrender of *a Freehold* made *by Deed indented upon Condition* is good, and if the Surrender be of an *Eſtate for Years* in Land, then the Surrender may be *upon Condition without Deed*; and if a Surrender be made of the Freehold by Deed indented upon Condition, that if he to whom the Surrender is made, do not go unto York within one Month next following the Date of the Surrender, That then it ſhall be lawful for him who made the Surrender to re-enter into the Land; The ſame is a good Surrender upon Condition. Perk. S. 624.

2. Tenant for Life, and he in Reverſion for Life **may ſurrender** without Deed, **and the Eſtate of him in Reverſion ſhall be ſurrender'd thereby; (For it ſeems this ſhall enure firſt as a Surrender of the Leſſee to him in Reverſion, and then as the Surrender of him in Reverſion, ſo that he ſurrenders an Eſtate in Poſſeſſion. 27. Aſſ. 46. adjudged.**

As Tenant in Dower gave the Land *to*

3. **A Surrender** of an Eſtate for Life **may be** without Livery. 44 **Aſſ. 3. Curia.**

him in the Reverſion by Dedi, Conceſſi & Confirmavi for her Life rendring Rent, and for Default of Payment to re-enter; and in Aſſiſe brought by the Tenant in Dower againſt him of the Land, *he pleaded the Deed Quod ipſa ratificavit & confirmavit the Land to him in Reverſion then ſeiſed of the Reverſion Habendum for Life of the Tenant in Dower, rendering 5 l. Rent*, which he has been always ready to pay, *and would not uſe the Deed as a Gift, but as a Surrender*; And the Opinion of the Court was, That it is a Surrender and not a Leaſe; And this notwithſtanding the Condition and the Rent reſerved. Br. Surrender, pl. 37. cites 44 Aſſ. 3.

But

But Tenant of Fee Simple cannot ſurrender to the Lord without Livery of Seiſin. Br. Surrender, pl. 9. cites 12 H. 4. 21. ——— Br. Condition. pl. 15. cites S. C.

4. In Aſſiſe, 'twas admitted a good *Bar, that the Tenant brought Præcipe quod reddat, ſcilicet, Dum fuit infra ætatem againſt the Plaintiff, and he rendered to him the Land in Pais*, Judgment Si actio; For per Fiſh, this is all that the Writ demands; for it is Præcipe N. quod reddat B. ſuch Land. By which the Iſſue was taken, that he diſſeiſed him, abſque hoc that he had any thing of his Render, quod nota; And the Aſſiſe was taken; Which ſaid that he did not Surrender. Br. Barre, pl. 64 cites 27 Aſſ. 37. Br. Surrender pl, 28. cites S. C. But Brooke ſays, It ſeems that the Intent of the Writ is that he ſhall come into the Court where the Writ is returnable, and render it there, ſo that it may be of Record to bar the Demandant at another Time; And yet the Writ ſays further, Et niſi fecerit, & prædictus (le demandant) fecerit te ſecurum de clamore ſuo proſequend. tunc ſum. per bonos ſummonit. prædict. (le Tenentem) quod ſit &c. oſtenſur' Quare non fecerit &c. And ſo it ſeems that *in ancient Time, it ſufficed that the Tenant render in Pais according to the Words of the Writ.*

5. Leſſee for Years can't ſurrender *by Attorney*; But he may make a Deed importing a Surrender, and a Letter of Attorney to another to deliver it; Per Clench. Le 36. pl. 45. Trin. 28 Eliz. B. R. Anon.

6. A Surrender may be *to an uſe*. Cro. E. 668. pl. 23. Trin 41 Eliz. in C. B. Smith v. Warren. Whether *Lands in Fee* may be ſurrender'd *to an Uſe* was doubted by Coke. Roll. R. 412.—They may be ſurrendered according to the Cuſtom of a Manor, Roll R. 411. Waſſel v. Yelton. ——— 3 Bulſt. 230. Elkin v. Waſtell, Mich. 14 Jac. S. C. and there 231. It was urged that Fee Simple Land may be ſurrender'd by the Cuſtom, and that it had been ſo adjudged here; And this ſeems admitted by Coke Ch. J.

(L) In what Caſes Surrender may be *without Deed*, and in what not. *What Thing.*

See (H) Bennet v. Weſtbeck. (K) pl. 2.

1. A Corodie **cannot be ſurrendered without Deed. 12 H. 4. 17.**

2. **Such** thing which cannot be created without Deed, **cannot be ſurrendered without Deed. 19 H. 6. 33. b.** Br. Monſtrans pl. 54. S. P. cites S. C. ——— S. C. cited Poph. 137. Paſch. 16 Ja. in Caſe of Bennet v. Weſtbeck. ——— S. P. *But a thing which may be leaſed without Deed* may be ſurrendered without Deed, *tho' the Leaſe was by Deed*; per Markham. Br. Surrender, pl. 12. cites S. C.

3. As a Rent Charge **or Rent** Seck **cannot be ſurrendered without Deed. 19 H. 6. 33. b.** S. P. Br. Surrender, pl. 12. cites S. C ——— S. P. Ibid pl. 16. cites 14 H. 7. 2. —— Br. Monſtrans. pl. 54. cites S. C. *But Surrender of Land* is good without Deed thereof made; For it may paſs without Deed as by Livery. ——— S. P. Perk. pl. 581, 582.

4. Leſſee for Years of a Manor **cannot ſurrender it without Deed, becauſe it cannot paſs without Deed. Tr. 5 Ja. B. Agreed per Curiam, between Bucknam and Warnford.**

5. **If a Man grants a** Reverſion for Years **by Deed as he ought, and after this** comes into Poſſeſſion, **this may be ſurrendered without Deed. Tr. 5 Ja. B. R. per Coke.** If *Leſſee for Life* be of Land or of a Houſe, and the *Grantor grants the Reverſion unto a Stranger for Life*, and the Leſſee attorns, the Grant is void if it be not by Deed. And yet if the *Leſſee dies*, and the *Grantee enters* into the Land, *he may ſurrender* the ſame without Deed and out of the Land, if the Surrender be made *within the County where the Land is.* But if the Surrender be made in another County, it ought to be by Deed &c. Perk. S. 583.

6. If

6. If a Man be *Tenant by the Curteſy, or* Tenant *in Dower, of an Advowſon*, Rent or other Thing that lies in Grant, albeit there the Eſtate begins without Deed; Yet in Reſpect of the Natute and Quality of the thing that lies in Grant, it cannot be ſurrender'd without Deed. Co. Litt. 338. a.

7. *So* it is if a *Leaſe for Life* be made of Lands, the *Remainder for Life*, albeit the Remainder for Life began without Deed; Yet becauſe *Remainders and Reverſions*, tho' they be of Lands, are things that lie in Grant, they cannot be ſurrender'd without Deed. Co. Lit. 338. a.

8. *A. Tenant for Life*, Remainder *to B. and C. for Life. C. purchaſes the Reverſion in Fee*; A. and B. ſurrender to C. but without Deed; Per Fenner J. The Surrender is void; for if it be good it muſt firſt be the Surrender of him in Remainder, which cannot be *without Deed*, and it cannot be the Surrender of the firſt Tenant for Life to him; for there is no Word of Surrender between them. Cro. E. 269. pl. 9. Hill. 34 Eliz. B. R. Perkins v. Perkins.

9. A *Corporation aggregate* cannot make an expreſs Surrender without Deed in Writing under their Seal, yet they may *by Act in Law* ſurrender their Term without Writing; for *fortior & potentior eſt Diſpoſitio Legis quam Hominis.* Admitted. 10 Rep. 67. b. Trin. 11 Jac. in the Churchwardens of St. Saviour's, Southwark's Caſe.

Leſſee for Years agreed to ſurrender his Leaſe to the Leſſor, and *delivers the Key, which Leſſor accepts*,

10. 29 *Car.* 2. *cap.* 3. Enacts, That *no Leaſes, Eſtates, Intereſt of Freehold, or Terms of Years, or any uncertain Intereſts in, or out of any Lands, Tenements, or Hereditaments, not being Copyhold or cuſtomary Intereſt, ſhall be ſurrender'd, unleſs by Deed or Note in Writing ſign'd by the Parties, making them, or their Agents authoriz'd by Writing, or by Operation of Law.*

but afterwards refuſed to take the Surrender of the Leaſe; Decreed by Lords Commiſſioners that the Leſſee ſhould be diſcharged of the Rent. 2 Vern. 112. pl. 109. Mich. 1689. Natchbolt alias Knatchbull v. Porter.

Upon a Caſe referr'd to the Lord Ch. B. Gilbert for his Judgment, at his Chambers, he gave his Opinion, That ſince the Statute of Frauds and Perjuries, a Leaſe for Years cannot be ſurrender'd by cancelling of the Indenture, without Writing, becauſe the Intent of that Statute was to take away the Manner they formerly had of transferring Intereſts to Lands, by Signs, Symbols, and Words only; and therefore as a Livery and Seiſin, on a Parol Feoffment, was a Sign of paſſing the Freehold before the Statute, but is now taken away by the Statute, ſo he takes it, that the cancelling of a Leaſe was a Sign of a Surrender before the Statute, but is now taken away, unleſs there be a Writing under the Hand of the Party. And the Words, viz. By Act and Operation of Law are to be conſtrued a Surrender in Law by the taking a new Leaſe, which, being in Writing, is of equal Notoriety with a Surrender in Writing. Gilb. Equ. Rep. 236. Caſes in Ireland, in Time of Geo. 1. Magennis v. Mac-Cullogh.

(L. 2) What *Eſtate.*

S.P. And without Livery; becauſe it is but a Yielding or a Reſtoring of the Eſtate again to him in the immediate Reverſion or Remainder, which are always favour'd in Law. Co. Litt. 338. a.

[1] 6. **Eſtate** for Life of Land **may be ſurrender'd without Deed.** 40 E. 3. 41. b. 19 H. 6. 33. b. 50 Aſſ. 1.

Leſſee for Life or Years of Land, or of a Houſe, *upon Condition by Deed indented*, may ſurrender his Eſtate without Deed. Perk. pl. 583.

[2] 7. One Jointenant **may ſurrender** to his Companion **(admitting that he may ſurrender) without Deed.** 40 E. 3. 41.

S.P. Br. Conditions, pl. 149. cites 7 E. 4. 49.

3. Surrender *of a Term upon Condition*, is good without Deed. *Contra of* ſuch Surrender *of a Leaſe for Term of Life upon Condition*; for this ought to be by Deed. Br. Surrender, pl. 40. cites 7 E. 4. 16.

4. *Eſtates in Fee of ſome Things* iſſuing out of Lands may be determined *by the Surrender of the Deed to the Tenant of the Land by which* Deed *it was granted &c.* Perk. S. 585.

(L. 3) To

(L. 3) To whom. [*The King.*]

[1] 8. THE Tenant of the King (admiting that he may surrender) cannot surrender without Deed. Contra 49 E. 3. 5. 50 Aſſ. 1.

(M) *What* ſhall be ſaid a Surrender *of Part, or of all.*

1. IF Leſſee for Years of Land accepts a new Leaſe by Indenture of Part of the Land before leaſed to him, this is a Surrender only for this Part, and not for the whole. Hill. 43 Eliz. B. R. Per Curiam, between Fiſh and Campion.

2. A Man *leaſed for Life rendring Rent*, and after the *Tenant for Life granted his Eſtate to the Leſſor and 2 others*; And the beſt Opinion was, That this is a Surrender for the 3d Part; for when the Fee and the Franktenement come together, the one determines the other, and ſo the *Jointure determines, and they are Tenants in Common*; and yet the Opinion of Perkins in his Book is, that it is no Surrender for any Part for the Advantage of the other two; but this does not ſo appear in this Book. Br. Surrender, pl. 11. cites 7 H. 6. 2, 3.

If *Tenant for Life* makes a *Leaſe for his own Life to the Leſſor*, the *Remainder to the Leſſor, and an Eſtranger in Fee*; in this Caſe, foraſmuch as the Limitation of the Fee ſhould work the Wrong, it *enures* to the Leſſor *as a Surrender for the one Moiety, and a Forfeiture as to the Remainder of the Stranger*; for he cannot give to the Leſſor that which he had before: And as to the Remainder to the Stranger, it is a Forfeiture for this Moiety, and when the Leſſor enters he ſhall take the Benefit of it. Co. Litt. 335. a.

If *Leſſee grants his Eſtate to Leſſor and a Stranger*, this is is a Surrender *for a Moiety*. Arg. 2 Roll. R. 445. in Caſe of Euſtace v. Scayen.

3. *Where there are two Co-heirs*, and the *Tenant for Life grants his Eſtate to the one*, this is no Surrender but for the one Moiety; and of the other Moiety the other may have Writ of Waſte, tho' the Action of Waſte ſhall be in Name of both, and the one ſhall be ſever'd as it ſeems. But quære; for it ſeems the Action of Waſte ſhall be of the Moiety; Quære before Partition and Severance of the Land. Br. Surrender, pl. 23. cites 21 H. 7. 40.

4. If A. B. and C. be *Joint Feoffees* of Lands, to have and *to hold unto them and to the Heirs of B.* and afterwards *A. does releaſe all* his *Right to C.* and afterwards *C. ſurrenders to B. &c.* it is a good Surrender for the 3d Part of the Land &c. Perk. S. 587.

5. If I *hold one Acre* of Land *for Life, of the Leaſe of the Father of J. S. and* I hold *one other Acre* for Life or Years *of the Leaſe of J. S.* and *I ſurrender unto J. S. the Land which I hold of his Leaſe*, by this Surrender he ſhall not have the Land which I hold of the Leaſe of his Father, notwithſtanding that the Reverſion of the ſame Acre be in him by Deſcent from his Father &c. Perk. S. 611.

6. *A. B. and C.* Jointenants *join* in the Leaſe of a *Houſe to J. S. to commence from Michaelmas laſt.* Afterwards *on the ſame Day B. and C.* without A. *demiſe the ſame Houſe to J. S. to commence from the ſame Time and for the ſame Number of Years* as in the Leaſe made by all three; and in Ejectment by J. S. he declares upon both theſe Leaſes. Reſolved that the Declaration was not *double*; for when the 3 demiſed the whole, and afterwards 2 of them demiſed all the ſame Thing, this is a *Surrender* of the firſt Leaſe, and a new Leaſe of their 2 Parts, and the old Leaſe continues as to the 3d *Part* of A. and ſo J. S. entered, and was poſſeſs'd by both

both Leaſes, viz. of the 3d Part of A. by the *firſt Leaſe*, and of the two Parts of B. and C. by *the 2d Leaſe*; and ſo affirm'd a Judgment in B. R. 3 Lev. 117. Paſch. 34 Car. 2. in Cam. Scacc. Tubervill v. Stockton.

(N) Pleadings.

1. IN Aſſiſe Bagot pleaded Surrender *of Letters Patents of the Office of Clerk of the Crown of the Chancery into the Hands of the King*, viz. *Quod idem W. S. coram dicto Domino Rege in Cancell. ſua tali Die & Anno eadem Cancell. apud Villam Weſtm. tunc exiſtente perſonaliter conſtitutus ex certis cauſis ipſum moventibus totum jus, Statum, Tit. & intereſſe ſua quod ipſe in dicto Officio ac in 20 li. pro exercitio ejuſdem habuit, conceſſit, ac Officium illud gratis, pure, ſponte, realiter, & abſolute ſurſum reddidit, dimiſit, & reſignavit, præfato Domino Regi, ac literas illas ſibi inde factas in Cancell. prædicta ibidem ex cauſis prædictis tunc ibid. reſtituit cancellandas.* Br. Surrender, pl. 18. cites 9 E. 4. 7.

Litt. Rep. 83. S. C. & P. accordingly; for in Common Parlance, when it is ſaid ſuch an one had a Leaſe for Years, not only a Writing is intended, but a Term; and in the Books it is ſaid that he ſurrender'd his Leaſe &c. and cited Sir John Paginton's Caſe adjudged, which was, that he made a Feoffment in Fee upon Condition that if he paid Money at ſuch a Day, then the Charter of Feoffment ſhould be utterly fruſtrate and void, but did not ſay that the Eſtate ſhould be void, or the Livery and Seiſin &c. And yet adjudg'd that this goes to the Eſtate, and yet the Deed does not make the Eſtate, but the Livery. And ſays Coke remember'd this Caſe in 5 Rep. and that the Caſe is more ſtrong than a Leaſe for Years, as the Principal Caſe is, which is only a Contract; that if it was Eſtate of Franktenement, it ought to be Intrando agreavit.

2. In Replevin the Defendant rejoin'd, that Leſſee ſurrender'd *Dimiſſionem prædictam*, without ſaying that he ſurrender'd the Tenements or all the Eſtate therein. But it was held, that theſe Words imply all his Eſtate and Intereſt, and ſo it is intended; and tho' the uſual Courſe is to plead Surrender of the Eſtate, yet all is one, and ſo much is implied. Cro. C. 101. Hill. 3 Car. C. B. Peto v. Pemberton.

3. The conſtant Form of pleading a Surrender, is not only to plead the Surrender, but to plead it *with an Acceptance*, viz. to which the Surrenderee agreed; and ſo are all the Precedents, unleſs one or two in Raſtal. Per Pollexfen Ch. J. Rooksby & Powell 9. 3 Lev. 284. Trin. 2 W & M. B. C. in Caſe of Thompſon v. Leach.

For more of Surrender in General, ſee Copyhold, Extinguiſhment, Fines, Releaſe, and other Proper Titles.

Survivor.

(A) *What Things* Survivor *ſhall take.*

1. IF an *Obligation* be made to many for one Debt, he who ſurvives ſhall have the whole Debt or Duty. And ſo it is of other *Covenants and Contracts* &c. Litt. S. 282.

2. Money

2. Money lent on a *Mortgage* in Truſt, and with Intention, that each of the Mortgagees ſhould have his Money and Intereſt again, there ſhall be no Survivorſhip. Chan. Rep. 57. 7 Car. Petty v. Styward.

3. *Joint Farmers of Exciſe*; per Finch C. If there had been no Covenant that it ſhould ſurvive, yet in Equity it ought, by reaſon of the joint Charge and Expence If there had been any Agreement among the Farmers that it ſhould not ſurvive, that might have alter'd the Caſe. Vern. 33 Hill. 1681. Hays v. Kingdom.

4. Where 2 become *Jointenants*, or jointly intereſted in a Thing *by way of Gift*, or the like, there the ſame ſhall be ſubject to all the Conſequences of Law. But as to a joint Undertaking in *the way of Trade*, or the like, it is otherwiſe. Vern. Rep. 217. Hill. 1683. Jeffries v. Small.

5. If a *Guardianſhip* was granted to 2, if one dies, it ſhall ſurvive to the other. G. Equ. Rep. 177. Paſch. 8 Geo. 1. Earl of Shaftsbury v. Counteſs of Shaftsbury.

See 2 Lev. 218, 219. Hill. 29 & 30 Car. 2. B. R. Lowry v. Reines, where this Point was moved, and cited D. [189. b. &c. pl. 15. &c. Mich. 2 & 3 Eliz.] Lord Bray's Caſe, That by the Death of one the Authority is determined; but in the principal Caſe the Court ſaid nothing to the Point.

(B) *In what Caſes* Survivor *ſhall take.*

1. IF a *Demiſe* of Lands be *by* 3, on Condition *to pay them* 100 *l.* equally to be divided, and one of them dies, his Executor or Adminiſtrator ſhall have the Money. Brownl. 32. a Nota there.

2. If I make a Leaſe for Years, reſerving *Rent during my Life, and my Wife's Life*, if I die, the Rent is gone, becauſe *ſhe is a Stranger*; and ſhe ſhall never have the Rent, becauſe ſhe has no Intereſt in the Land. If one of them die, nothing can ſurvive to the other; and a Limitation muſt be taken ſtrictly, otherwiſe it is by way of Grant, that ſhall be taken ſtrongly againſt the Grantor. Brownl. 39. a Nota.

If a *Rent-Charge* be granted by A. *to Huſband and Wife, during the Life of the Wife*, and the Wife ſurvives, ſhe ſhall have the Rent. Brownl. 171. Hill. 15 Jac. Brown v. Dunry.

3. Lands charged by Deed with 1000 *l. to be raiſed and divided among 5 Children*, one dies before Diſtribution; the Survivor ſhall have his Share, and not the Deviſee of him that is dead. 2 Chan. Rep. 129. 29 Car. 2. Woolſtenholm v. Swetnam.

4. *Joint-purchaſe by A. and B.* of a Building-Leaſe, in the Name of of C. who declared it a Truſt for A. and B. and of another Building-Leaſe in D.'s Name, who alſo declared the Truſt for A. and B.—A. dies, and M. his Executor, and E. (who had taken the Houſes in Execution) aſſign'd to J. S.—B. became Bankrupt, and the Commiſſioners aſſign'd to R. S.———R. S. conveys to W. S.———W. S. denies Notice of the Title of J. S. but confeſs'd his having C.'s Aſſignment, and the Declaration of *Truſt* put therein, and that the Leaſe to C. was not aſſign'd to him by any expreſs Words.—Yet, W. S. being a Purchaſor, tho' under thoſe Circumſtances, Trevor, Maſter of the Rolls, diſmiſs'd the Bill without Coſts, and the rather becauſe the Plaintiff did not bring the *Bill* till *after Defendant's Purchaſe*, tho' Plaintiff's Purchaſe was made 2 Years before. Vern. R. 360. Hill. 1685. Uſher and Prime v. Aylworth, Edmonds & al'.

(C) *By*

(C) *By what Limitation* Survivor ſhall take.

1. GIFT to 2 *in Tail*; here are Eſtates Tail executed with ſeveral Inheritances; But if one die, the other ſhall have all by Survivor for his Life; Per Haughton. Roll R. 178. Paſch. 13 Jac. in Caſe of Bowles v. Berry.

2. So *Gift to 2 and the Heirs of one*, if he who has the Fee dies, the other ſhall have all for his Life; Per Haughton. Roll R. 178. in Caſe of Bowles v. Berry.

3. Lands were *deviſed to Baron and Feme for their Lives, and after the Deceaſe of the Feme*, then *to the Child or Children of her Body*; in this Caſe the Baron's Eſtate determines upon the Death of the Feme. 2 Wms's. Rep. 653. 671, 672. Mich. 1734. Cowper v. Earl Cowper.

4. *But* a Limitation to them *for their Lives*, (without more) will undoubtedly carry an Eſtate for both their Lives, during the Life of the Survivor; per Maſter of the Rolls. Ibid. 671. cites 5 Rep. 9. Brudenell's Caſe.

5. *And* he ſaid, that this is the legal as well as literal and grammatical Conſtruction of thoſe Words (for their Lives,) which, being plural, muſt comprehend both, and join them together, *where there is no particular Reaſon to vary from it*; As where an *Office* was granted *to 2 for Term of their Lives*, this was held in Auditor Curle's Caſe, 11 Rep. 3. b. to determine upon the Death of one. But in a *Limitation of Lands*, it *is otherwiſe*. And the *Reaſon of the Difference is* this, a Jointenancy of Lands may be ſever'd; and if it be not, the Intereſt muſt conſequently ſurvive, which is otherwiſe in an Office; and that it is ſo in Lands, is not *from the Import of the Words* of that Limitation, *but from the Inſtitution or Operation of Law*; for if the Words imported a Survivorſhip, it would do ſo in both Caſes. Beſides, *upon a Severance of the Jointenancy in Land, the Eſtate does not continue during the Life of each Donee*; but determines upon the Death of one for his Moiety, and of the other for his; and cited D. 67. a. and Co. Litt. * 197. a. 2 Wms.'s Rep. 672. in Caſe of Cowper v. Earl Cowper.

* It ſeems it ſhould be 191. a.

(D) Survivorſhip. In what Caſes *among what Perſons.*

Noy 55. Anon. That a Joint-bond to Joint-traders ſhall not ſurvive; Per Owen.

1. *JUS accreſcendi inter Mercatores locum non habet*; this extends to Joint *Shopkeepers*; And per Coke, There are 4 Sorts of Merchants, viz. Adventurers, Dormant, Travelling, and Reſident; and neither of them ſhall take by Survivorſhip. 2 Brownl. 99. in a Nota there.

——No Survivorſhip between *Merchants*. Chan. Caſes 127. Paſch 21 Car. 2. in Caſe of Holtſcomb v. Rivers.——Nelſ. Chan. Rep. 139. in S. C.

(E) *By what Words* a Thing ſhall ſurvive the Perſon, or die with him.

3 Le. 65. pl. 97. S. R. and there Dyer ſays, that

1. AN Award was, that A. ſhall *pay to B.* during the Term of ſix Years, *towards the Education* and bringing up of ſuch an one, an Infant. Within the 2 firſt Years of the Term the Infant dies. Cited by Dyer,

Dyer, who ſaid it was adjudged that the Sum ought to be paid for the whole Term after; for the Words (towards his Education) are only to ſhew the Intent and Conſideration of the Payment of that Sum, and are not Words of Condition &c. 2 Le. 154. in pl. 186. 19 Eliz. in C. B. Anon.

this Caſe was in C. B. about 3 Years before.

2. *Covenant to pay* ſo much to two; if this be *no Intereſt*, and one dies, then there is nothing to ſurvive; Per Doderidge J. 3 Bulſt. 31. Paſch. 13 Jac. in Caſe of Quick and Harris v. Ludburrow.

Joint Covenant ſhall ſurvive, as where A. covenanted with B. C. and D. to give Bond to pay 10 l. to B. who dies, the Covenant ſurvives. Yates v. Rolles. Brownl. 207.

(F) In what Caſes the Survivor ſhall *bring Actions*, *or* be *charg'd alone*, or he and the Executors or Heirs of the other.

1. IF 4 *are bound in a Recognizance*, and *one dies*, the other 3 ſhall not be charg'd with the whole, but they and the Heir of the Deceaſed ſhall be equally charg'd; quod nota. Br. Charge, pl. 27. cites 29 Aſſ. 37.

If the Heir be within Age, and the Conuſee brings *Scire facias againſt the* 3, it is a good Plea that the 4th is dead, and his Iſſue within Age, and by his Age the Parol ſhall demur againſt all; Per Judicium; quod nota, that Charge ſhall not ſurvive; and it is not ſaid there if they were *bound jointly and ſeverally*, or not. Br. Jointenants, pl. 27. cites * 39 Aſſ. 37.——*And* Execution ſhall be againſt the 3, and the Heir of the other, and well; and Judgment given, and affirm'd in Error. Br. Error, pl. 191. cites 29 Aſſ. 37.——Br. Parol Demur, pl. 16. cites S. C.——Br. Age, pl. 36. cites S. C. Per Seton and Shard, but Mombray contra.

* It ſhould be (29.)

2. In *Debt upon Bond againſt Husband and Wife, as Heireſs to her Father*, they pleaded Non eſt Factum of the Father. The Jury found that *the Bond was made to the Plaintiff and another*; whereas in Truth the Plaintiff declared on a Bond made to himſelf only, without mentioning the other Obligee, and *he as Survivor, brought the Action.* The Court was clear of Opinion, that the Plaintiff *ought to have declared upon the ſpecial Matter.* Le. 322. pl. 453. Mich. 30 & 31 Eliz. C. B. Dennis v. St. John.

3. If a *Bond* is made *to* 3, *to pay* Money *to one of the* 3, they muſt all join in the Action; for they are all but as one Obligee. And if *he to whom the Money is payable dies*, the other 2 who ſurvive ought to ſue, tho' they have no Intereſt in the Money contained in the Condition; Per Cur. Yelv. 177. Trin. 8 Jac. B. R. in the Caſe of Rolls v. Yates.

4. In Debt on Bond it appeared upon Oyer, that *A. B. and C.* were *bound jointly*, and that *A. was dead*; whereas the Action *was brought againſt his Executor, and the other* 2. Upon Demurrer the Court were of Opinion that the Action was not well brought; for by the Death of one of the Obligees, his Executor is wholly diſcharged. Sid. 238. pl. 7. Hill. 16 & 17 Car. 2. B. R. Osborn v. Crosbern & al.

5. A *Judgment* was obtained *jointly againſt* 3, and *one* of them *dies*, and the Plaintiff ſued a *Scire facias againſt the Executor* of him that was dead, *and the* 2 *Survivors.* The Judges ſeemed to incline, that the Charge did ſurvive, and the *Executor was not liable*; but per Wylde, he might have ſued a *Scire facias againſt the Heir and the* 2 *Survivors*, becauſe as it charg'd the Realty, it did not ſurvive; but he could not charge the Executor. Freem. Rep. 366. pl. 468. Paſch. 1674. Anon.

Saunders of Counſel with the Executor, cited a Caſe of Morton and Harbey, where Harvey being *Executor was ſued, and pleaded ſeveral Judgments*, and that he had fully adminiſter'd; *and* amongſt other Judgments

Judgments pleaded *one which was recovered againſt his Teſtator, and an Eſtranger*; and becauſe he did *not aver that his Teſtator ſurvived*, the Plea was ruled to be ill. Ibid.

For more of Survivor in general, ſee **Deviſe, Jointenants, Truſt,** and other Proper Titles.

Suſpicion.

(A) *What* is *good Cauſe* of Suſpicion to detain a Perſon.

Bridgm. 62. Arg. in Caſe of Weal v. Wells, cites S. C. that Suſpicion cannot be tried, becauſe it is but the Imagination of a Man, which lies in his own Conceit.

1. BILL of Falſe Impriſonment in B. R. the Defendant *ſaid that certain Perſons ſaid to him that the Plaintiff and J. N. were come to L. with certain Oxen, which were ſtole, as they thought; and he* came and *found the Oxen in an obſcure Houſe, and arreſted him upon Suſpicion*; Judgment ſi Actio. And per Gaſcoign and Hull, it is no Plea; for * *Suſpicion is no Cauſe of Arreſt, unleſs a Felony was committed* in the Country before. Et adjornatur. Br. Faux Impriſonment, pl. 4. cites 7 H. 4. 35.

——* Serjeant Hawkins ſays, that generally no Suſpicion will juſtify an Arreſt where *no Treaſon or Felony* hath been *committed*, or dangerous Wound given. 2 Hawk. Pl C. 76. S. 16.

But the Serjeant thinks that this Rule holds not as to Arreſts *on a Hue and Cry*, or by Virtue of a *Warrant* from a Juſtice of Peace. 2 Hawk. Pl.C. 76. S. 16, 17.

2. It is good Cauſe to arreſt a Man, inaſmuch as he is *Vagrant, exerciſing no Trade, nor doing any Work.* Br. Faux Impriſonment, pl. 22. cites 7 E. 4. 20.

Goods were *ſtolen and found* in the Houſe of the Plaintiff, and he would *not ſhew how he came by them*, this gave good Cauſe of Suſpicion, and being examined before a Juſtice, giving *various and uncertain Anſwers*, aggravated the Suſpicion, and was juſt Cauſe of binding him to Seſſions. Cro. E. 901. pl. 4. Mich. 44 & 45 Eliz. B. R. Chambers v. Taylor.

3. *So, that Parcel of the Goods ſtole were found in the Poſſeſſion of the Plaintiff.* Br. Faux Impriſonment, pl. 22. cites 7 E. 4. 20.

4. Falſe Impriſonment made at W. in the County of K. The Defendant *ſaid, that at the Time &c. T. Fawconbridge with* 20000 *Men, as Rebels* and Traitors to the King, *intending to depoſe the King, aſſaulted the City of London, and burn'd Houſes*, and kill'd A. and B. and the Citizens drove them to Blackheath; *and the common Voice and Fame was, that the Plaintiff was one of them, and the* **Defendant ſuſpecting him thereof, took him at W. and becauſe there was no Gaol in the County of K. where he might put him for Doubt of Rebels, he carried him to London, and there impriſoned him.* And per Cur. a Man cannot arreſt another for Suſpicion, if he himſelf has not Suſpicion thereof; nor he cannot juſtify by Command of him who has Suſpicion. Br. Faux Impriſonment, pl. 25. cites 11 E. 4. 4 — But after Fol. 7. the Opinion was, that it is no Plea, if he *does not ſay that he durſt not carry the Plaintiff to the Gaol of Kent for Doubt of Rebels.* Quod nota; for a Man cannot juſtify the Taking in one County, and the Impriſonment

* Orig. is (Pl'.)

priſonment in another County, unleſs for ſuch ſpecial Cauſe; but where the *Gaol of one County ſerves in two Counties*, there he may plead it and juſtify &c. And the Plaintiff maintained his Writ abſque hoc, that the common Voice and Fame in London was, that he was one of the Rebels.

5. In Falſe Impriſonment the Defendant *juſtified that a Felony was done, and the common Fame and Voice of the Country was, that the Plaintiff was of ill Government, and that he did the Felony, by which he who was robb'd came to the Conſtable &c. and required him to arreſt the Plaintiff*, whereupon the *Conſtable came and required the Defendant to aid him*, by which he aided him to arreſt the Plaintiff, which is the ſame Impriſonment. And per Keble, Vaviſor, and Townſend, the Plea is good; and it is lawful to arreſt him by the Suſpicion of him who was robb'd; and a Man may juſtify the taking the Goods of an Alien, as Servant of the Duke of G. and yet every one may ſeiſe them as well as another. Contra Brian and Hawes, and that the Suſpicion *cannot extend but to him who has the Suſpicion*, and to no other. Br. Faux Impriſonment, pl. 14. cites 2 H. 7. 15.

6. In Falſe Impriſonment the Defendant *ſaid that J. S. was poiſon'd, and the common Voice and Fame was, that the Plaintiff had done it, by which he as Servant of W. N. Sheriff took the Plaintiff, and carried him to the Priſon.* And per Cur. he who juſtifies as here, ought to allege that ſuch a one was poiſon'd, and therefore for Suſpicion of Felony he ſhall ſay that ſuch Felony was committed &c. and this is traverſable; And per tot. Cur. He cannot juſtify as Servant of the Sheriff, but of his own Authority; for *when a Felony is done*, and Suſpicion is, *every one who has the Suſpicion may arreſt the Party, but not by the Command of the Sheriff, unleſs the Sheriff has Writ ad illum arreſtand.* by which the Defendant amended his Plea in this Point; quod nota bene. Br. Faux Impriſonment, pl. 16. cites 5 H. 7. 4. S. C. cited Arg. Bridgm. 62. Trin. 14 Jac. in Caſe of Weal v. Wells.

7. *And* per Davers and Brian, if a Man be *indicted of Felony*, this is a ſufficient Cauſe of Suſpicion to arreſt him; quod Jay and Keble negaverunt; for Proceſs ought to be awarded, and the Indictment may be falſe. Br. Faux Impriſonment. pl. 16. cites 5 H. 7. 4.

8. *Common Voice and Fame* is not ſufficient to arreſt a Man, where no Felony is done. Contra where a Felony is done. Br. Faux Impriſonment, pl. 16. cites 5 H. 7. 4. S. P Arg. Bridgm 62. in Caſe of Weal v. Wells. ——

S. P. Arg. Godb. 406. cites 7 H. 4. 35. ——— S. P. 2 Inſt. 52. ——— Bulſt. 149. Trin. 9 Jac. in the Caſe of Wale v. Hill, Arg. cites 2 H. 7. 5. 5 H. 7. 5. 26 H. 8. 9. & 7 E. 4 20. That common Fame, in ſome Caſes, may be a good Juſtification in a falſe Impriſonment; but this is to be taken, if the Cauſe, for which he was taken, be publick; but otherwiſe it is, where the Cauſe is private; that for taking of a Man's Goods in a private Manner, there he ought to ſhew ſpecially, that the Goods were found with him, and in his Poſſeſſion, and not to go by Belief, and to give Credence to every particular Man; but he ought for to ſhew ſome good and apparent Cauſe to the Court, and ſo is 7 E. 4. fo. 20.

If a Man be robb'd in the Night, and it is the common Voice and Fame that J. D. did it, a Man may arreſt him by the *Fame of this County where*, &c. *Contra by the Voice of another County.* Per Choke & Brian. Br. Faux Impriſonment, pl. 25. cites 11 E. 4. 4.

This Fame, Bracton deſcribes well: *Fama* quæ ſuſpicionem inducit *oriri debet apud bonos & graves*, non quidem malevolos & maledicos, ſed providas & fide dignas perſonas, non ſemel, ſed ſæpius, quia Clamor minuit & Defamatio manifeſtat. 2 Inſt. 52.

9. *Hue and Cry* is good Cauſe to take a Man for Suſpicion of Felony, and *if it be made without Cauſe, he who made it ſhall be puniſh'd*, and not the other who arreſted the Man. Br. Treſpaſs, pl. 213. cites 21 H. 7. 27. S. P. Br. Faux Impriſonment, pl. 16. cites 5 H. 7. 4. —— S. P. Ibid. pl. 25. cites 11 E. 4. 4. ——— S. P. 2 Inſt. 52.

10. A *Juſtice of the Peace* himſelf *cannot arreſt* a Man for Suſpicion of Felony, unleſs he himſelf ſuſpects him, and not *by the Suſpicion of another*; and therefore cannot make a Warrant to arreſt him upon Suſpicion of Br. Faux Impriſonment, pl. 33. cites S. C. —

of another; but he, who has the Suſpicion of Felony in another, may arreſt him himſelf. Br. Faux Impriſonment, pl. 8. cites 14 H. 8. 16.

The Defendant cannot arreſt any of *Suſpicion of another*, but of himſelf. Br. Faux Impriſonment, pl. 22. cites 7 E. 4. 20.

No *Cauſes of Suſpicion* whatſoever, let the Number and Probability of them be ever ſo great, will juſtify the Arreſt of an innocent Man *by one who is not himſelf induced by them to ſuſpect him guilty*, whether he make ſuch Arreſt of his own Head, or in Obedience to the Commands of a private Perſon, or even of a Conſtable. 2 Hawk. Pl. C. 76. S. 15.

11. If A. be ſuſpected, and he *fleeth, or hides himſelf*, it is a good Cauſe to arreſt him. 2 Inſt. 52.

Abſenting himſelf after Notice of a Warrant againſt him for Robbery committed, is good Cauſe of Suſpicion. Cro. E. 871. pl. 7. Hill. 44 Eliz. B. R. Pain v. Rocheſter and Whitfield.

12. If *Treaſon or Felony* be done, and one has juſt Cauſe of Suſpicion, this is a good Cauſe, and Warrant in Law, for him to arreſt any Man; but he *muſt ſhew in Certainty the Cauſe of his Suſpicion*; and whether the Suſpicion be juſt or lawful, ſhall be determined by the Juſtices in an Action of falſe Impriſonment brought by the Party grieved, or upon a Habeas Corpus &c. 2 Inſt. 52.

13. *Refuſal to ſhew Cattle* which are charged to be ſtolen, is a good Cauſe of Suſpicion, and to carry before a Juſtice of the Peace to be examined; Per Doderidge, J. 3 Bulſ. 287. Hill. 14 Jac. in Caſe of Weal v. Wells.

(B) Pleadings.

1. IN falſe Impriſonment in S. the Defendant *ſaid, That before the Impriſonment B. was kill'd in S. and the Plaintiff was in the Company of the Murderers at the Time of the Felony; and the Fame of the County of S. was, that the Plaintiff was Party to the Felony, by which the Defendant found the Plaintiff at S. and arreſted him for Suſpicion of Felony, and committed him to the Sheriff, which is the ſame Impriſonment.* And Brian ſaid, the Plea is double, viz. the Fame, and the being in the Company. But Markham, J. contra; for in ſuch Juſtification a Man may make 20 Cauſes of Suſpicion, and all is only one Suſpicion. Brian ſaid, he impriſon'd him De ſon tort Demeſne, abſque hoc that he was in Company, or that there was ſuch Fame, and was not ſuffer'd to have both, by which he travers'd the being in the Company only. Br. Faux Impriſonment, pl. 22. cites 7 E. 4. 20.

Br. Double, pl. 151. cites S. C.—— S. C. cited Arg. Bridgm. 61. in Caſe of Weal v. Wells, that the Defendant travers'd the Indictment without that, that the Plaintiff was in their Company, and without that, that the Report was ſo, &c. And Nidkam [Markham] ſaid there, That Iſſue could not be taken upon the Report, but upon the Matter in Fact; for if Men ſay in the Country that I am a Thief, that is no Cauſe to arreſt me; but Matter in Fact ought to be ſhew'd, which is traverſable. Whereupon Iſſue was taken upon the firſt Matter only. And in the 9th of Edw. 4. it is holden that a Man ought to ſhew ſome Matter in Fact, to prove that the Plaintiff is ſuſpected. And 11 Ed. 4. 46. in a Falſe Impriſonment, the Defendant, who juſtifies upon a falſe Impriſonment for Felony, ought to ſhew ſome Matter in Fact to induce his Suſpicion, or that his Goods were in his Poſſeſſion, of which the Country may take notice. And in the 17 Ed. 4. 5. in a falſe Impriſonment the Defendant juſtified, becauſe that A. and B. did rob another, and did go to the Houſe of the Plaintiff; whereupon the Conſtable did ſuſpect him, and did require the Defendant to aſſiſt him in arreſting him &c. and holden there, that they ought to ſurmiſe ſome Cauſe of Suſpicion, or otherwiſe the Plea was not good.

2. In Treſpaſs the Defendant juſtified, becauſe *a Felony was done* in the Country, and the *Defendant had Suſpicion of the Plaintiff, and enter'd into the Houſe, and there found the Ox that was ſtole, by which he arreſted him.* And per Cur. he ought to carry him to Gaol; to which he ſaid, that the *Plaintiff reſcued himſelf.* And it was awarded a good Plea, tho' he

he did not ſay that the Plaintiff was ſuſpected in the Country; for he did not arreſt him but for Suſpicion which he had in himſelf. Br. Faux Impriſonment, pl. 27. cites 20 E. 4. 6.

3. Whoſoever would juſtify the Arreſt of an Innocent Perſon, by reaſon of any Suſpicion, muſt not only *ſhew that he ſuſpected the Party* * *himſelf*, but muſt alſo ſet forth the † *Cauſe which induced* him to have ſuch a Suſpicion, that it may appear to the Court to have been a ſufficient Ground for his Proceeding. Alſo it ſeems ‡ certain, that regularly he ought expreſsly to ſhew, *that the very ſame Crime for which* he made the Arreſt, *was actually committed.* But if a || Man have *ſeveral Cauſes* of Suſpicion, he is not bound to inſiſt upon ſome one of them only, but may *alledge them all*; for that the Replication *De ſon Tort Demeſne* anſwers the Whole. As ** where a Man arreſts another, who is actually guilty of the Crime for which he is arreſted, it ſeems that he needs not, in juſtifying it, ſet forth any ſpecial Cauſe of his Suſpicion; but may *ſay in general, that the Party feloniouſly did ſuch a Fact, for which he arreſted him, &c.* 2 Hawk. Pl. C. 77. S. 18. cites the Books in the Margin.

* 10 H. 7. 17. b. 2 H. 7. 15. b. 16. 5 H. 7. 4 b. 5. a. 7 Ed. 4. 20. a. 20 E. 4. 6. b. 11 E. 4. 4. b. Cro. E. 871. H. P. C. 93. 12 Rep. 91. 10 H. 7. 17. b. 2 H. 7. 15. b. 16. a. 17 E. 4. 5. a. b.

† 2 Inſt. 52. Finch. 340. 17 E. 4. 5. a. b. 1 E. 4. 20. a. Bridgm. 62. 7 H. 4 35.

‡ 8 E. 4. 3. b. 27 H. 8. 23. a. Cro. J. 194. Finch 340.

|| 7 E. 4. 20. 17 E. 4. 5. a. b. Bridgm. 62. Fin. 394. 4 H. 7. 1. b. 2. a.

** 10 H. 7. 14. b. Fitz. Faux Impriſonment, 5.

(A) Taliter Proceſſum.

1. TReſpaſs for taking his Beaſts. Defendant juſtified by a Plaint in a *Hundred-Court*, by which Taliter Proceſſum fuit, that the Plaintiff was nonſuited, and Coſts tax'd, and a Precept to levy; whereby he took the Beaſts, and travers'd, that he was guilty before the Delivery of the Precept, or after the Return. Upon Demurrer it was objected, that this ſhort Way of pleading a Judgment in Inferior Courts is not allowable. Sed non allocatur; for it is good enough, *ſetting out the Plaint levied, but ought not to commence at the Judgment*, viz. that *Conſideratum fuit.* 2 Lev. 81. Hill. 24 & 25 Car. 2. B. R. Doe v. Parmiter.

2. In *Treſpaſs* for taking his Cattle, the Defendant *juſtified by* Virtue of an *Execution in* an Action of *Treſpaſs in the Hundred-Court.* The Plaintiff demurr'd. Exception was taken, that the Defendant, reciting the Proceedings below, ſaith, Taliter Proceſſum fuit; whereas he ought particularly to ſhew all that was done, becauſe not being in a Court of Record the Proceedings may be denied, and tried by a Jury. But the Court inclin'd that it was well enough, and the *ſafeſt Way to prevent Miſtakes*; but if the Plaintiff had *replied De injuria ſua propria abſque tali cauſa*, that had traverſed all the Proceedings. But no Judgment was given. 2 Mod. 102. Trin. 28 Car. 2. C. B. Lane v. Robinſon.

3. In Treſpaſs and falſe Impriſonment, the Defendant juſtified by Proceſs out of the *Court of Warwick*, on a Judgment had there, on a Plaint in Treſpaſs, Super quo Taliter Proceſſum fuit, that Judgment was

Freem. Rep. 322. pl. 402. Trin. 1677. S. C. but not exactly S. P.

was given againſt him, whereupon he was taken &c. Exception was taken, becauſe it was pleaded by a Taliter, and *no Mention was made of any Declaration*; and that the pleading Taliter &c. in an Inferior Court, is not good. But it was anſwer'd on the other Side, That the Taliter &c. is the ſhorter and better Way; and therefore in a Sci. fa. nothing is recited but the Judgment; tho' it is true, in a Writ of Error, the whole Record muſt be ſet out. The Court was of Opinion, that the Plea was well enough as to this. 2 Mod. 195, 196. Hill. 28 and 29 Car. 2. C. B. Higginſon v. Martin.

4. In Treſpaſs of taking a Gelding, the Defendant juſtified by a Plaint in a *Court-Baron*, and that Taliter Proceſſum fuit, that the Plaintiff recover'd againſt the now Plaintiff, and that a Precept was thereupon made to the now Defendant, who is an Officer of the ſaid Court, to levy the Debt and Coſts, by Virtue whereof he took the Gelding, and appraiſed and ſold him. The Plaintiff demurr'd generally; and Exception was taken for him, that Taliter Proceſſum in a Court-Baron is a very curt Way of pleading, and that all the Proceedings ought to be ſhewn at large, becauſe not being Matter of Record all is traverſable: Quod Curia conceſſit. And Judgment for the Plaintiff, Niſi &c. 2 Jo. 129. Hill. 31 & 32. Car. 2. B. R. Garret v. Higby.

5. In falſe Impriſonment the Defendant preſcrib'd to have a Court &c. for Trial of all Perſonal Actions, &c. and that a Plaint was levied there, &c. and that Taliter Proceſſum fuit, and did *not ſet forth any Declaration or Appearance*, but only *that the Plaintiff had Judgment, and the Defendant was taken in Execution, where he was detain'd till he paid the Debt*, &c. And upon Demurrer it was adjudged for the Plaintiff, becauſe the Record in the inferior Court was recited only by Taliter Proceſſum fuit. 2 Lutw. 913. Trin. 3 Jac. 2. Dennis v. Rowles.

Comb. 124. Simpſon v. Mayhill, S. C. And Dolben J. ſaid, That Taliter Proceſſum fuit is ill in an Inferior Court, and has been ſo adjudged ſeveral times ſince the Lord Hale's Time; and there is no Caſe againſt it, except the Caſe above-recited by Holt, and that Caſe was diſallow'd by Pemberton; but Hale was always very much inclin'd to make Pleadings good.

6. In Treſpaſs for taking Goods &c. the Defendant juſtifies by Judgment in a *Hundred Court*, and Proceſs thereupon, that there was a Plaint levied in Treſpaſs on the Caſe, & *taliter proceſſum fuit, that it was conſider'd that the Plaintiff ſhould pay Coſts for his Default, Unde convictus eſt.* This was inſiſted to be ill, becauſe in Caſe of an Inferior Court, they ought not to plead it ſo; for that each Part of the Proceſs is traverſable. Holt Ch. J. ſaid, that in Ld. Hale's Time it was held good, tho' only ſaid Taliter proceſſum fuit, and that in that very Point himſelf was overruled in Sir Francis Pemberton's Time, and a Year ſince in C. B. Adjornatur. Show. 47. Trin. 1 W. & M. Simpſon v. Merrille.

Adjornatur.

7. In Treſpaſs of taking his Cattle the Defendant juſtified under a Plaint by J. S. againſt the now Plaintiff in the *County-Court for a Debt of* 39 *s.* 11 *d.* and that Superinde taliter proceſſum fuit, that T. P. the Plaintiff in that Plaint recovered &c. and thereupon Quoddam Præceptum emanavit, per quod the Sheriff commanded the Plaintiff to levy the Money &c. and upon Demurrer to this Plea it was adjudged for the Plaintiff (among other Reaſons) becauſe the Judgment was pleaded in an Inferiour Court, not being a Court of Record, with a Taliter proceſſum fuit, when the Proceedings ſhould be ſet forth at large. 2 Vent. 100. Mich. 1 W. & M. in C. B. Pinager v. Gale.

8. *In Debt on Bond for quiet Enjoyment of Lands* leaſed to the Plaintiff *the Plaintiff averred, That he was proſecuted in the Exchequer by J. W. and that Taliter ſuperinde in eadem Curia* &c. *proceſſum fuit, that the Plaintiff there recovered againſt the* Plaintiff here 80 *l. and* 70 *l. for Damages* &c. *prout per Recordum* &c. *plenius liquet* &c. It was inſiſted for the Defendant, that the whole Record of the Recovery ought to be ſet forth

forth at large in the Declaration; Sed per Curiam non allocatur; for at this Day 'tis otherwiſe practiſed; And 'tis ſufficient to plead, that the Plaintiff recovered with a Taliter proceſſum fuit, without reciting the whole Record. Holt Ch. J. ſays, this Declaration *is too general*, and that the Plaintiff *ſhould* at leaſt *have ſet the Matter out in this Form*; Scil. *That he was impleaded in an Action of Debt for ſo much Money certain (of which this was Parcel)* or have *ſet forth the whole Declaration in the Action brought* by J. W. *with Taliter ſuperinde proceſſum fuit, ſo as it might appear* to the Court, *that the Recovery was againſt the Plaintiff for the ſame Matter*, againſt which he was to be defended; For that in this Caſe he could plead no other Plea than Nul tiel Record; And upon his Opinion Judgment was given againſt the Plaintiff. Carth. 305, 306. Paſch. 6 W. & M. B. R. Hool v. Burgoigne.

9. In *Treſpaſs of Aſſault, Battery, wounding, and impriſoning* &c. the Defendant, as to the Force and wounding pleads not guilty, Et *quoad* reſiduum tranſgreſſionis, *the Aſſault and Impriſonment*, he *juſtifies, for that the Plaintiff was indebted to him Infra Juriſdictionem Cur. de Recordo de B. and for the Recovery thereof the Defendant Implacitaſſet eum in the ſaid Court, and found Pledges* to proſecute his Suit; *Et Superinde taliter proceſſum fuit* in eadem Curia, *that he had Judgment and Execution, which he delivered to the other Defendant being a Bailiff, who at D. infra juriſdictionem Cur' molliter manus impoſuit* upon him, and arreſted him and detain'd him in Priſon, which are Idem reſiduum tranſgreſſionis præd'. It was reſolved upon Demurrer, that this ſhort way of pleading the Judgment in an inferior Court, viz. by an Implacitaſſet, and that Taliter proceſſum fuit was good, tho' the Uſage anciently was otherwiſe; And tho' there are ſome Caſes where the Plea has been held ill without reciting a Plaint levied, yet by the Implacitaſſet and Pledges found as here in this Caſe they ſupply that Matter. 3 Lev. 403. Mich. 6 W. & M. in C. B. Patrick v. Johnſon.

2 Lutw. 925. S. C. but as to the Taliter Proceſſum, tho' it is in the Pleadings, I do not obſerve any Notice taken of that Part in the Obſervations of the Reporter.

3 Lev. 404. in S. C. was cited per Cur. Mich. 36 Car. 2. in C. B. the Caſe of

Adny v. Vernon, where the Pleadings by Taliter proceſſum of a Judgment in Worceſter-Court was adjudged good; but obſerves, that there they *commenced the Plea with the levying of a Plaint, upon which Taliter proceſſum fuit*. And likewiſe another Caſe reſolved by Hale Ch. J. and the whole Court Hill. 24 & 25 Car. 2. B. R. but there a Plaint was likewiſe pleaded to have been levied and ſo held good; But that without Plaint it would have been void. —— See 3 Lev. 243, 244. Mich. 1 Jac. 2. in C. B. Adney v. Vernon.

10. In *Treſpaſs* Defendant *juſtified* the Taking &c. *by Proceſs out of the County-Court, that Taliter proceſſum fuit that the Plaintiff there had Judgment, and a Precept was directed to this Defendant* to levy the Money, and ſo juſtified. Exception was taken, that ſuch Pleading is not good as to Proceedings in a County-Court. Several other Exceptions were taken to the Pleadings, and Judgment was given to the Plaintiff; But the Reporter ſays, That the Court did not declare for which of them they gave their Judgment. And adds a Nota, that as to the abovementioned Exception, it had of *late Time* been *adjudged*, that the Proceedings in ſuch Inferior Courts may be pleaded by a Taliter proceſſum fuit &c. 2 Lutw. Rep. 1410. Hill. 7 W. 3. Walker v. Freeby & Holmes.

11. Treſpaſs for the taking of a Horſe. The Defendant juſtifies under a Judgment recovered againſt the Plaintiff in the *Hundred Court* by a Taliter proceſſum, and does not ſet out the Proceedings at large; And adjudged good, notwithſtanding that the old Books are to the contrary, upon the Authority of a Caſe between **Doe and Parmiter**; Hill. 24 & 25 Car. 2. adjudged in Point in B. R. in the Time of Lord Hale, upon great Debate. Ld. Raym. Rep. 80. Eaſt. 8 Will. 3. Mackareth v. Pollard.

See pl. 1.

For more of Taliter Proceſſum in General, ſee other proper Titles.

Tally

Tally of the Exchequer.

The Sheriff often gave Acquittances and Tallies to the Tenants, and yet Nichil'd them on the Account; and upon Complaint of the Tenants, the King often iſſued out Writs, whereby Inquiſitions were taken, and what Perſons the Sheriff had received Money from, which was Nichil'd at the Exchequer, and ſuch Tallies were produced to the Perſons impanelled; and if the Sheriffs were found guilty they were attach'd. The Words of the Writ are, Quod veritatem talliar' delictarum ſcil't inquirat, & ſi delictores talliarum fuerint attincti tunc Habeas Corpora eorum coram Baronibus &c. But for the more effectual Remedy of this Grievance, the Stat. de Attinct. was made, 12 E. 2. Gilb. Hiſt. View of Exch. 94, 95. cap. 5.

1. 14 *Edw.* 2. cap. 1. ENacts, That *If Sheriffs and other Miniſters which gather the Debts of the King, and make * Tallies and other Acquittances to the Debtors, and yet do not acquit them in the Exchequer, and of the ſame are impleaded in the Exchequer, and by Favour are put to little Iſſues, which they will rather loſe than come to anſwer, the Sheriff &c. when he is impleaded in the Exchequer, and the great Diſtreſs returned againſt him, and he comes not to anſwer, there ſhall go forth another Writ of Diſtreſs, in which ſhall be commanded that Proclamation be made in the full County, that the Defendant come at ſuch a Day, and acquit the Debtor of the Sum for which he made Tally or Acquittance, at which Day if the Defendant come not, and the Writ be returned, and Proclamation certified, he ſhall be holden for convict, and the Debt levied of him, and Damages awarded to the Plaintiff, according to the Diſcretion of the Barons. And this Statute ſhall extend as well to thoſe which have been Sheriffs, and other Miniſters that let to Leaſe their Bailiwicks, as to the Sheriffs and other Miniſters, which hold their Bailiwicks themſelves. And by this Statute no Man ſhall be forbidden, but that he may complain of Sheriffs and other Miniſters when they be found in the Exchequer, and that they ſhall anſwer there as has been uſed.*

Wingate mentions this Statute as 13 E. 2. and Cay mentions it as 14 E. 2. which Ld. Ch. B. Gilbert mentions as 12 E. 2.

* When any Man pays in Money into the Exchequer, he pays the Sum to the Teller, and the Teller makes a Bill in Parchment for the Sum ſo paid, in which is the Chriſtian and Sirname of the Party, his Office, and the Day of Payment, and the Sum ſo paid wrote in Numeral Letters; this Bill is roll'd up, and thrown down thro' a Pipe into the Tally Court; then the Tally-cutter prepares the Tally, which is notch'd according to the Sum mentioned in the Bill, viz. a greater Notch for (M) and a leſſer Notch for (C) a leſſer Notch for (X) and ſo a leſſer Notch for ſingle Pounds, and for Shillings and Pence; the Tally is but ſlightly cut with the Knife. Then the Auditor of the Receipt, who was anciently call'd the Receptor Talliar' writes a Duplicate upon the Wood of the Tally, of the Contents of the Parchment Bill, and the Sum (which is writ in the Numerical Letters upon the Bill, and is expreſs'd by Notches on the Tally.) Then the Clerk of the Pells enters the Bill into his Book, and the Scriptor Talliar' reads the Tally; the Clerk of the Pells at the ſame Time looking into his Book to ſee that his Entry and the Tally agree together; and then the Chamberlains ſtrike the Tally, that is, divide it into two, and the Tally or the Stock is given to the Party, and the Foil or Counter-part is left with the Chamberlains, and the Bill is carried away and filed by the Auditor of the Receipt. Gilb. Hiſt. View of the Exch. 140, 141. cap. 9.

Br. Debt pl. 17. cites S.C.

2. It appears in a Caſe of Debt, that where the *King is indebted* to a Man, *he may aſſign the Party by the Record to take the Sum of a Cuſtomer, and deliver to him a Tally thereof*; and there *if the Creditor ſhews the Tally to the Cuſtomer, the Cuſtomer is* thereby *charg'd, if he has Aſſets in his Hands, or when Aſſets come to his Hands, he may have Debt againſt the Cuſtomer thereupon, naming him Cuſtomer*; and there it is a good *Plea for the Cuſtomer* to ſay, *that at the Time of the ſhewing of the Tally, nor ever after, he had nothing in his Hands*; and there *the Tally need not be ſhewn in the Court, nor upon the Count*, as upon Debt upon an Obligation; *for the Cuſtomer is not Debtor by the Tally only, but by the Record by which it is aſſign'd to the Plaintiff, and by the ſhewing of the Tally.* Br. Taile de Exchequer, pl. 1. cites 27 H. 6. 9.

3. And

3. And if the *Tally be loſt* the *Creditor upon his Oath ſhall have a new Tally* which is called an *Innovate*, contra of an Obligation; For there if he loſes it, he loſes his Duty, and therefore this ſhall be ſhewn in the Count, contra of the Tally; for this is only to deliver to the Cuſtomer to take Allowance thereof upon his Account, but the Debt is due by the Aſſignment in the Record, and not by the Tally; note the Diverſity. Br. Taile de Exchequer. pl. 1. cites 27 H. 6. 9.

4. In the Exchequer it is the common Courſe upon a Tally for the Cuſtomer *to ſay, that he has nothing in his Hands but 20 l. and that B. ſhewed to him a Tally of 20 l. and one A. another &c.* and *to thoſe who firſt ſhew they are chargeable* &c. nota. Br. Taile de Exchequer, pl. 2. cites 9 E. 4. 12. per Pigot; And the ſame Law per Chocke in the Reſidue of the ſaid Caſe, fol. 14. upon ſeveral Tallies ſhewn, and in pleading thereof it *ought to be ſhewn what Day and Year it was ſhewn to him, and at what Place.*

5. A *Tenth was granted* to King R. 3. by the Clergy *payable at two Days*, by which the *King aſſign'd divers Tallies thereof* to his Debtors, *payable by the Hands of the King's Collectors thereof*, which *Collectors were aſſign'd by the Clergy*, and *meſne between the two Days King R. died.* And it was held that the *Collectors upon the ſhewing of the Tallies by the Debtors are chargeable to them, and that the Clergy after this are chargeable to the Debtors, and* that *after this Aſſignment and ſhewing of the Tally, the King cannot pardon the Clergy of the Tenth*; for it is alter'd into a Debt before, and that it is not due to the King after the ſhewing of the Tally; *and* that *after this the old King, nor the new King, cannot have it, but the Debtors.* Br. Taile de Exchequer. pl. 5. cites 1 H. 7. 8. Br. Dette. pl. 221. cites S. C.

For more of Tally of the Exchequer in General, ſee **Acquittance** (B) **Prerogative** and other proper Titles.

Taxes.

(A) How Conſtrued.

1. THE Word Taxes *generally ſpoken with Reference to a Freehold, or where the Subject Matter will bear it*, ſhall be intended Parliamentary Taxes, propter excellentiam. 2 Salk. 615. ſays, that this was laid down as a Rule by Holt Ch. J. Hill. 9 W. 3. B. R. in Caſe of Brewſter v. Kidgell, and cited 34 H. 8. Quinzim 9. But ſaid that there are other Taxes not parliamentary, as for Repair of Churches, Commiſſion of Sewers; For *any Impoſition which takes away part of the Goods or Rent is a Tax*, and cites 2 Inſt. 532.

2. If a *Tax* be given by Parliament, which was *never known, or in Eſſe before*, a Covenant *That the Leſſee ſhould pay all Sum and Sums of Money that now is or ſhall be aſſeſſed or taxed for, and in Reſpect of the Premiſſes demiſed for Chimney-Money, Church and Poor, or viſited Houſes, or* See the Caſe of Brewſter v. Kidgell at (D)

otherwiſe above and beſides the Rent reſerved would not extend to ſuch Taxes; But if it had been worded thus (*All Taxes that ſhould be hereafter impoſed by Parliament*) all Taxes whatſoever would be included. 11 Mod. 239. per Powel J. Trin. 8 Annæ B. R. in Caſe of Hopwood v. Bareſoot.

See Prerogative (R. 5.)

(B) Liable, What and Who.

1. A Having a *Rent* payable half yearly out of a Term, whereof about ſix Years were to come, was content to *releaſe it upon a Bond* enter'd into to him, and condition'd *for Payment of the like Sum with the Rent, and at the ſame Times*. Per Cur. 'tis equitable Taxes be *allow'd*, in Regard the Money in the Condition was intended between the Parties to be but in Lieu of the Rent, which ſhould have been chargeable with the Aſſeſſment. Vent. 252. Hill. 25 & 26 Car. 2. B. R. Anon.

2. In Treſpaſs upon Not Guilty pleaded the Queſtion upon a ſpecial Verdict was, Whether a *new built Houſe* which had *never* been *inhabited, nor any Account of the Chimnies thereof return'd into the Exchequer* ſhould pay the Duty for Chimnies. The whole Court was clear of Opinion, that it ſhould, for the Words are, *Every Houſe (other than ſuch as hereafter are excepted)* ſhall pay, and a new built Houſe is not excepted. Vent. 311. Trin. 29 Car. 2. B. R. Ironmonger's Company v. Nailer.

3. By an Act of Parliament for building new ſhips, and another for disbanding the Army, *All Lands* &c. *Annuities, Offices, (except Military* Offices, *and* Offices *relating to the Navy under the Command of the High Admiral) and all other real and perſonal Eſtates* were to be aſſeſſed equally by a Pound Rate. Upon a Reference by the King to all the Judges of England, the Queſtion was, *Whether the Commiſſioners of the Cuſtoms*, being conſtituted by Letters Patents, *are taxable* in the Tower-Ward, where they execute this Office, *for their Sallaries of* 1200 *l. per Ann.* It was inſiſted for the Commiſſioners, that the Word Offices did not extend to them, and the Words Annuities, Profits, and perſonal Eſtates, do not make them taxable in the Tower-Ward, for theſe Words follow their their Perſons: As for the Word Offices, it imports a ſtated and ordinary Charge for ever; Bur this Office is Pro hac vice tantum, and the Words (other real and perſonal Eſtates) charge only ſuch Eſtates; But per omnes Juſticiarios, theſe Words Annuities, Profits, and Perſonal Eſtates do charge theſe Salaries. It is true, this is not ſuch an Office, for which an Aſſiſe would lie, but the Intent of the Act was to charge every Thing which was not excepted; And Military Offices are excepted of which an Aſſiſe will not lie, and yet they are called Offices, and would have been charged if not excepted. 2 Jo. 220. Trin. 34 Car. 2. B. R. Sir Rich. Temple and the Mayor of London's Caſe.

4. The Attorney Gen. Treby, and Sollicitor Gen. Somers's Anſwer to the Quæries ſent them by the Lords Commiſſioners of the Treaſury, 30th March 1692.

Qu. Whether *High Conſtables*, and thoſe that have ſerved the Office of High Conſtable are to be aſſeſs'd *as Gentlemen* by the Poll?

Reſp. We conceive, that the mere Bearing the Office of High Conſtable, *without being otherwiſe reputed*, owned or written Gentlemen, doth not make the Perſon liable.

Qu. Whether *Graſiers*, *Malſters*, *Horſe-courſers* &c. ought to be charg'd *as Tradeſmen?*

Reſp. Graſiers, Malſters and Horſe-courſers being underſtood to be ſuch as make the ſaid Employments their ordinary Profeſſion and Way of Livelihood, ought to be charg'd as Tradeſmen.

Qu.

Qu. The 4 quarterly Payments are to be aſſeſs'd together; if ſo, then what can be done with *Servants upon their Removals*, and how the Aſſeſſments can be levied?

Reſp. We conceive the beſt and moſt proper Courſe will be to make four *diſtinct Aſſeſsments*.

5. A. ſurrender'd a Copyhold Eſtate to B.—*B. ſurrender'd it back to A.* provided if B. paid not 100 *l. per Ann. to A. without any Deductions* or Charges, A. to re-enter, and the Surrender to be void. The Queſtion was, whether Parliamentary Taxes are to be allowed out of it, this being neither properly a Rent, Annuity, nor Intereſt Money? 2 Vern. Rep. 306. pl. 296. Mich. 1693. Lynes v. Brown.

6. A *Rent-charge* can be ſubject *to no other but Parliamentary Taxes*; it is *not* contributory *to Church*, * *Poor*, *Sewers*, *or Highways*. Arg. 5 Mod. 369. in Caſe of Brewſter v. Kidgill. * Ibid 371. Arg. contra.

7. Per Cur. If a Man's *Eſtate* is of *ſuch a Nature*, as that the Commiſſioners *cannot aſſeſs a certain Tax* upon every Man, as in the Caſe of *Common* &c. they ought not to meddle with it. 11 Mod. 89. pl. 10. Trin. 5 Annæ. Anon. cites Hill. 7 Ann.

(C) In what Place.

1. IN the Exchequer upon a Super, the Queſtion, upon the Statute for impoſing the Tax of 4s. in the Pound, aroſe upon the Clauſe in one of the firſt Acts, for taxing the *Shares in the Company of the New River Water*, which ordains that the Shares in this Company ſhould be tax'd *in the County where the Owners inhabit*; and in the principal Caſe, the Defendant inhabited *in one County, and was tax'd in another*, and therefore ſhe refuſed to pay. And the Court was clear, that ſhe ought to pay; for there is an Intereſt veſted in the King by the Act, and if the *Remedy* for collecting it, or the Method for aſſeſſing it, *prove impracticable*, the Duty being veſted in the King, this *ſhall be levied by the Aid and Aſſiſtance of this Court*; and it was adjudged accordingly. But inſomuch that there was 1800 l. and more return'd upon the Super, the Court declared that the Defendant ſhall *not be charg'd* for the whole, *but only for her own Proportion*. Skin. 642. Trin. 8 W. 3. B. R. The King v. Margaret Webſter.

2. The *Inhabitants* of one Pariſh *had Common appendant in Waſte Grounds which lay in another Pariſh*; and the Queſtion was, whether the Commoner ſhould pay Taxes, and ſhould be aſſeſs'd in the Pariſh where the Waſte lay, or where his Farm lay. And it was held that it ſhould be where his Farm lay; for it is incident, and will paſs by the Grant of the Farm &c. ſo that it is to be conſidered as Part of the Farm, and the Farm to be taxed the higher. 1 Salk. 169. pl. 1. Mich. 6 W. & M. in B. R. The King v. Fox.

3. Treſpaſs againſt the Collectors of the Land Tax. The Plaintiff *liv'd in Middleſex*, and *exerciſed the Employment of a Factor in Smithfield*. The Queſtion was, whether he ſhould be tax'd where he lived, or where he followed his Employment. Holt Ch. J. was of Opinion, that he was not taxable by the Commiſſioners of Middleſex; for by the very Words of the Act he is to be taxed in the Place where his Office is exerciſed. But the other Judges contra; for this is not an Office which is local, but *a perſonal Employment*, and the Perſon is taxable where he lives, and the affirmative Words of the Act are directory: He is *taxable in either Place*. 2 Salk. 616. pl. 2. Trin. 5 Ann. B. R. Trowell v. Elford.

(D) *Allowed*

(D) *Allowed or Deducted* in what Caſes.

Br. Charge, pl. 47. cites S. C. and adds, And by ſeveral he ſhall diſcharge him; for the King may diſtrain upon the Land; Quære inde, where the Leaſe was before the Grant by Parliament.——Br. Covenant, pl. 30. cites S. C.

1. IF a Man *leaſes* his Land *for Years* rendring Rent, *and grants that he will diſcharge the Tenant* during the Term *of all Charges ariſing upon the Land*, and after the Parliament grants to the King *the tenth Part of the Value of the Land* of every Man; Several held, that he ſhall not diſcharge the Tenant of this. Otherwiſe if *the tenth Part of the Iſſues of the Land* had been granted by Parliament. Br. Grants, pl. 164. cites 17 E. 4. 6.

2. The Plaintiff demiſed unto the Defendant a Houſe, *rendring* 10*l.* yearly, *without any Deduction* or Abatement for, or *in Reſpect of any Hearth-money, Pariſh-duties, Dues, Taxes and Aſſeſsments* already had, *made*, rated, tax'd or aſſeſs'd, *or to be* had, *made* &c. at any Time during the ſaid Term upon the Plaintiff, by Reaſon of the ſaid Houſe. Afterwards an Act of Parliament gives a Tax, and enacts, That the Landlord ſhall pay it; but there is a Proviſo, that it ſhall not extend to diſcharge any Covenants or Agreements made between Landlords and Tenants. It was inſiſted for the Defendant, that the Word Pariſh ſhall extend to Dues, Duties &c. and it ſhall not be intended of extraordinary Charges laid by Parliament, and ſaid that *Pariſh eſt verbum gubernans*. Ellis J. ſaid, If the Words do not extend to Parliamentary Taxes, they can have no Signification; for Hearth-money and Pariſh-duties &c. are to be paid by the Tenant without ſuch a Covenant. But as to that Point, whether or no this Covenant was diſpenſed with by the Act of Parliament, the Court delivered no Opinion, becauſe they all agreed, that as the Tender was pleaded it was naught; and upon that Point Judgment was given for the Plaintiff. Freem. Rep. 148, 149. pl. 169. Paſch. 1674. Marſhal v. Wiſdale.

3. If a Leaſe be made for Years *rendring Rent free of all Taxes, Charges, and Impoſitions whatſoever*, the Word Render makes a Covenant, and the Leſſor is diſcharg'd from all Land-taxes lately impoſed by Parliament, and long after the Commencement of this Leaſe; and the Leſſee muſt pay the whole Rent, without any Manner of Deduction for any old or new Charge, or Impoſition whatſoever. Adjudg'd, abſente Holt Ch. J. Carth. 135 Paſch. 2 W. & M. in B. R. Giles v. Hooper.

12 Mod. 54. S. C. Trin. 6 W. & M. ſays the Leaſe was made in 1675, and the other Juſtices as to this Point held contra to Holt Ch. J.

4. Lessee covenanted to pay ſo much *Rent clear of all Taxes*; The Defendant pleaded Performance; The Plaintiff replied, and aſſigned a Breach in Non-payment of ſo much for half a Year's Rent; The Defendant rejoin'd, that he had paid ſo much in Money, and ſo much in Taxes, which being allowed, did amount to the whole Rent; And upon Demurrer, Holt Ch. J. held, that this Covenant did not extend to Parliamentary Taxes for Want of the Word Parliamentary; But the others contra; For All Taxes include Parliamentary. 1 Salk. 221. pl. 2. Trin. 5 W & M. in B. R. Counteſs of Arran v. Criſpe.

5 Mod. 368. S. C. and ſays, The Confirmation of this Grant was in 1652. and per Curiam, where Taxes are men-

5. A. ſeized of Lands in Fee, by *Deed dated* 1649, *granted a Rent Charge* to one Brewſter and his Heirs, which Deed was thus endorſed, that the Rent was to be paid *clear of all Taxes*; afterwards A. confirmed this Grant, and covenanted to pay the Rent-Charge clear of all Taxes. By the Statute 3 W. and M. 4 s. in the pound was laid on all Lands, and Power given to the Tenants to deduct it, with a Proviſo not to alter any Covenants or Agreements of Parties. The Queſtion was, Whether the Tenant could deduct for Taxes. Per Cur. if this Covenant had

had been made in the Year 1640, it would not have diſcharged the Rent Charge, from the Taxes impoſed by this Act, becauſe there was no ſuch parliamentary Tax known or in being at that Time; but becauſe *there were ſuch Taxes in the Year* 1645, which was before this Grant, this Covenant muſt for that Reaſon be conſtrued to extend to them, otherwiſe it would ſignify nothing. 1 Salk. 198. pl. 4. Hill. 9 W. 3. B. R. Brewſter v. Kidgell.

tion'd (if the Subject Matter will allow it) it muſt be intended Taxes by Parliament, which are the moſt eminent, and

that by an Ordinance in Force, when this Covenant was made, the Rent was as much rated as the Land. But they were of Opinion that this was only a Perſonal Covenant, and not a Covenant running with the Land. —— Comb. 424. Trin. 9 W. 3. S. C adjornatur.— Ibid. 466. Hill. 10 W. 3. B. R. the Reſolution of the Court was deliver'd by Holt Ch. J. accordingly, and becauſe Taxes have a virtual Exiſtence in the Conſtitution of the Government before any Act is made for the raiſing of them.—— Carth. 438. S. C. accordingly. —— Ld. Raym. Rep. 317. S. C. accordingly. —— 12 Mod. 170. S. C. and the Reſolution of the Court deliver'd by Holt Ch. J. accordingly. But Holt ſaid he could not ſee how the Plaintiff can have his Judgment; For if this Covenant ſhould charge the Land it would be higher than a Warrantia Chartæ, which only affects the Land from the Judgment therein given. But the other three Judges thought that this Covenant might charge the Land, being in Nature of a Grant, or at leaſt a Declaration going along with the Grant, ſhewing in what Manner the Thing granted ſhould be taken; and reckoned the Indorſement as part of the Deed, and ſo Judgment was given for the Plaintiff.

If a Tax had been given for rebuilding St Paul's Church, this would have been out of the Statute. Per Holt Ch. J. in delivering the Opinion of the Court. Carth. 439 in Caſe of Brewſter v. Kidgell. —— Ld. Raym. Rep. 322. S. P. per Holt in S. C.

6. Deviſe of Lands on Condition to *pay* 20000 *l.* *by* 1000 *l.* *a Year for* 20 *Years, till* 20000 *l. paid.* The Deviſee enter'd for Non-payment. It was decreed, inter alia, that here is to be *no Deduction* of any Taxes, becauſe it is not to iſſue nor ariſe from the Lands, but is given as a *Sum in groſs*, ſecured by Entry on the Lands for Non-payment. 1 Salk. 156. 1707. in Canc. Grimſton v. Ld. Bruce. 2 Vern. 594. S. C. but not S. P.

7. In a Trial before Holt Ch. J. in an Action of *Covenant*, this Caſe was reſerved for the Opinion of the Court. A *building Leaſe* was made *in* 1672, by A. for 61 Years, in which there was this Covenant, *that the Leſſee ſhould pay all Sum and Sums of Money that now is or ſhall be aſſeſſed or taxed for, and in reſpect of the Premiſes demiſed* as aforeſaid *for Chimney-Money, Church and Poor, or Viſited Houſes, or otherwiſe, above and beſides the Rent reſerved thereupon*; *in* 1698, *the Leſſee ſurrenders* this Leaſe and a new *Leaſe was made* upon the Foot of the former, in which there was the *ſame Covenant* as in the former Leaſe. After ſeveral Arguments at Bar, adjudged that Leſſee was not liable to pay the Land Tax. 11 Mod. 237. &c. Trin. 8 Ann. B. R. Hopwood v. Bareſoot.

8. Holt Ch. J. ſaid, That it was likewiſe adjudged, that where A. made a Leaſe, and covenanted to diſcharge the Leſſee of all *Burdens and Charges*, (there being no Tax at that Time, but afterwards a 15th being granted by Parliament) the Tenant was diſtrained for it; and this was adjudged within the Covenant, becauſe Taxes are always a Charge in * Viris. 11 Mod. 240. in Caſe of Hopwood v. Bareſoot. * Quære.

9. A. *covenants to pay an Annuity* to B.——A. ſhall not deduct for Taxes; for the Charge is on the Perſon of the Covenantor, and not on the Land. 2 Salk. 616. pl. 3. Mich. 8 Annæ, in Chancery. Robinſon v. Stephens. G. Equ. Rep. 141. Legat v. Shewell.

10. If H. having a Term for Years, *deviſes an Annuity* to J. S. and his Heirs, there can be no Deduction for Taxes. 2 Salk. 616. Mich. 8 Annæ, in Canc. Robinſon v. Stephens.

11. If H. grants *Annuity to J. S. and after ſecures it out of a Real Eſtate*, there ſhall be no Deduction for Taxes; for the ſubſequent Security can't leſſen the Effect of his former Grant, which in its Creation was Tax-free. Per Cowper, Lord Chan. 2 Salk. 616. Mich. 8 Ann. in Chancery. Robinſon v. Stevens. G. Equ. Rep 142. cites the Caſe of Green v. Green.

12. Leſſor *covenants* with Leſſee *to pay all Taxes on the Lands demiſed.* Leſſee brought Covenant, and aſſign'd for Breach the not paying the Rates to the Church and Poor. Upon Demurrer it was objected, that

thoſe Rates are perſonal Charges, and not on the Land; and for that Reaſon the Defendant had Judgment. 8 Mod. 314. Mich. 11 Geo. 1. 1725. Theed v. Starkey.

(E) Allow'd. *How much.*

Comb. 483. Trin. 10 W. 3. in the Exchequer, Sherrington v. Andrews, S. C.——*So* in caſe of a *Quit-Rent*. And a Bill brought by the Lord of the Manor was diſmiſs'd with Coſts. But the Matter having been examin'd and aſcertain'd by the Commiſſioners of the Land-Tax, Lord Cowper would not re-examine it; but declared his Opinion, that the Payment ſhould be only in Proportion. Wms.'s Rep. 328. Mich. 1716. Brockman v. Honeywood.

1. A. Seiſed of a *Rectory of* 120 *l.* per Ann. charged with a *Fee-Farm Rent of* 26 *l.* per Ann. was tax'd for all the Rectory only according to the Rate of 25 l. per Ann. for Taxes; he retains 4 s. per Pound for the *Fee-Farm Rent*, which *was much more than he really paid.* The whole Matter appearing in the Exchequer, where a Bill was brought, it was decreed, that the Owner of the Fee-Farm Rent ſhould *allow only in Proportion* to what was paid. 12 Mod. 171. Hill. 9 W. 3. cited as one Sherington's Caſe.

Comb. 483. S. C.

2. P. ſeiſed of Land, and Sir J. W. of a *Fee-Farm* iſſuing out of it, *paid* Taxes *only after the Rate of* 1 *s.* 3 *d. per Pound*, and retain'd for the Fee-Farm after the Rate of 4 s. at which the Land-Tax was. On which Sir J. W. Owner of the Fee-Farm Rent, brought his *Bill in the Exchequer*, and *pray'd*, That P. ſhould *ſet forth the Value of the Land*, and what Rent he received, and what he had paid for Taxes: To which Bill P. *demurr'd*, and the *Demurrer* allow'd, notwithſtanding the above Caſe of Sherington was cited; the whole Matter there appearing, and this being on a Demurrer, which was made the Difference. 12 Mod. 171. cites it as one Pickering's Caſe.

(F) *Collectors.* Their *Power.* And how *puniſh'd* for *Miſdemeanors.*

1. A *Warrant* given to the Collectors of the King's Tax was to *break open Doors* &c. in caſe of Oppoſition &c. and this Warrant was granted *before any Default*, which ought not to be. And Holt Ch. J. ſaid, ſtrictly it was ſo; but the Practice having been, in this Caſe of Taxes, to grant ſuch a *conditional* Warrant to diſtrain, Communis Error facit Jus. Cumb. 342. Trin. 7 W. 3. B. R. Eaſt India Company v. Skinner & al'.

2. The Collectors of the King's Tax may *diſtrain Money* as well as Goods; and tho' they take more than was due, yet it ſufficeth that they return the Overplus, when they have ſold it &c. Per Holt. Cumb. 342. Trin. 7 W. 3. in Caſe of Eaſt India Company v. Skinner & al'.

3. The Defendants were found guilty of Miſdemeanor, for that being *Aſſeſſors and Collectors* of the publick Taxes in ſuch a Pariſh, they *aſſeſs'd ſome too high, and omitted others in their Books; and yet levied the Money on them, and put it in their own Pockets.* On their coming to receive Judgment, it was moved, That no corporal Puniſhment might be inflicted, becauſe the Crime was not of an infamous Nature.

But

But *they were adjudged to the Pillory* in the County where the Crime was committed; and that the Marſhal ſhould carry them down, and a Writ ſhould go to the Sheriff to aſſiſt him in the Execution. 6 Mod. 306. Mich. 3 Annæ, B. R. the Queen v. Buck & Hale.

4. Upon the Motion of Sir Peter King, Recorder of London, the Court granted a *Mandamus* to the Commiſſioners of the Land-Tax for Barnwell, *to tax the Lands* there *equally*. 11 Mod. 206. pl. 6. Hill. 7 Ann. in B. R. Queen v. the Commiſſioners of the Land-Tax for Barnwell.

For more of Taxes in General, ſee **Bridges, Poor,** and other proper Titles.

Tayle.

(A) Tayle. *Of what* Thing *to another.*

Fol. 499.

1. IF a Meſne gives the Meſnalty in Tayle, the Law will create a Tenure **between the Donee and Donor.** 1 H. 4. 3. b. See Tenure (B) pl. 4. & (G) pl. 5.

S. C.——And of what Things an Eſtate-Tail may be, ſee Eſtates (S.)

(B) *What Perſons may make* Eſtate-Tayle, *and to whom.*

1. A. Acknowledged all his Right [**by Fine**] to B. who render'd to A. for Life, Remainder to him in Tail; **it is a good Taile,** without Donor **beſides himſelf.** 42 E. 3. 5. b. (**But it ſeems it is not Law.**) If A. levy a Fine, Remainder in Tail to himſelf, Remainder to B.

in Fee, this Remainder in Tail is void; for he cannot give to himſelf. Br. Fines, pl. 113. cites 14 H. 4. 31. & 42 E. 3. 5. where he ſays it is not adjudged; and yet he ſays it ſeems to be a void Remainder. ——A Man cannot by Fine, by way of Remainder, reſerve a leſs Eſtate to himſelf than Fee. And therefore if A. acknowledge a Fine to B. in Fee, and he renders to A. in Tail, the Remainder to himſelf for Life, this Remainder is void; for A. had Fee-Simple before. Weſt's Symb. S. 30. cites 24 E. 3. 28. 14 H. 4. 31.

He who is ſeiſed in Fee, and gives, cannot reſerve a Remainder to himſelf in Tail, the Fee-Simple never being out of him. Br. Reſervation, pl. 41. cites 1 H. 5. 8.

A Man cannot reſerve a leſs Eſtate to himſelf than he had before. Br. Reſervation, pl. 19. cites 38 H. 6. 38.

[C] *At what Time* [*he may bar* Eſtate-Taile.]

See Eſtate (A. a) S. P.

[1.] 2. AFTER Iſſue, **he may barr the Eſtate-Taile** by Alienation, or Forfeiture **by Treaſon.** 7 H. 4. 46. pl. 6. See pl. 2. Paragr. 4. in the Notes there.

2. 13

Before this Statute, all *Inheritances were Eſtates in Fee*, viz. either Fee-Simple abſolute, or Fee-Conditional,

2. 13 *Ed.* 1. *cap.* 1. *Concerning* * *Lands that many times are given upon Condition, that is, to wit, where any gives his Land to any Man and his Wife, and* † *to the Heirs begotten of the Bodies of the ſame Man and his Wife, with ſuch* ‡ *Condition expreſs'd, that if the ſame Man and his Wife die without Heirs of their Bodies between them begotten, the Land ſo given ſhall revert to the Giver or his Heir.*

or a qualified Fee; whereof you may alſo read in the firſt Part of the Inſtitutes, S. 1. [13] And *Tenant of Lands intail'd had*, before this Statute, a *Fee-Simple conditional Subſequent*; for albeit Britton, who wrote before this Statute, ſays, That if any purchaſe to him and his Wife, and to the Heirs of them lawfully begotten, the Donees have preſently but an Eſtate of Freehold for the Term of their Lives, and the Fee accrues to their Iſſue &c. taking the Condition to be precedent; yet had the Donees at the Common Law a Fee Simple conditional preſently by the Gift. For if Lands had been given to a Man, and the *Heirs of his Body iſſuing*, and before Iſſue he had, before this Statute, made a Feoffment in Fee, the Donor ſhould not have enter'd for the Forfeiture, but this Feoffment had barr'd the Iſſue had afterwards; which proves, that he preſently by the Gift had a Fee-Simple conditional, and this agrees with the Authority of Littleton, ubi ſupra. 2 Inſt. 333.

If Donee in Tail at Common Law had *aliened before any Iſſue had*, and *after had Iſſue*, this Alienation had barr'd the Iſſue, becauſe he claim'd a Fee-Simple; yet if *that Iſſue died without Iſſue*, the Donor might re-enter, for that he aliened before any Iſſue, at what Time he had no Power to alien, to bar the Poſſibility of the Donor. But *if Feme Tenant in Tail had taken Husband, and had Iſſue*, and the *Husband and Wife* had *alien'd in Fee by Deed* before the Statute, yet the Iſſue might have had a Formedon in Deſcender, for the Alienation was not lawful; but *otherwiſe* it is, *if* it had been *by Fine*. And theſe Things, tho' they ſeem ancient, are neceſſary notwithſtanding to be known, as well for Knowledge of the Common Law as for Annuities, and ſuch like Inheritances as cannot be intail'd within the ſaid Statute, and therefore remain at the Common Law. If the *King*, before the Statute of Donis Conditionalibus, *had made a Gift* to a Man, and to the Heirs of his Body begotten, the *Donee*, *poſt prolem ſuſcitatam*, *might have alien'd* as well as in the Caſe of a Common Perſon. *But if* the *Donee had no Iſſue*, and before the Statute *had alien'd with Warranty, and died, and the Warranty had deſcended upon the King*, this ſhould not have bound the King of his Reverſion, without Aſſets; but otherwiſe it was in the Caſe of a common Perſon. Of the other Side, if *Lands* had been *given to the King*, *and to the Heirs of his Body*, *he could not before Iſſue* have alien'd in Fee, but only to *have barr'd* his Iſſue as a common Perſon might have done; but not to have barr'd *the Reverſion*, for that ſhould have been a Wrong in the Caſe of a Subject, and the King's Prerogative cannot alter his Caſe, nor make it greater than the Donor gave unto him; and it is a Maxim in Law, That the King can do no Wrong. Co. Litt. 19 a. b.

Now for the better underſtanding of this Act, ſeeing that the Eſtate was conditional at the Common Law, it is neceſſary to be known when the Condition was perform'd, and to what Purpoſes. If the Donee had Iſſue, he had not thereby a Fee-Simple abſolute, for, if after he had died without Iſſue, the Donor ſhould have enter'd as in his Reverter. But *after Iſſue had* the Condition was perform'd to this Purpoſe, that *he might have* || *alien'd*, *and* thereby have *barr'd the Donor and his Heirs* from all Poſſibility of Reverter for Default of Iſſue; for the Heirs of his Body (he having a Fee conditional) might have barr'd them as well before Iſſue (as has been ſaid) as after. 2 Inſt. 333——This is ſaid to have been a common Error, that the Donee poſt prolem ſuſcitatam habuit Poteſtatem alienandi; but being taken and enſued as Common Law, this Statute was made to reform the Abuſe, and reſtore the Common Law to its right Courſe, and reſtore to the Donor the Obſervation of his Intent, and ſo is made in Reſtitution. Pl. C. 251. b. 252 a. in Caſe of Willion v. Lord Barkley.

|| Co. Litt. 19. a. S. P.

* In 2 Inſt. Lord Coke for the Word (*Lands*) uſes the Word (*Tenements*;) and in his Co. Litt. 19. b. ſays, the Word (Tenement) is the only Word which this Statute uſes.

† For to a Gift in Tail made, this Word (*Heirs*) is requiſite, unleſs it be in caſe of a laſt Will &c. 2 Inſt. 334.

‡ If this Condition expreſs'd had not been added, the very Gift would have imply'd ſo much. 2 Inſt. 334.

By this Clauſe it appears that an Inheritance paſſes by theſe Words (*Frank Marriage.*)

In Caſe alſo where one gives Lands in Free-Marriage, *which Gift has a Condition annex'd, though it be not expreſs'd in the Deed of Gift, which is this, That if the Husband and Wife die, without Heir of their Bodies begotten, the Land ſo given ſhall revert to the Giver or his Heirs.*

2 Inſt. 334.——Lands were given before the Statute in Frank-Marriage, and the Donees had Iſſue, and died; and after the Iſſue died without Iſſue. It was adjudged, that his collateral Iſſue ſhall not inherit, but the Donor ſhall re-enter. So note, that the Heir in Tail had no Fee-Simple abſolute at the Common Law, tho' there were divers Deſcents. Co. Litt. 19. a.

This Act having put 2 Examples of Eſtates Tail ſpecial, viz. the firſt to a Man and his Wife, and to the Heirs of their Bodies; the 2d of a Gift in Frank-marriage, a ſpecial

In Caſe alſo where one gives Land to another, and the Heirs of his Body *iſſuing: It ſeemed very hard, and yet ſeems, to the Givers and their Heirs, that their Will being expreſs'd in the Gift, was not heretofore, nor yet is obſerved.*

cial Caſe, and a ſpecial Eſtate in Tail; here he puts a Caſe of an Eſtate *Tail general*, not that the Makers of this Statute meant to enumerate all the Forms of Eſtates in Tail, but to put theſe as Examples, ſo as all Manner of Eſtates Tail, general or ſpecial, are within the Purview of this Act. 2 Inſt. 334.

In all the Caſes aforeſaid, after Iſſue begotten and born between them (to whom the Lands were given under ſuch Condition) heretofore ſuch Feoffees had * Power to alien *the Land ſo given*, † and to diſinherit *their Iſſue of the Land*, contrary to the Minds of the Givers, and *contrary to* the Form expreſs'd in the Gift.

That is to ſay, *by Fine, Feoffment, Releaſe, or Confirmation.* 2 Inſt. 334.

* But the Tenant in Tail had not only Poteſtatem alienandi, but forisfaciendi &c. alſo; for if after Iſſue had, he had been attainted of Treaſon or Felony, the Land intail'd had been *forfeited*, and thereby the Donor barr'd of the Poſſibility of Reverter, and Forisfacere is Alienum facere; and therefore in this Act is included in theſe Words, Poteſtatem alienandi. And ſo might the Tenant in Tail, before the making of this Act, [after Iſſue had Co. Litt. 19. a.] have *charged* the Land *with Rent, Common*, or the like, to have bound his Iſſue; but by this Act he is reſtrained as well to charge as to alien. 2 Inſt. 334.

But the having of Iſſue before this Act did not alter the Courſe of Deſcent. 2 Inſt. 334.——Co. Litt. 19. a. S. P. For if the Donee had Iſſue, and died, and the Land deſcended to his Iſſue, yet if that Iſſue had died (without any Alienation made) without Iſſue, his *collateral Heir ſhould not have inherited*; becauſe he was not within the Form of the Gift, viz. Heir of the Body of the Donee.

† Hereby it appears, that there were 2 *Miſchiefs* before this Act, viz. 1ſt. The Diſheriſon of the Iſſues in Tail. 2dly. That it was contra voluntatem Donatorum, & contra formam in Dono expreſſam; for the Donor and his Heirs were barr'd of the Poſſibility of Reverter; and both theſe were Wrongs for which at the Common Law there lay no Remedy; for Diſheriſons, and breaking the expreſs Will and Intention of the Donor, are Wrongs which this Act does remedy. 2 Inſt. 334.——Pl. C. 247. a. S. P. Arg. in Caſe of Willion v. Ld. Berkley.

And further, when the Iſſue of ſuch Feoffee is failing, the Land ſo given ought to return to the Giver, or his Heir, * by Form of the Gift expreſs'd in the Deed, *tho' the Iſſue (if any were) had died.*

* It was ſaid before, Contra formam in Dono expreſſam; ſo as whether the Eſtate was made by Deed, or without Deed, it is all one to the Intention of this Act; and the moſt uſual Gifts in Tail being of Inheritance, were by Deed. 2 Inſt. 334.

Yet by the Deed and Feoffment of them (to whom Land was ſo given upon Condition) the Donors have heretofore been barr'd of their Reverſion, which was directly repugnant to the Form of the Gift.

S. 2. Wherefore our Lord the King, perceiving how neceſſary and expedient it ſhould be to provide Remedy in the aforeſaid Caſes, has ordained, That the * Will of the Giver, *according to the Form in the Deed of Gift manifeſtly expreſs'd, ſhall be from henceforth obſerved.*

* Upon theſe 2 Branches, viz. that the Will of the Donor ſhould be obſerved, and that the Donee ſhould not have Power to alien, the Judges by a *threefold Conſtruction* did not only remedy all the ſaid former Miſchiefs, but prevent all others that might ariſe, viz.

1ſt. Therefore in Execution of the Will of the Donor, and that he ſhould have no Power to alien either Lands that lay in Livery, or Tenements that lay in Grant, they adjudged that the Donee ſhould not have a Fee-ſimple, but *divided the Eſtates*, and created *a particular Eſtate in the Donee, and a Reverſion in the Donor*; ſo as where the Donee had a Fee-ſimple before, by this Act he had but an Eſtate Tail; and where the Donor had but a Poſſibility before, which after Iſſue might be barr'd at the Pleaſure of the Donee, now by Conſtruction upon this Act the Donor had the Fee-ſimple expectant upon the Eſtate Tail, which we call a Reverſion; ſo as by this Diviſion of the Eſtates, the Donee after Iſſue, or before, could not bar or charge his Iſſue, nor, for Default of Iſſue, the Donor or his Heirs, either by Alienation, Forfeiture, or any Charge whatſoever.

The 2d Conſtruction was, *That no lineal Warranty ſhould bar the Iſſue* in Tail, *unleſs* there were † *Aſſets deſcended in Fee-ſimple from the ſame Anceſtor; but a collateral Warranty* made by a collateral Anceſtor, *ſhould* bar the Iſſue in Tail without Aſſets; for that Warranty is not reſtrained by this Act; and ſo likewiſe the collateral Warranty of the Donee ſhall bar the Donor, and is not reſtrained by this Act, as well as the Warranty of the Donor ſhall bar the Donee, and is not reſtrained by this Act.

The 3d Conſtruction was, *That* albeit Tenant in Tail was reſtrained from Power of Alienation, yet of Lands and Tenements, that lay in Livery, his *Fine or Feoffment ſhould work a Diſcontinuance, and drive the Iſſue* in Tail *to his Action*; for ſeeing he had an Eſtate of Inheritance, the Judges compared it to this Caſe, where a Man was ſeiſed in the Right of his Wife, or a Biſhop in the Right of his Biſhoprick, or an Abbot in the Right of his Monaſtery, Et ſic in ſimilibus, and of Inheritances that lay in Grant, as of Rents, Advowſons, and the like, Tenant in Tail could not make any Diſcontinuance, no more than the others before recited might do, which Conſtruction was made according to the Rule and Reaſon of the Common Law in other like Caſes. 2 Inſt. 335.

† See Litt S. 712. and the Notes thereupon. Co. Litt. 374. b.

* It was adjudged by Beresford, that the Iſſues in Tail ſhould not alien no more than they to whom the Land was given, and that was the Intent of the Makers of this Act; and it was but their Negligence that it was omitted, as there it is ſaid. In this Caſe, by Way of Purchaſe, the Land is given to the Donee, and by Way of Limitation to the Iſſues in Tail; and therefore by a benign Interpretation, *the Purview* of this Act *extends to the Iſſues* in Tail. 2 Inſt. 335, 336.

* *So that they, to whom the Land was given under ſuch Condition,* ſhall have no Power to alien *the Land ſo given, but that it ſhall remain unto the Iſſue of them to whom it was given after their Death, or ſhall revert unto the Giver, or his Heirs (if Iſſue fail) where* [*ſo*] *as there is no Iſſue at all, or if any Iſſue be, and fail by Death, or Heir of the Body of ſuch Iſſue failing.*

Upon theſe Words ſeveral Conſtructions have been made; As if Tenant in Tail makes a *Feoffment in Fee*, this *makes a Diſcontinuance*, and is *voidable by Action only*. And that if he *grants* in Fee, *Rent*, or other Thing lying in Grant, and *whereof he is ſeiſed in Tail, it is* no Diſcontinuance, but is *voidable by Claim, or by Action*; That if he *grants Rent out of the Land*, the Rent abſolutely *determines by his Death*; That a *Releaſe to his Diſſeiſor* is no Diſcontinuance, but the Eſtate is voidable by Entry or Action of the Iſſue; but Releaſe with Warranty is Diſcontinuance, if the Iſſue be Heir to the Warranty; That if he makes a *Leaſe for his own Life*, or Years, *and releaſes to Leſſee and his Heirs*, this is no Diſcontinuance, tho' it be with Warranty; That if he *makes Leaſe for Life, and afterwards grants the Reverſion in Fee*, this is no Diſcontinuance of the Fee, unleſs it be executed in the Life of the Grantor. The *Reaſon of which*, and many other Conſtructions made upon theſe Words is, that the Judges have *conſtrued* them *according to the Rule* and Reaſon *of the Common Law*; for at Common Law, if a Biſhop, Abbot &c. or Baron ſeiſed in Right of his Wife, had made a Feoffment in Fee, this had been a Diſcontinuance, and put the Succeſſor or Feme to their Action, in regard to the Favour which the Law gave to an Eſtate which paſs'd by Livery and Seiſin, and becauſe it is publick and notorious, and formerly was the common Aſſurance of Land; but if they had been ſeiſed of a Rent, or other Thing lying in Grant, and had granted it in Fee, this had been no Diſcontinuance, and yet it was not abſolutely determined by Death of the Biſhop, Abbot &c. or Baron; for the Succeſſor or Feme had Election to determine it, and make it voidable either by bringing a Writ, or by Claim upon the Land; But if the Rent had been granted by them de novo, it had been abſolutely void by their Death. So, if they had releaſed to a Diſſeiſor, it had been no Diſcontinuance; and if they had leaſed for Years, and releaſed to the Leſſee and his Heirs, this had not abſolutely determined by their Death, but had been voidable, or void, at the Election of the Succeſſor or Feme. But had they made Leaſe for Life, and after granted the Reverſion in Fee, and the Leſſee for Life had died, living the Biſhop &c. or Baron, this had been a Diſcontinuance; Otherwiſe had the Leſſee ſurviv'd the Biſhop &c. or Baron. 3 Rep. 85. b. Paſch. 44 Eliz. a Nota of the Reporter in the Caſe of Fines.——See Co Litt 327. b.

Grant by Tenant in Tail to hold without Impeachment of Waſte, with Aſſets deſcended, is no Bar againſt the Iſſue in Tail; for the *Statute of Glouceſter ſpeaks only of Warranty and Aſſets*, and the Statute of *Weſtm. 2. cap. 1. mentions Quod non habeat poteſtatem alienandi*, yet *this is intended of all* Things *which may turn in Diſinheritance of the Iſſue*. Br. Tail & Dones &c. pl. 13. cites 38 E. 3. 23.

* Theſe are but Conſequents to the Words of the Purview, and are but *explanatory*, and not of of Subſtance, and might well have been omitted. 2 Inſt. 336.

* *Neither ſhall the* * 2d *Husband of any ſuch Woman, from henceforth have any Thing in the Land ſo given upon Condition, after the Death of his Wife, by the Law of England, nor the Iſſue of the 2d Husband and Wife ſhall* † *ſucceed in the Inheritance, but immediately after the Death of the Husband and Wife, (to whom the Land was ſo given) it ſhall come to their Iſſue, or return unto the Giver, or his Heir, as before is ſaid.*

Yet was it adjudged, ſoon after the making of this Act, that where Lands were given in Frankmarriage, and the Husband died, and the Wife took another Husband, and had Iſſue before this Act, that the Husband ſhould be Tenant by the Curteſie; and the principal Reaſon was upon this Branch of the Statute (nec habeat de cætero ſecundus vir, &c.) for that this Reſtraint proved, as there it is ſaid, that the Law before was, that he ſhould be Tenant by the Curteſie; and yet, without Queſtion, the Iſſue ſhould not inherit that Land. 2 Inſt. 336.

† In ancient time, if *Land* had been *given to J. S. and his Succeſſors*, he had had a Fee-Simple; but otherwiſe it is at this Day. 2 Inſt. 336.

* Hereby it appeared that a *Formedon in the Deſcender lay not at the Common Law*, but was given by this Act, and the Form of the Writ is here ſet down. 2 Inſt. 336.

S. 3. * *And foraſmuch as in a new Caſe new Remedy muſt be provided, this Manner of Writ ſhall be granted to the Party that will purchaſe it.*

Here is the *Form of the Formedon in the Deſcender* ſet down; and therefore this Statute need

Præcipe A. quod juſte &c. reddat E. manerium de F. cum ſuis pertinentiis, quod C. dedit tali viro, & tali mulieri, & hæredibus de ipſis viro & muliere exeuntibus.

Or thus.

Quod C. dedit tali viro, in liberum maritagium cum tali muliere, & quod poſt mortem prædictorum viri & mulieris, prædicto B. Filio eorundem viri

viri & mulieris deſcendere debeat per formam donationis prædictæ, ut dicit &c. Vel, quod C. dedit tali & hæredibus de corpore ſuo exeuntibus, & quod poſt mortem illius talis prædicto B. Filio prædicti talis deſcendere debeat per formam &c.

not be recited, nor any Statute which gives the Form of the Writ. 2 Inſt. 336.

*S. 4. * The Writ whereby the Giver ſhall recover, (when Iſſue fails) is common enough in the Chancery.*

* The Formedon *in Reverter* did lie at the Common Law, but not a Formedon in Remainder upon an Eſtate Tail, becauſe it was a Fee-ſimple conditional, whereupon no Remainder could be limited at the Common Law; but after this Statute a Remainder may be limited upon an Eſtate Tail, in Reſpect of the Diviſion of the Eſtates. 2 Inſt. 336.

** And it is to wit, That this Statute ſhall hold Place touching Alienation of Land contrary to the Form of the Gift hereafter to be made, and ſhall not extend to Gifts made before.*

* This Clauſe ought to receive a two fold Interpretation.

1. That (ad dona prius facta) muſt be intended of Feoffments or Alienations made by the Donee or his Iſſues, and not to Gifts made by the Donor, for to them this Act does extend. 2 Inſt. 336.

2. Dona prius facta, that is, poſt prolem ſuſcitatam, for then the Alienation by the Tenant in Tail, or his Iſſues, was good in Law; ſo as (Dona) here are to be intended lawful Gifts, and made in due manner, and ſuch as could not be avoided; for Law allows no Wrong. 2 Inſt. 336.

*And * if a Fine be levied hereafter upon ſuch Lands, it ſhall be void in the Law.*

* This Act does not make the Fine void, but ipſo jure ſit nullus, that is, it ſhall *not bind the Right*; yet it ſhall (as has been ſaid) make a Diſcontinuance. 2 Inſt. 336.

But now by the Statutes of 4 H. 7. cap. 24. & 32 H. 8. cap. 34. a Fine levied with Proclamation does barr the Iſſues in Tail; but a Fine without Proclamation is a Diſcontinuance only, and no Bar. 2 Inſt. 336, 337.

Neither ſhall the Heirs, or ſuch as the Reverſion belongs unto, tho' they be of full Age, within England and out of Priſon, need to make their Claim.

Here is *Non compos mentis* left out, *and* ſo is a *Feme Covert*. 2 Inſt. 337.——Hereby it may be gathered (as the Law was) that a Fine at the Common Law did not bind a Stranger that was within Age, in Priſon, or beyond the Seas. 2 Inſt. 337.

(D) *Iſſue* in Tail. *Bound* by Acceptance or *Agreement*.

1. TEnant in Tail *granted Rent*, and died, *the Iſſue* paid the Rent, and *made a Feoffment* of the Land, *and retook in Fee*, yet he ſhall hold diſcharg'd; for the Rent was void by the Death of the Grantor, and the Payment by the Heir will not make it good. *Contrary of a Leaſe* by the Tenant in Tail, and the *Heir accepts the Rent*; for the Leaſe was only voidable. Br. Grants, pl. 145. cites 21 H. 6. 25.

S. P. Br. Barre, pl. 27. cites 21 H. 6. 24. And upon Acceptance of the Rent, there is *no Difference where it is accepted in Pais, and where he avows for it in a Court of Record*; for the Subſtance is in the one Caſe and the other, that where he accepts it, or demands it, he thereby affirms the Leaſe or Diſcontinuance; Per Newton. For a Thing void or determin'd can't be made good by Payment, but muſt have a new Creation.

2. Grandfather, Father and Son. The Grandfather being Tenant in Tail by Indenture makes *Feoffment in Fee, rendering Rent to him and his Heirs*, and dies. The *Father accepts* the Rent; the Feoffee levies a *Fine with Proclamation*; *5 Years paſs*, and then the Father dies. The *Point* was, Whether the Acceptance of the Rent by the Father had extinguiſhed his Right to the Entail, or whether 'tis an Eſtoppel only; For if he is only eſtopped, then, he having a Right at the Time the Fine was levied

Poph. 112. Holme v. Gee S. C. and by Popham and Clench the Acceptance, tho' by the Hands of

vied, and the five Years incurring in his Time, the Son was barred; But if he had extinguiſhed his Intereſt, then the Son, being the firſt to whom the Right came after the fine levied, is not barred by the five Years incurred in the Life of the Father. 'Twas adjudged per Walmſley and Clench J. at Lancaſter Aſſiſes that the Iſſue was barred. But the Court here thought that he is not barred, becauſe the *Acceptance is Concluſion only, and does not extinguiſh the Right.* Mo. 301. pl. 449. Paſch. 33 Eliz. Hulme v. Jee, alias, Ice.

one who was to pay viz. the Tenant himſelf, ſhall not bar the Right of Intail in the Father (as a Releaſe of Right ſhould do) but this

Acceptance ſhall only foreclose him of his Action to demand the Land during his Life, and therefore the Right, which the Father had, being barr'd by the Fine, the ſon is without Remedy; for he ſhall never have Remedy on a Fine levied in his Father's Time, the five Years after the Proclamation being paſt, unleſs only where the Right begins firſt to be a Right in the Son, and not where there was a Right in the Father; And ſo they thought the Judgment is to be affirmed. And they ſeemed further that Payment by him, who had nothing in the Land at the Time of Payment, ſhall make no Concluſion to him that accepts it, becauſe this Payment would be as none in Law.

Tenant in Tail made *Feoffment in Fee to the Uſe of himſelf and his Heirs, and after made a Leaſe for Years* rendering Rent and died; the Iſſue accepted the Rent. And by the Opinion of all the Juſtices the Acceptances does *not confirm the Leaſe*, becauſe the Iſſue was remitted to the Eſtate Tail by Deſcent, and ſo the Leaſe was utterly void that was made by the Father, being then Tenant in Fee Simple. Mo. 846. pl. 1143. Mich. 13 Jac. B. R. Anon.

3. Tenant in Tail agreed to make a Conveyance but died before it was perfected, and was in Contempt for the not doing it. The Iſſue in Tail *accepted the Satisfaction* agreed to be given for the Conveyance to have been made by the Tenant in Tail. By this Acceptance he has made it his own Agreement, and ſhall be bound by it, and decreed accordingly. Chan. Caſes 172. Trin. 22 Car. 2. Roſs v. Roſs.

4. Tenant in *Tail of a Rent grants it in Fee*, it is void by his Death; but if the Iſſue affirms it to be good, and brings a Formedon, he may be barred by Warranty. Per Holt Ch. J. 12 Mod. 361. Paſch. 12 W. 3. in Caſe of Pullen v. Purbeck.

(E) Equity. *Agreement of Tenant in Tail carried Execution* againſt the *Iſſue.*

1. TEnant in Tail made a Mortgage without levying a Fine, and entered into a *Covenant for further Aſſurance* and died. Bridgman K. would not compell the Iſſue to make the Aſſurance good, tho' the Father might have done it by ſuffering a Recovery. Lev. 238 Paſch. 20 Car. 2. in Canc. Jenkins v. Keymis.

S. C. cited 2. Vent. 350. Hill. 32 & 33 Car. 2. in Caſe of

2. *Covenant* by Tenant in Tail *to levy a Fine* upon a valuable Conſideration, and *a Decree* that he ſhall do ſo binds the Iſſue in Tail. Chan. Caſes, 294. Mich. 28. Car. 2. Hill. v. Carr.

Sayle v. Freeland. But Ld. Chancellor ſaid, he would not ſuperſede Fines and Recoveries; But where a Man was only Tenant in Tail in Equity, there this Court ſhall decree ſuch a Diſpoſition good; For a Truſt and Equitable Intereſt is a Creature of their own, and therefore diſpoſable by their Rule, otherwiſe where the Entail was of an Eſtate in the Land.

Where a Tenant in Tail *ſold the Lands at a full Value, and received the Conſideration Money*, and had *covenanted to levy a Fine*, and a Bill being brought to inforce him, he was *decreed to do it*, Yet he dying (tho' in Priſon, in Contempt for not performing the Decree) the Iſſue in Tail could not be bound by it. 2 Vern. 306. Arg. cites it as the Caſe of Weale v. Lower. —— S. C. cited per Ld. C. Macclesfield. Williams's Rep. 720. in Caſe of Frederick v. Frederick. —— S. P. cited Arg. 9 Mod. 16. in Lady Coventry's Caſe. —— S. P. Chanc. Prec. 278. in Caſe of Powel v. Powel. —— G. Equ. R 164. cites the Caſe of Sangon v. Williams.

So where there was a Covenant and no Decree upon it, and he *acknowledged a Fine, but died before it was perfected.* Equity would not ſupply this Defect againſt the Iſſue. 2 Vern. 3 Trin. 1686. Wharton v. Wharton.

So

So where Tenant in Tail *mortgaged* the Land, and on a Bill in this Court was *decreed to ſuffer a common Recovery*, but he died in Contempt of the Court for not performing the Decree, The Court would not carry the Decree into Execution againſt the Heir in Tail. Cited Arg. 9 Mod. 18. And by the Judges Aſſiſtants that Caſe was admitted ; But they ſaid, the Reaſon may be, that the Heir, after the Death of his Anceſtor was in by the Statute De Donis, which this Court could not control. But if the *Anceſtor had been Ceſty que Truſt in Tail*, his Heir would have been bound by ſuch Anceſtor's Lien ; Becauſe in that Caſe he would not have been in by the Statute. 9 Mod. 19. in Caſe of Coventry v. Coventry. —— This is the Caſe of Meale v. Lower cited 2 Vern. 306. in Caſe of Fox v. Crane and Wright.

Bare Articles ſhall be a Bar to an Entail of an Equity ; Per Cur. 2 Vern. 226. pl. 205. Paſch. 1691. in Caſe of Baker v. Baily. —— Where an Intail is only of a Truſt, it is not within the Statute De Donis; And ſo a Fine or Recovery is not neceſſary, but is alienable by any other conveyance made by him that has an Eſtate of Inheritance in the Truſt. Arg. and decreed accordingly, That a Feoffment by Ceſty que Truſt and Truſtees barred ſuch Eſtate. 2 Vern. 344. pl. 318. Hill. 1697. Bowater v. Elly.

Thoſe Caſes in which the Court will not compel the Execution of Powers, are where *it would be againſt the Will of the Donor*, that they ſhould be executed. Arg. 9 Mod. 16. in Lady Coventry's Caſe.

3. The *Mother agrees to give her Son other Lands in Lieu of Lands intail'd*, and *by Will diſpoſes* of *the intail'd Lands to her Daughter, takes Bond from her Son to permit* and ſuffer the *intailed Lands to be enjoyed, as ſhe* by Will had *deviſed them* ; The Son dies, leaving the Defendant his Son an Infant, who brought an Ejectment for the intailed Lands. The Plaintiff could not ſue the Bond againſt the Defendant being an Infant. Per Cur. The Infant being in Poſſeſſion of the Lands that came in Recompence, we will at preſent only quiet the Plaintiff's Poſſeſſion in the intailed Lands, until 6 Months after the Infant comes of Age, and then he may ſhew Cauſe if he thinks fit. 2. Vern. 232, 233. pl. 212. Trin. 1691. Thomas v. Gyles.

4. *Partition between Tenants in Tail*, tho' but *by Parol*, was decreed to bind the Iſſue. 2 Vern. 232. cites the Caſe of Burton v. Jeux and the like in the Caſe of Roſe v. Roſe.

5. Tenant in Tail *covenants to ſettle a Jointure* ; tho' he might have done it by Fine and Recovery, yet if he dies without doing it, a Court of Equity can't relieve and decree a Jointure. Arg. 2 Vern. 380. in Caſe of Lady Clifford v. the Earl of Burlington and Ld. Clifford.

And where a Power was reſerved to him to ſettle a Jointure and he covenants to ſettle, but does not execute it at all, there may be ſome Reaſon for a Court of Equity, not to enforce the Execution thereof but where it is executed in any Part, tho' not ſtrictly performed, it is the ſtanding Rule of this Court to make it good. And cited ſeveral Caſes where Articles had been carried into Execution againſt Remainder-men, and particularly the Caſe of Ld. Burlington v. Clifford ; And it was agreed by the other Side to be true, that in the Ld. Burlington's Caſe there was a general Covenant, but that it did not reſt there ; For he ſettled what he pretended was 1000 l. a Year, according to the Articles which was afterwards found to be of leſs Value, and appeared ſo by the Defendant's Anſwer. 9 Mod. 16, 17. Arg. in the Caſe of Ld. and Lady Coventry.

6. If Tenant in Tail, having a *Power to make Leaſes* for 3 Lives, covenants to make ſuch a Leaſe, and dies before Execution ; The Court will carry this into Execution tho' they would not *a Sale*. Arg. 10 Mod. 469. in Caſe of Coventry v. Coventry.

(F) Equity. Agreement of *Tenant for Life* carried into Execution againſt the Iſſue in Tail.

AN Agreement was made by Articles between a *Lord of a Manor* who was only a *Tenant for Life, and* certain *Tenants* of the Manor, who were likewiſe Tenants for Life only by Settlements made Precedent to the Articles, which were *for ſettling Heriots and ſtinting of Common*, was confirm'd by Decree. Upon a Bill to revive the Decree, it was

jected that this Agreement could in no ſort bind on the one Hand or the other the Perſons, who upon the reſpective Deaths of the Tenants for Life became Tenants in Tail. But the Maſter of the Rolls was of Opinion, that theſe Articles tending to ſettle the *Cuſtoms* of the Manor, which were *immemorial*, and before the Statute De Donis, and for ſtinting the Common and preventing Suits, ought to bind the Iſſue in Tail, tho' made only by Tenant for Life; And he would not preſume that the Tenant in Poſſeſſion would do any Thing in Prejudice of the Tenants Right, And decreed that the former Decree ſhould be confirm'd, and revived, and executed. Quære. Vern. 426, 427. pl. 401. Hill. 1686. In Curia Canc. Dunn v. Allen.

(G) Equity. *Creditors relieved againſt* the *Iſſue* in Tail. In what Caſes.

1. THE Husband in Conſideration of his Wife's joining with him in a Fine, and parting with her Jointure of 40 l. per Ann. gives her Truſtee a *Bond to ſettle* other Lands of 40 l. per Ann. *on the Wife for Life*, Remainder *to the Heirs of his Body by her*. The *Husband* being indebted in other Bonds *dies inteſtate*, and the *Wife takes Adminiſtration, and confeſſes Judgment to her Truſtee*; On a Bill by another Bond-Creditor decreed the Wife's Bond ſhould be allowed, and ſtand good ſo far as to ſecure 40 l. per Ann. to the Wife for Life; but as to the Remainder to the Children, or any Settlement to be made for them, the Court took it, that upon the wording of the Condition of the Bond, the Husband was to have been Tenant in Tail, and might have barred ſuch Settlement, if made, as to the Children, and therefore as againſt the Plaintiff the Defendant muſt have a Satisfaction prior to him, but as to the Children he muſt be preferred; And decreed it accordingly. 2 Vern. 220, 221. pl. 201. Paſch. 1691. Bottle v. Fripp. & al.

2. *Truſtees* in a Marriage Settlement for preſerving contingent Remainders, the Marriage having been ſix Years ſince (there being *no Iſſue*) are decreed to *join in a Sale*, the Settlement being only of an *Equity of Redemption*, and the Wife conſenting to the Sale. 2. Vern. 303. pl. 294. Mich. 1693. Platt v. Sprigg.

3. Where a Settlement on Marriage is made in Tail of an *Eſtate mortgaged*, if Mortgagee *foreclose* the Husband and Wife, 'twill bind, tho' Iſſue ſhould be born afterwards. 2 Vern. 304. in Caſe of Platt v. Sprigg.

4. A. *mortgages* Land to B. for 1000 Years, and afterwards *ſettles it on Marriage* to himſelf for Life, then to his Wife for Life, and then to the Heirs of his Body on the Body of the Wife, and afterwards *mortgages again* the ſame Lands to C. and makes Oath that the Lands were free from Incumbrances; They have Iſſue a Son; The Wife dies; A. dies inteſtate; J. S. takes Adminiſtration durante Minoritate of the Son, and *pays off the Mortgage to B. out of the Perſonal Eſtate, and takes an Aſſignment in Truſt for the Iſſue*. Maſter of the Rolls decreed the Debt to C. to be ſatisfied as far as there were Aſſets of A. and that in taking the Account, J. S. the Adminiſtrator ſhould not be allow'd, as againſt C. the Plaintiff, the Money by him paid to B. on his aſſigning the firſt Mortgage. 2. Vern. 304. pl. 295. Mich. 1693. Fox v. Crane and Wight.

(H) *Actions.* What Actions Tenant in Tail may have, and *Pleadings.*

1. ENTRY in Nature of Aſſize; The Demandant *counted that one J. N. gave in Tail*, and it was agreed, That it is not the Courſe to count of a Giſt; But per Priſot in this Caſe, where it is of a particular Eſtate, he *cannot ſay, That he was ſeiſed in his Demeſne as of Fee*; For he has only Tail; *but* ſhall ſay, that he was ſeiſed in his Demeſne *as of Frank-Tenement*. Br. Count. pl. 15. cites 33 H. 6. 14.

2. Tenant in Tail ſhall not have Quo Jure; for it is a *Writ of Right*, ſo of *Ne Injuſte vexes* for the ſame Reaſon. And if Tenant in Tail brings Writ of Right, the *Tenant ſhall ſay, that the Demandant had nothing the Day of the Writ purchaſed, but to himſelf and his Heirs of his Body begotten.* Br. Tail & Dones, pl. 35. cites 5 E. 4.

3. Tenant in Tail *ſhall recover the Rent* by Formedon, *without ſhewing the Deed*; for the *Formedon* is in the Right. But he ſhall not have *Avowry nor Aſſiſe*, without ſhewing the Deed, for this is in the Poſſeſſion. Br. Tail & Dones, pl. 26. cites 4 H. 7. 10. Per Keble & Fairfax.

(I) *Tenant* in Tail *after Poſſibility. Who* is.

1. TEnant in Fee Tail after Poſſibility of Iſſue extinct *is*, Where Tenements are given to a Man and to his Wife in ſpecial Tail, *if one of them die without Iſſue*, the Survivor is Tenant in Tail after Poſſibility of Iſſue extinct; and if they have Iſſue, and the one die, albeit that during the Life of the Iſſue the Survivor ſhall not be ſaid Tenant in Tail after Poſſibility of Iſſue extinct, yet if the *Iſſue dies without Iſſue*, ſo as there be not any Iſſue alive which may inherit by force of the Tail, then the ſurviving Party of the Donees is Tenant in Tail after Poſſibility of Iſſue extinct. Litt. S. 32.

He is call'd Tenant in Tail after Poſſibility of Iſſue extinct, becauſe by no Poſſibility he can have any Iſſue inheritable to the ſame Eſtate Tail.

But if a Man gives Land to a *Man and his Wife*, and to the Heirs of their 2 Bodies, and they *live till each of them be an Hundred Years old, and have no Iſſue*, yet do they continue Tenant in Tail, for that the Law ſees no Impoſſibility of having Children. But when a Man and his Wife be Tenant in Special Tail, and the Wife dies without Iſſue, there the Law ſees an apparent Impoſſibility that any Iſſue, that the Husband can have by any other Wife, ſhould inherit this Eſtate. Co. Litt. 28. a.

2. Alſo if Tenements be given *to a Man, and to his Heirs, which he ſhall beget on the Body of his Wife*; in this Caſe the Wife has nothing in the Tenements, and the Husband is ſeiſed as Donee in ſpecial Tail. And in this Caſe, if the *Wife dies without Iſſue* of her Body begotten by her Husband, then the Husband is Tenant in Tail after Poſſibility of the Iſſue extinct. Litt. S. 33.

3. *None can be* Tenant in Tail after Poſſibility of Iſſue extinct, *but one of the Donees, or Donee in Special Tail.* For the Donee in General Tail cannot be ſaid to be Tenant in Tail after Poſſibility of Iſſue extinct; becauſe, always during his Life, he may by Poſſibility have Iſſue, which may inherit by force of the ſame Entail. And ſo in the ſame manner the Iſſue, which is Heir to the Donees in Special Tail, cannot be

be Tenant in Tail after Poſſibility of Iſſue extinct, for the Reaſon aboveſaid. Litt. S. 34.

2 Inſt. 681, 682. cites S. C. but ſays it was reſolved 4thly, that the Eſtate of the Feme was chang'd to an Eſtate for Life, diſpuniſhable of Waſte; for that the Iſſue in Tail, by the Fine, was diſabled to inherit.

4. W. R. ſeiſed in Fee, gave Land *to B. and M. his Feme, and to the Heirs of their 2 Bodies* begotten, Remainder *to the Heirs of the ſaid B.*— *B. levied a Fine* with Proclamations, *and dies, leaving Iſſue C.* a Son by the ſaid M. Within 5 Years after *M. enter'd*, claiming her Eſtate. It was inſiſted, that M. had only an Eſtate for Life, diſpuniſhable of Waſte, as Tenant in Tail after Poſſibility. But reſolved, that after B.'s Death, *M. had an Eſtate in Tail*; and tho' the Iſſue is barr'd by the Fine, yet the Eſtate of the Feme is not touch'd by it, ſhe being a Stranger to the Fine, and therefore her Eſtate not chang'd into an Eſtate for Life. 9 Rep. 138. b. Paſch. 10 Jac. in the Court of Wards. Beaumont's Caſe.

——This very ſame Caſe came in Queſtion again, in an Ejectment by **Baker v. Willis**. Cro. C. 476. pl. 5. Trin. 13 Car. B. R. and was argued by Crooke and Barkley J. but not by the other Juſtices, becauſe they heard that the Parties were about to agree, which, by means of the Judges, they afterwards did. But Crooke and Barkley held, that M. by her Entry, was Tenant in Tail, and not Tenant after Poſſibility, nor in nature of ſuch a Tenancy in Tail, but an abſolute Tenant in Tail to all Purpoſes. And Crooke ſaid, that if ſhe be to ſue a Real Action, ſhe muſt name herſelf Tenant in Tail; and cited D. 331. and 351.——Jo. 393. pl. 3. S. C. by Name of **Dixie v. Beaumont**. But nothing ſaid there as to this Point; but ſays the Caſe was argued by Crooke and Berkley, and afterwards the Matter was compromis'd ——S. C. cited accordingly, Hob. 257. 259. by Hobart Ch. J. in Caſe of Duncomb v. Wingfield.

So where Baron and Feme were Tenants in Tail, Remainder to the Heirs of the Baron *by a Conveyance made by the Baron during Coverture*; and the Baron died, and the Feme enter'd, and was ſeiſed; and the Iſſue, in Life of the Mother, levied a Fine to the Uſe of himſelf and his Heirs. It was held, that the Mother remain'd Tenant in Tail, and ſo a Leaſe made by her was held good. Cro. J. 688. pl. 5. Trin. 21 Jac. **Crocker v. Kelſey**. But in a Note there ſays, this was on a Writ of Error, brought 3 Car. in the Exchequer-Chamber, on a Judgment given 1 Car.

5. A. in Conſideration of Marriage, covenanted to ſtand ſeiſed *to the Uſe of himſelf and M.* his intended Wife, *for their Lives, without Impeachment of Waſte*; *and after of their firſt Iſſue Male, and the Heirs Male of ſuch Iſſue Male* iſſuing &c. And *for Default* of ſuch, then *to the Uſe of the Heirs of the Body of A. and M.* And for Default &c. then to the Uſe of B. Son and Heir apparent of A. (by a former Wife) and the Heirs Male of his Body. And for Default &c. A. and M. marry, and have Iſſue C. Afterwards A. dies, not having other Iſſue of the Body of M. Then M. enters. C. dies. Reſolved, that becauſe M. had Eſtate for Life by Limitation of the Party, and the Eſtate which ſhe had in the Remainder, viz. of Tenancy in Tail after Poſſibility, was not larger in Quantity than the Eſtate for Life, and conſequently cannot drown it, M. was not Tenant in Tail after Poſſibility; for ſuch Eſtate muſt be a Reſidue of an Eſtate Tail, and muſt happen by the Act of God, and not by Limitation. 11 Rep. 79. b. and the 3d Reſolution, Paſch. 13 Jac. B. R. Lewis Bowles's Caſe.

Such Tenancy ought to be the Reſidue of an Eſtate in Special Tail; per Coke Ch. J. Roll Rep. 180. in Caſe of Bowles v. Berry, and cited 50 E. 3. that Feoffment on Condition to have for Life only is good; but when it is decreaſed to an Eſtate for Life, he ſhall not be Tenant after Poſſibility, becauſe this muſt be Ex Diſpoſitione Legis, and not Ex Proviſione hominis ——11 Rep. 80. b. the 3d Reſolution in Lewis Bowles's Caſe.

6. The *Eſtate* of this Tenancy *muſt be alter'd by the Act of God*, and that *by dying without Iſſue*; for if a *Feoffment* in Fee be made *to* the Uſe of *a Man and his Wife for their Lives, and after to their next Iſſue Male* to be begotten in Tail; *and after to* the Uſe of the *Husband and Wife*, and of *the Heirs of their 2 Bodies* begotten, they *having no Iſſue Male at that time.* In this Caſe the Husband and Wife are Tenants in Special Tail executed; and after they have Iſſue a Son, they are become Tenants for Life, the Remainder to the Son in Tail, the Remainder to them in Special Tail; for albeit their Eſtate Tail is turn'd to an Eſtate for Life, yet they have a bare Eſtate for Life: But if the Husband die, having no other Iſſue, and then the Son dies without Iſſue, the Wife ſhall have the Privileges belonging to a Tenant in Tail, after Poſſibility of Iſſue extinct, as it appears in **Lewis Bowles**'s Caſe. Co. Litt. 28. a.

7. If

7. If Land be given *to a Man and his Wife, and the Heirs of their 2 Bodies*, and after they are *divorced*, Cauſa præcontractus, or Conſanguinitatis, or Affinitatis, their Eſtate of Inheritance is turn'd to a joint Eſtate for Life; and albeit they had once an Inheritance in them, yet for that the *Eſtate is alter'd by their own Act*, and *not by the* Act of God, viz. by the *Death of either Party without Iſſue*, they are not Tenants in Tail after Poſſibility. Co. Litt. 28. a. b.

Br. Deraign ment and Divorce. pl. 13. cites 7 H. 4. 16. — Br. Taile & Dones &c. pl. 9. cites S. C — Br. Eſtates, pl. 11. cites S. C. — 2 Inſt. 682. in Beaumont's Caſe. — 9 Rep. 141. a. in S C. cites 7 H. 4. 16. b. and ſays, that in ſuch Caſe the Eſtate-Tail is diſſolved ab Initio, and ſo the Iſſue is made Baſtard.

8. Lands are given *to the Husband and Wife, and to the Heirs of the Body of the Husband*, the *Remainder to the Husband and Wife, and to the Heirs of their 2 Bodies* begotten; the *Husband dies without Iſſue*; the Wife ſhall not be Tenant in Tail after Poſſibility; for the *Remainder in Special Tail* was utterly void, becauſe it *could never take Effect*; for ſo long as the Husband ſhould have Iſſue, it ſhould inherit by force of the General Tail; and if the Husband die without Iſſue, then the ſpecial Eſtate Tail cannot takeEffect, inaſmuch as the Iſſue which ſhould inherit the Special Tayle muſt be begotten by the Husband, and ſo the General, which is larger and greater, has fruſtrated the Special which is leſſer. Co. Litt. 28. b.

9. If Lands be given to a Man with a Woman in *Frank-Marriage*, albeit the Woman (which was the Cauſe of the Gift) dies without Iſſue, yet the Husband ſhall be Tenant in Tail after Poſſibilitie, &c. for that he and his Wife were Donees in Special Tail, and ſo within the Words of Littleton. Co. Litt. 28. b.

But if the King give Land to a Man *with a Woman of his Kindred in Frank-Marriage*, and the *Woman dies without Iſſue*, the Man, in the King's Caſe, ſhall not hold it for his Life; becauſe the Woman was the Cauſe of the Gift. But otherwiſe it is in the Caſe of a common Perſon. Co. Litt. 21. b. 22. a.

10. If the *King gives Land to a Man and a Woman, and the Heirs of their 2 Bodies*, and the *Woman dies* without Iſſue; yet ſhall the Man be Tenant in Tail after Poſſibility. Co. Litt. 22. b.

(K) *Of what Thing* Tenant in Tail after Poſſibility, may be.

1. THERE is no Queſtion but Tenant in Tail after Poſſibility, may be *of a Remainder*, as well as of a Poſſeſſion. 11 Rep. 81. a. Paſch. 13 Jac. B. R. in the 4th Reſolution, in Lewis Bowles's Caſe.

S. P. per Coke Ch. J. Roll Rep 180. in Caſe of Bowles v. Berrie, S. C.

3. And therefore, if *Leaſe for Life* be made *to A.* the *Remainder to Baron and Feme in Special Tail*, and the *Baron dies without Iſſue*, now the Feme is Tenant in Tail after Poſſibility of this Remainder; and if A. ſurrenders to her, as he may, now ſhe is Tenant in Tail after Poſſibility, in Poſſeſſion. Rep. 81. a. Per Cur. in the 4th Reſolution, in Lewis Bowles's Caſe.

(L) *Privilege* of Tenant in Tail after Poſſibility, Or of his Grantee.

1. TEnant in Tail, after Poſſibility of Iſſue extinct, has eight Qualities and Privileges, which Tenant in Tail himſelf has, and which Leſſee for Life has not. Co. Litt. 27. b.

S. P. Br. Tail & Dones, pl. 17. cites 39 Ed. 3. 16.——Dr. & Stud. Lib. 2. Cap. 1. ſays, The Law is clear, that Tenant in Tail after Poſſibility &c. is not puniſhable for Waſte.——4 Rep. 63. S. P. in Herlakenden's Caſe, becauſe his original Eſtate is not within the Statute of Glouceſter, cap. 5.——2 Inſt. 302. S. P. And tho' he is within the Letter of that Statute, yet he is out of the Meaning of it, becauſe the Inheritance was once in him.

2. *As*, 1ſt. He is diſpuniſhable for *Waſte*. Co. Litt. 27. b.

Roll. Rep. 179. S. P. by Doderidge J. cites Time of E. 1. Fitzh. Waſte 26. 45 E. 3. 39 E. 3. 16. 12 H. 4. 1. 11 H. 4. 5. 16 H. 6. 16. 7 H. 4. 26 H. 6. Aide 77.——And per Doderidge J. He ſhall not be puniſhed for Waſte, becauſe he continues in by Virtue of the Livery upon the Eſtate Tail; and it ſeems becauſe by the Livery he had Power to do Waſte, tho' the Eſtate be chang'd, yet the ſame Liberty continues ſo long as the Gift and Livery continues. And per Coke Ch. J. At Common Law this Tenant had a Fee, and conſequently full Power to ſell and diſpoſe of the Trees; and notwithſtanding the Statute has made the Eſtate to be only for Life, yet the Privilege and Liberty is not taken away. Roll. Rep. 184. Paſch. 13 Jac. B. R. Bowles v. Berry.——11 Rep. 80. a. Lewis Bowles's Caſe.

The Learned Author of An Inſtitute, but now call'd The New Abridgment, 2d Vol. 269. tells us, That to puniſh the Tenant for Waſte, ſeems to be againſt the Deſign and Intention of the firſt Donation; for by that the Donor gave the Inheritance, and an abſolute Power over the laſting Improvements, which are look'd upon as Part of the Inheritance for their Duration; and conſequently it can be no Injury to him in Reverſion, nor beſides his Intention in the Donation, if the Donee exerciſes the Power he was intruſted with by the Donor; nor can the Donor revoke it, becauſe the Authority given by the Gift muſt continue, as long as the Gift, to which it was annex'd, continues.——But ſee Tit. Waſte (Q) pl. 1. and (S) pl. 12.

S. P. Br. Attornment, pl. 10. cites 43 E. 3. 1.——Ibid. pl. 11. cites 46 E. 3. 13.——Ibid. pl. 12. cites 46 E. 3. 27.——Ibid. pl. 26. cites 39 E. 3. 20.——Br. Tail & Dones, pl. 17. cites 39 E. 3. 16.——Quid Juris clamat lies not againſt ſuch Tenant. Br. Quid Juris clamat, pl. 1. cites 43 E. 3. 1.——Ibid. pl. 6. cites 46 E. 3. 13.——11 Rep. 80. Paſch. 13 Jac. B. R. in Lewis Bowles's Caſe.——Roll. Rep. 179. S. P. Per Curiam, in Caſe of Bowles v. Berry.——Co. Litt. 316. a. S. P. But his Aſſignee ſhall attorn, becauſe he never had but an Eſtate for Life.——3 Le. 241. pl. 336. Trin. 32 Eliz. in the Exchequer, in George Ap-Rice's Caſe, it was ſaid to have been adjudg'd in a Court of Wales, That the Aſſignee of Tenant in Tail after Poſſibility of Iſſue, ſhould attorn; upon which Judgment a Writ of Error was brought in B. R. and there, upon good Advice, the ſaid Judgment was affirm'd; for altho' it be true, that Tenant in Tail after Poſſibility ſhall not be compell'd to attorn, yet that is a Privilege which is annex'd to his Perſon, and not to the Eſtate; and by the Aſſignment of the Eſtate the Privilege is deſtroyed.——2 Le. 40. pl. 54. Mich. 30 Eliz. B. R. S. C. accordingly.——S. C. cited per Coke Ch. J. Roll. Rep. 179. in Caſe of Bowles v. Berry.——Co. Litt. 316. a.

3. 2dly. He ſhall not be compell'd *to attorn*. Co. Litt. 27. b.

In Error brought of a Judgment in Quid Juris clamat, Clerk J. conceived that Grantee of Tenant in Tail after Poſſibility, ſhould not be driven to attorn. Sed adjornatur. 3 Le. 121. pl. 173. Trin. 27 Eliz. B. R. Anon.——Le 291. pl. 397. S. R.——But Co. Litt. 28. a. ſays, That where Tenant in Tail after Poſſibility of Iſſue extinct, granted over his Eſtate to another, his Grantee was compell'd to *attorn* in a Quid Juris clamat, as a bare Tenant for Life, and ſo be named in the Writ; for by the Aſſignment, the Privity of the Eſtate being alter'd, the Privilege was gone; cites it as adjudged Mich. 28 & 29 Eliz. in Ewens's Caſe, and Judgment affirm'd in a Writ of Error, and ſays herewith agreeth 27 H. 6. Tit. Aid. Statham, 29 E. 3. 1. b.——S. C cited 11 Rep. 83. b. in Lewis Bowles's Caſe.——Roll. Rep. 179. S. C. cited by Coke as Owen's Caſe.

S. P. Br. Tail and Dones, pl. 17. cites 39 E. 3. 16.——S. P. Fitzh. Tit. Ayde, pl. 77. cites Trin. 26 H. 6. becauſe the ſame Tenancy, which he had at the firſt, continues.

4. 3dly. He ſhall not have *Aid* of him in the Reverſion. Co. Litt. 27. b.

Tenant in Tail after Poſſibility &c. ſhall not have Aid, but his Grantee ſhall. Arg. 3 Le. 121. pl. 173. Anon. cites Statham, Tit. Aid, 27 H. 6.——Br. Aid, pl. 37. S. P. cites 2 H. 4. 17. Brooke ſays, It ſeems the Reaſon is, becauſe he had once an Eſtate of Inheritance.——Roll. Rep. 184. S. P. Per Doderidge J. in Caſe of Bowles v. Berry, cites 10 H. 6. 1.——11 Rep. 80. a. b. Lewis Bowles's Caſe.

S. P. Becauſe he having originally the Inheritance by the firſt Gift, has likewiſe the Cuſtody of the Writings which are neceſſary to defend it. 2 New Abr. 269.

5. 4thly,

5. 4thly, Upon his Alienation, no Writ of *Entry in conſimili caſu* lies. Co. Litt. 27. b.

S. P. But he in Reverſion may enter. Fitzh. Tit. Entre Congeable, pl. 56. cites 13 E. 2.

S. P. Becauſe this Caſe is not conſimilis to that of Tenant for Dower, becauſe this Tenant had originally the Inheritance in him, which the Tenant in Dower never had. 2 New Abr. 269.

So upon his Death the Donor ſhall not have Writ of Entry in Conſimili Caſu, as upon the Death of Tenant for Life; Per Doderidge and Coke, quod fuit conceſſum per Haughton, Roll. Rep. 179. and cited 13 E. 2. Entre Congeable 56.——11 Rep. 80. b. Lewis Bowles's Caſe.——Fitzh. Tit. Ayde, pl. 77. cites Trin. 26 H. 6. That he ſhall have Formedon in Reverter, and not Writ of Entry.——S. P. As to the Formedon; Per Doderidge J. quod fuit conceſſum per Coke. Roll. Rep. 179.

6. 5thly, After his Death no Writ of *Intruſion* does lie. Co. Litt. 27. b.

Roll. Rep. 179. in Caſe of Bowles v. Berry. S. P. by Coke Ch. J.——11 Rep. 80. b. Lewis Bowles's Caſe.——S. P. Becauſe this Writ is given only upon an Entry and Intruſion after the Death of a bare Tenant for Life, which this Tenant is not. 2 New Abr. 269.

But he ſhall have Formedon, ſee the Notes on the Plea next above.

In Writ of Intruſion, it is a good Plea to ſay that he was ſeiſed, and gave to him whom he ſuppoſes Tenant for Life, and to the Heirs of his Body; and for that he died without Heir, he entered, abſque hoc, that he held for Life of the Leaſe of the Demandant at the Time of his Death. F. N. B. 203. (E) in the new Notes there (a) cites 24 E. 3. 74.

7. 6thly, He may join the *Miſe in a Writ of Right* in a ſpecial Manner. Co. Litt. 27. b.

S. P. Becauſe the Deeds belonging to the Inheritance lying in his Hands, he may make out his Title without calling in the Reverſioner. 2 New Abr. 269.

S. P. by Doderidge. Roll. Rep. 179. cites 19 E. 3. 16. But by Coke, he cannot join the Miſe upon the meer Right. Ibid. cites 27 H. 6.——11 Rep. 80. b. Lewis Bowles's Caſe, cites Abundance of Caſes out of the old Books.

8. 7thly, In a Præcipe brought by him, he ſhall *not name himſelf Tenant for Life.* Co. Litt. 27. b.

S. P. For if he does, and it appears to the Court that he is Tenant in Tail after Poſſibility, the Writ ſhall abate; Per Coke and Doderidge. Roll Rep. 179. cites 18 E. 3. 27.——11 Rep. 80. b. cites S. C. of 18 E. 3. 27. a. that Feme brought Cui in vita, quod clamat tenere ad vitam, and maintained it in her Count by Gift in ſpecial Tail to her and her Baron, and that her Baron is dead without Iſſue, and the Writ abated, becauſe of the Contrariſity of the Title.

9. 8thly, In a Præcipe brought againſt him, he ſhall *not be named barely Tenant for Life.* Co. Litt. 27 b.

S. P. Becauſe his original Infeudation, by which he claims, was of an Eſtate of Inheritance, and not of an Eſtate for Life. 2 New Abr. 269.

In Quid Juris clamat, The Defendant *pleaded, that he, Tempore Levationis notæ prædictæ, was ſeiſed in Fee of the Gift of R. R. abſque hoc, Quod ipſe tempore* Levationis notæ prædictæ *held Tenementa prædicta, pro termino vitæ ſuæ tantum* &c. And thereupon they were at Iſſue; And it was found, that he held them as Lands entail'd, after Poſſibility of Iſſue &c. The Court reſolved for the Defendant; Becauſe it appears to the Court, That the Defendant has an Eſtate privileged from Attornment, to be madeby him; And the Inducement of the Traverſe is not any Cauſe of Forfeiture. Wherefore it was adjudged for the Defendant. Cro. Eliz. 671. pl. 29. Paſch. 41 Eliz. C. B. Veal v. Road —— Noy. 74. Veale v. Reede, S. C. but ſays nothing of any Judgment, but only that upon the Queſtion for whom Judgment ſhould be given upon this Iſſue, Williams ſaid for the Plaintiff, becauſe it is an Eſtate privileged, and ought to have been pleaded in Bar.——11 Rep. 80. b. in Lewis Bowles's Caſe, cites S. C. as adjudged for the Defendant, becauſe ſuch Tenant ſhall not in Judgment of Law be included in Writ or Fine &c. within the general Allegation of a Tenant for Life.——S. C. cited Roll. Rep. 179. in Caſe of Bowles v. Berrie, ſays that in the Quid Juris clamat it was alleg'd that the Defendant was Leſſee for Life at the Time of the Fine levied, and adjudged for the Defendant; for he was not any ſuch Tenant as was compellable to attorn in ſuch Writ; but ſays, he that took the Traverſe was not commended for taking ſuch a deſperate Traverſe, notwithſtanding it was help'd in this Manner; for he was a Tenant for Life. But the Book cites 29 E. 3. 1. b. that if it be alleg'd that one holds for Life, it ſhall not be taken that he is Tenant after Poſſibility.

10. And yet he has 4 other *Qualities*, which are *not agreeable to an Eſtate in Tail*, but to a bare Leſſee for Life Co. Litt. 27. b. 28. a.

11. *As*, 1ſt. If he makes a *Feoffment in Fee*, this is *a Forfeiture* of his Eſtate. Co. Litt. 28. a.

S. P. Becauſe having no longer a deſcendible Eſtate in him, he cannot transfer it to another, without the Prejudice and Diſheriſon of him in Remainder. 2 New Abr. 269.

He

He in Remainder may enter for Alienation. Br. Aide, pl. 37. cites 7 H. 4. 10. and 39 E. 3.——Br. Forfeiture, pl. 88. cites 45 E. 3. 25.————Br. Entre Congeable, pl. 12. cites S. C.——Br. Tail & Dones, pl. 17. cites 39 E. 3. 16.——Roll Rep. 179. Paſch. 13 Jac. B. R. in Caſe of Bowles v. Berry, Per Doderidge J. cites 13 E. 2. Fitzh. Entre Congeable 56. 11 H. 4. 30 E. 3. 16. accordingly, quod fuit conceſſum per Curiam.——11 Rep. 80. b. in Lewis Bowles's Caſe, cites 45 E. 3. 22. 28 E. 3. 96. b. 27 Aſſ. 60.

Br. Eſtates, pl. 25. cites 9 E. 4. 17, 18.—Roll. Rep. 179.

12. 2dly. If an Eſtate in Fee, or in Fee Tail in Reverſion or Remainder deſcend, or come to this Tenant, his *Eſtate is drowned*, and the Fee or Fee Tail executed. Co. Litt. 28. a.

S. P. Per Doderidge, and cited 9 E. 4. 50 E. 3. 35. 7 H. 4. 23. Quod fuit conceſſum per Coke, and he cited the ſame Books alſo.——11 Rep. 80. b. in Lewis Bowles's Caſe, cites 32 E. 3. Tit. Age 55. 50 E. 3, 4. 9 E. 4. 17. b.

S. P. Br. Aide, pl. 37. cites 7 H. 4. 10. and 39 E. 3.——S. P. Br. Taile & Dones, pl. 17.————S. P. 11 Rep. 80. b. Lewis Bowles's Caſe, cites 2 E. 2. Reſceit 147. 41 E. 3. 12. 20 E. 3. Tit. Reſceit. 38 E. 3. 33.————S. P. Roll. Rep. 179 Per Doderidge J. cites 11 H. 6. 15. 10 H. 6. 1. Quod fuit conceſſum per Crooke and Haughton; but Haughton ſaid that this is by the expreſs Words of the Statute of Reſceits, which ſays (Per Donum) but ſaid that if it had not been for the expreſs Words, he doubted whether he ſhould be received.

13. 3dly, He in *Reverſion* or Remainder ſhall be *received upon his Default*, as well as upon that of bare Tenant for Life. Co. Litt. 28. a.

S. P. Per Coke Ch. J. Roll. Rep. 179.—— 11 Rep. 80. b S. P. Lewis Bowles's Caſe.

14. 4thly, An *Exchange* between a bare Tenant for Life, and him, is good; for their Eſtates in reſpect of their Quantity are equal, ſo as the Difference ſtands in the Quality, and not in the Quantity of the Eſtate. And as an Eſtate Tail was originally carv'd out of a Fee-ſimple, ſo is the Eſtate of this Tenant out of an Eſtate in ſpecial Tail. Co. Litt. 28. a.

Fitzh. Tit. Aid, pl. 77. cites Trin. 26 H. 6.— 11 Rep. 81. a.

15. Tenant in Tail *recovers in Aſſiſe, and after becomes Tenant in Tail after Poſſibility* &c. he ſhall have *Rediſſeiſin*. Per Doderidge J. Roll. Rep. 179. in Caſe of Bowles v. Berry.

in the 3d Reſolution in Lewis Bowles's Caſe; for it is the ſame Franktenament as he had before, this being Parcel of the Eſtate Tail.——Co. Litt. 154. b.

16. *In ſome Caſe a Perſon* who is *not really* and ſtrictly *Tenant in Tail after Poſſibility, ſhall have the Privilege of ſuch Tenant.* As in the Caſe of the Wife in **Lewis Bowles**'s Caſe, 11 Rep. 81. a. where an Eſtate for Life fell to her on her Baron's Death by reaſon of a prior Limitation in their Marriage Settlement, and afterwards, by the Death of the Iſſue in ſpecial Tail without Iſſue, an Eſtate of Tenancy in Tail after Poſſibility would have fallen to her by Means of a ſubſequent Limitation in the ſame Settlement (viz. in Default of Iſſue Male of their 2 Bodies, then to the Heirs of the Bodies of the Baron and Feme) but ſhe being in of the Eſtate for Life, and that Eſtate being equal in Quantity with the Tenancy in Tail after Poſſibility, and conſequently could not merge in it, and ſo could not be Tenant in Tail after Poſſibility, beſides, that ſuch Eſtate is always a Reſidue of an Eſtate Tail, and muſt happen by the Act of God, as by Death, and not by Limitation of the Party, yet it was reſolved that now after ſuch Iſſue's Death ſhe ſhall have the Privilege of ſuch Tenant, by Reaſon of the Inheritance which was once in her. See the Caſe at (I) pl. 5.

For more of Tayle in general, ſee **Deviſe, Eſtates, Fines, Forfeiture, Formedon, Mord'ancestor, Recovery Common, Remainder,** and other Proper Titles.

Tender.

Tender.

(A) *Neceſſary* in what Caſes.

1. IF a Man be *bound to pay Rent-Service, or Rent-Charge*, there he need not to tender it; but it ſuffices to be ready upon the Land; quod non negatur. Br. Tender, pl. 22. cites 14 E. 4. 4.

2. *But Annuity* ought to be tender'd, to ſave the Obligation. Br. Tender, pl. 22. cites 14 E. 4. 4.

3. Per Anderſon, Ch. J. There is a Difference where the *Obligation precedes the Duty*, which accrues by a Matter ſubſequent, and where the *Duty precedes the Obligation*, which was made for the further Aſſurance of the Duty. In the firſt Caſe a Tender muſt be pleaded, and cites 14 E. 4. 4. where A. was bound to B. that whereas he had granted a Rent-Charge, Now if B. ſhould enjoy the ſaid Rent, according to the ſaid Grant, that then &c. He needs not plead any Tender, becauſe the Rent is *not payable in other Manner than it was before.* Contrary if the Condition had been *for Payment of the Money*, or Annuity; and of that Opinion was the whole Court. Le. 71. pl. 95. Mich. 29 & 30 Eliz. C. B. in Caſe of Bret v. Audar, alias Andrews.

4. A Tender is not neceſſary in any Caſes, but *where there is a Penalty.* Per Holt, Ch. J. Comb. 334. Trin. 7 W. 3. B. R. in Caſe of Broome v. Pine.

(B) *Good. In reſpect of the Thing* tender'd.

1. AFter the Fall and Embaſement of Money in 5 E. 6. Debt was brought againſt Executor of Leſſee for Years, for Rent-Arrear for 2 Years *at Mich.* 2 *E.* 6. at which Time the *Shillings, which at the Time of the Action brought were decried to* 6 *d. were current at* 12 *d.* The Defendant pleaded Tender of the Rent at the Days when it was due, in Peciis Monetæ Angliæ vocat Shillings; and ſaid, that every Shilling at the time of the Tender was payable for 12 d. but that the Plaintiff nor any for him was ready to receive it. And concludes, that he is Uncore Priſt to pay the Arrears in Dictis Peciis vocat Shillings, ſecundum Ratam &c. The Plaintiff demurr'd; but afterwards accepted the Money ſecundum Ratam prædictam, without Coſts or Damages. Dav. Rep. 27. in the Caſe of mix'd Moneys, cites D. 81. 6 & 7 E. 6. This Caſe is D. 81. b. pl. 67. Barrington v. Potter.

2. In Debt upon Bond for Payment of 24 l. at 2 ſeveral Days, the Defendant pleaded, That at the Day and Place limited for Payment, *there was current certain Money call'd Pollards, in lieu of Sterling*, &c. and that Defendant, at the firſt Day of Payment, tender'd the Moiety of the Debt in the Money call'd Pollards, which the Plaintiff refuſed; and that he is Uncore Priſt &c. and offers it in Court. And becauſe the Plaintiff did not deny it, it was awarded, That he recover one Moiety in This is at D. 82. a. b. pl. 69. Hill. 6 & 7 E. 6. cites a Book in the Cuſtody of Lord Mountague; but ſays it is

not in his own Book of Pleas of the ſame Year. Pong v. Lindſey & al'.

in Pollards, and the other in pure Sterling Money. Dav. Rep. in the Caſe of mix'd Moneys, cites it adjudg'd 29 E. 1. and reported by Dyer, 7 E. 6. 82. b.

3. The Mortgagor was *bound to pay 250 l. of lawful Money of England*, on a certain Day and Place, and he tender'd Money accordingly; but becauſe *there was 5 s. in Spaniſh Money*, and two foreign Pieces of Gold call'd Double Piſtolets, the Mortgagee refuſed to take it. Adjudged, That Spaniſh Silver was lawful Money of England, being made ſo *by Proclamation*; and that the King, by his abſolute Prerogative, may make foreign Coin lawful Money of England. 5 Rep. 114. Trin. 43 Eliz. C. B. Wade's Caſe.

4. Queen Elizabeth made a large Quantity of *mix'd Money* in the Tower of London, and *ſent it into Ireland to pay the Army* there; *with a Proclamation*, dated 24 May, 43d of her Reign, *That the ſaid Money ſhould be lawful and current* in that Kingdom, and accepted and received as ſuch; and that they who refuſed it ſhould be puniſh'd for a Contempt. *And by the ſame Proclamation ſhe put down*, from the 10th of June next, *all other Coins current there*. A Merchant in Ireland had bought Goods of G. in London, and was bound to G. in a Bond of 200 l. condition'd to pay to the ſaid G. 100 l. Sterling in Ireland on a certain Day, which happen'd after the Proclamation; at which Day the Obligor tender'd the 100 l. in Mix'd Money. Reſolved, That the Tender was good. Dav. Rep. 18. Trin. 2 Jac. The Caſe of Mix'd Money.

Palm. 407. S C. & per Jones; ſo he may E converſo.

5. If a Man be obliged to pay 100 *l. French Crowns*, yet he may tender all in Engliſh Money. Per Jones J. Lat. 84. in Caſe of Ward v. Ridgwin.

2 Salk. 446. S. C.

6. Our Law takes notice of *Guineas*, and they are current here for 20 s. for before Guineas were coin'd there was a 20 s. Piece of Gold, which by Proclamation was raiſed to 21 s. 4 d. whereupon Guineas were coin'd at 1 s. 4 d. leſs. And provided any Piece has *the King's Stamp*, and be coin'd at the Mint, it ſhall be current without Proclamation, in Proportion to its Value. And in Indebitatus Aſſumpſit the Plaintiff need not ſet forth they were Guineas which Defendant received, but ſo much Money received to his Uſe. Per Holt Ch. J. Comb. 387. Mich. 8 W. 3. B. R. Dickſon v. Willowes.

7. Tender of a *Bank Note* is not ſtrictly a legal Tender; but it being proved, that the Plaintiff *offer'd to turn it into Money*, it then became a good Tender. Abr. Equ. Caſes, 319. Hill. 1729. Auſten v. Executors of Sir William Dodwell.

See (D)

(C) Good. *By whom.*

1. TEnder [of Rent-Service] *to the Lord, by one who has only a Leaſe for Term of Years*, is not good. Br. Tender, pl. 2. cites 2 H. 6. 1.——Brooke ſays, it ſeems it is not good at this Day, after the Statute * of 21 H. 8. any more than before.

* See Avowry.

2. In Replevin, Payment *by one Jointenant* is good for all, and againſt all, as Seiſin of Rent obtain'd. Contra of Attornment by the one. Br. Tender, pl. 16. cites 39 H. 6. 2, 3.

3. If a Man grants *an Annuity till the Defendant be promoted to a Benefice by R. the Grantor*, the Tender of the Benefice ſhall be by R. and *not by his Succeſſor*; for the Caſe was by Prior and Covent &c. Br. Tender, pl. 15. cites 14 H. 7. 31. & 15 H. 7. 1.

3. Where

4. Where a *Lord of Parliament is impleaded by Ceſſavit*, if he will tender the Arrears, he ſhall tender them *in proper Perſon*; ſo of all other Tenants *in Ceſſavit*. Br. Tender, pl. 29. cites 15 H. 7. 9.

5. If a *Feoffment be on Condition* that Feoffee pay 20 l. at Michaelmas to the Feoffor, otherwiſe that Feoffor ſhall re-enter, and *Feoffee before the Day enfeoffs J. S.* In this Caſe a Tender *by the Feoffee or J. S.* at Michaelmas is good, and upon Refuſal the Condition is gone. For the firſt Feoffee was *privy to the Condition*, and the 2d *in Eſtate*, and in Judgment of Law has an Eſtate and Intereſt in the Condition for the Salvation of his Tenancy. Litt. S. 336.

S. C. cited Mo. 336. pl. 455. in Englefield's Caſe. —— and 4 Le. 176. pl. 276. in S. C. —— and Pl. C. 291. b. in Caſe of Chapman v. Dalton —— and 5 Rep. 96. b. in Goodale's Caſe. —— S. C. cited per Sir Joſeph Jekyl. 10 Mod. 420. in Caſe of Marks v. Marks.

6. If a Feoffment be made upon *Condition*, That *if the Feoffor pay* ſuch a Sum *to the Feoffee*, then the Feoffor and his Heirs may enter; If the *Feoffee dies before the Payment*, and the Heir will tender to the Feoffee the the Money, ſuch Tender is void, becauſe the Time, within which this ought to be done, is paſt; For when the Condition is, That if the Feoffor pay the Money to the Feoffee &c. this is as much as to ſay, as if the Feoffor during his Life pay the Money to the Feoffee &c. and when the Feoffor dies, then the Time of the Tender is paſt. *But* otherwiſe, *where a Day of Payment is limited, and* the *Feoffor dies before the Day*, then may the *Heir tender the Money*, as is aforeſaid; For that the * Time of the Tender was not paſt by the Death of the Feoffor. Alſo it ſeems, that in ſuch Caſe where the Feoffor dies before the Day of Payment, if the Executors of the Feoffor tender the Money to the Feoffee at the Day of Payment, this Tender is good enough; And if the Feoffee refuſe it, the Heirs of the Feoffor may enter &c. becauſe the Executors repreſent the Perſon of their Teſtator &c. Litt. S. 337.

* See pl. 9. Marks v. Marks.

7. If a Man bring an Action of *Treſpaſs for taking away his Beaſts* or other Goods, there *tender* of ſufficient Amends before the Action brought *is no Barr*, becauſe he that tendered the Amends *is not the Owner* of the Goods, but a Treſpaſſer, whom the Law favours not. 2 Inſt. 107.

8. A *Leaſe* for Years was made upon Condition *to be void by the Tender of* 6 *d.* to the Leſſee *by him in Reverſion*; The *Leſſee entered and was diſſeiſed* by another; The Queſtion was, Whether the *Tender* of the 6 d. to avoid the Leaſe might now be made *by the Reverſioner after the Diſſeiſin*. The whole Court was of Opinion that it might; For this Payment is a collateral Thing. And Judgment accordingly. Bulſt. 118. Paſch. 9. Jac. Platt v. Sleep.

Cro. J. 275. pl. 4. S. C. accordingly.

9. A. *had* Iſſue 3 *Sons*, *B.* his eldeſt, *who died in his Life-Time leaving a Daughter, and C. and D.*—*A. deviſes Lands to his Wife for Life, and after* her Death *to D. and his Heirs, provided*, that *if C.* do, *within* 3 *Months after the Death of the Wife, pay to D.* the Sum of 500 *l. then the Lands to remain to C. and his Heirs. C. died in the Life-Time of the Wife, leaving N. his Heir.* D. enters *within* 3 *Months after the Wife's Death, N. brought a Bill to have a Conveyance on Payment of the* 500 *l.* The principal Point was, Whether this 500 l. being to be paid within a limited Time by C. and he dying within that Time, the *Heir at Law of C. who was not Heir at Law of A.* could now on Payment make a Title. The Counſel for the Plaintiff among other Things, inſiſted on Co. Litt. S. 134. and Coke's Comment thereupon; To which it was anſwered on the other Side, That the Caſe there was but in Nature of a Mortgage; That it was to relieve againſt a Forfeiture by Non-payment of the Money at the Day which may be good, even at Law, much more in this Court; That there was a wide Difference between a Condition Precedent, and a Condition Subſequent, That that was a Condition ſubſequent, and for the reveſting of the Eſtate, and the Condition deſcended on

10 Mod. 419. to 426. Mich. 5 Geo. 1. S. C. Decreed for Plaintiff by the Lord Chancellor, aſſiſted by Sir Joſeph Jekyll Maſter of the Rolls, who obſerved, that this was upon the Caſe of a Will, where the Law has ever allow'd the greateſt Latitude of

Conſtruction, in Support of the Intention of the Teſtator; That Nobody can doubt but the Teſtator's Intention was to give the Land only in the Nature of a Security for 500 l. and that C. was to have the Fee Simple. And Ld. C. Parker ſaid, That tho' the Words of the Will are only, that C. ſhall pay and not that C. and his Heirs ſhall, yet that is only a plain Miſtake in the Will, which is a Conveyance which the Law ſuppoſes to be made when a Man is Inops Conſilii, and therefere allows great Favour to be uſed in its Conſtruction; That if A. had made a Feoffment to D. upon Condition, That if the Teſtator ſhould pay ſo much Money to D. then C. ſhould have Fee, this is a Condition, the Right of performing which deſcends to the Heir of the Teſtator, and the Heir would be at Liberty to take Advantage of it; For the Limitation of the Fee over to C. would be void, by a particular Maxim of the Common Law, which will not allow a Fee to be limited upon a Fee, or by that other Maxim, which excludes a Stranger from taking Advantage of a Condition; That the Teſtator gives the Land to D. redeemable upon the Payment of 500 l. and he gives the Equity of Redemption to C.—C. therefore, ſeem'd to him to have an Equity of Redemption, that remains open to him in a Court of Equity, as well after the Time limited, as before. That indeed there might have been a Difference between this Caſe and the Caſe of a common Mortgage, where, tho' when the Day is paſt, and ſo the legal Eſtate is abſolutely veſted in the Mortgagee, yet in Equity a Right to redeem remains, had C. been to come here for Relief againſt the Heir at Law: But this is not the Caſe; for he comes for Relief againſt a third Perſon, who had the Eſtate veſted in him for no other Purpoſe but to make the Eſtate redeemable; That Payment of a ſmall trifling Sum, may be conſidered rather as a Ceremony than a valuable Conſideration. And this he took to be the Ground upon which the two Judges went, who in the Caſe of **Spring and Cæſar** held the Payment of the 10 s. to be a Perſonal Act; For when the Sum comes to be conſiderable, as here it is 500 l. the Payment of it is never eſteemed a Perſonal Act; And this appears throughout **Engleſield's** Caſe in the 7th Report; That the Caſe of the Feoffment in the Section of Littleton, is parallel in all Reſpects to the preſent Caſe; Parallel as to the Condition, as to the Performance, as to the Effect of the Performance, and differs only as to the Perſon who is to take Advantage of the Performance of it. And this is ſupplied by the Statute of Wills, which gives the 3d Perſon as good a Title to take Advantage of it, as the Feoffor had by the Common Law.

on the Heir, and conſequently might be performed by him, tho' not named; That this was a Condition Precedent, and for the new Creation of an Eſtate in a Perſon who had no Right or Title before, and was not Heir at Law; That this was perſonal in C. That he had not Jus in Re, nor ad Rem, and could neither have deviſed, releaſed, or extinguiſhed this Condition; That it was a bare Poſſibility, and he dying before it was perform'd, his Heir could not make it good. But the Maſter of the Rolls denied this to be a Condition, becauſe ſuch is only to be performed by the Party making it or his Heirs; whereas this is to be perform'd by a 3d Perſon. Nor is it in Nature of a Remainder to C. the Deviſe to D. being not in Tail, but in Fee, and a Remainder can be only after a Tail or leſs Eſtate; So that *this is an Executory Deviſe, or may be called a Poſſibility in the largeſt Extent of the Word, but is not ſtrictly ſuch*; For nothing was veſted in C. which he could either grant or releaſe, nor did any thing deſcend to his Heir: That (Heirs) in this Caſe were not named to take by Purchaſe, but by Deſcent, and the naming them was to denote the Quantity of the Eſtate, and was to take and not to give them any Eſtate originally; and cited 10 Rep. Lampett's Caſe, and Pl. C. Brett v. Rigden. But it was argued, That the Poſſibility of performing this Condition was an Intereſt, or Right, or Scintilla Juris, which veſted in C. himſelf, and that he ſurvived A. and ſo this differ'd from Brett and Rigden's Caſe; And conſequently ſuch Right, Poſſibility, or Intereſt, deſcended to his Heir, and might be perform'd by him, as before the Statute De Donis the Poſſibility of Reverter deſcended to the Heirs of the Donor. The Maſter of the Rolls looking on this as a Caſe of ſome Difficulty, appointed it to be ſpoke to again when the Court is full. Afterwards, in Mich. Term, 5 Geo. 1. It was decreed by Ld. Chancellor and Maſter of the Rolls for the Plaintiff upon Litt. S. * 334, 335, 336, and 337. Co. Litt. 205 &c. And they ſaid, that tho' a Condition was not in Strictneſs of Law deviſeable, yet ſince the Statute of Uſes, the Deviſee may take Benefit of it by an equitable Conſtruction of the Statute; And that C. might have releaſed or extinguiſhed his Right. Chan. Prec. 486. Paſch. 1718. Marks v. Marks.

I have likewiſe a MS. Report of this Caſe, agreeable to the Books above mentioned; and there Ld. C. Parker ſaid, That if the Heir of C. pays, C. pays to all the Purpoſes of the Will, by his Repreſentative; That certainly it is not neceſſary that the Eſtate ſhould veſt in C. in order to deſcend to his Heir; That the Ground of **Wood's** Caſe, [which had been cited, and is in **Shelly's** Caſe, 1 Rep. 99. a.] was, that a Right veſted and deſcended, but here the Condition is ſubſequent in reſpect to D. and precedent to the veſting C.'s Eſtate, and not ſo properly to defeat the Eſtate of D. as to veſt it in C. and

as

as to this the Caſe of Wood is exactly the ſame; and the only Difference between them is, that in Wood's Caſe the Condition was for the Benefit of the Covenantee and his Heirs, but here for a 3d Perſon; That there the old Eſtate is taken, but here C. takes a new one; but that this is a Difference only in Sound, and here it is upon the Operation of a Will, and each Party has the Benefit intended him; If the Eſtate had deſcended to the Heir at Law, C's. Condition would have been precedent, but here the Eſtate being given to D. the Condition is ſubſequent; Be it the one or the other, if it is perform'd it is all one, and the Heir's Payment is a good Payment. The Advantage was veſted in C which he might have releaſed or extinguiſh'd, but not having done ſo, his Heir has it. ——— N. B. It appears by the printed Reports of this Caſe, and likewiſe by the MS. Report, that the Reaſon why this, being a Point purely at Law, was brought into Equity was, that D. had ſo mortgaged and incumbred the Eſtate by a Marriage Settlement on his Wife, that the Plaintiff pray'd Relief, and the Direction of the Court, to whom he ſhould make a Tender of the Money. And Ld. Chancellor (as my MS. Report has it) ſaid, It was proper for the Plaintiff to come here for Relief, becauſe of the Uncertainty to whom the Money ſhould be paid; That perhaps, a Payment to D. would have been a good Payment, according to the Will; but it is a Queſtion if it had been ſecure againſt the Mortgages and Settlements of D. That the Decree muſt be in Nature of a Redemption; That the Money muſt be paid to the Maſter, to be laid out in a Purchaſe of Land to be ſettled to the Uſes of D's. Marriage Settlement, and the Profits in the mean Time during D's. Life, to be paid to his Mortgagee, according to their Priority.

* See Mortgage (N) pl. 1.

(D) Good. *To whom.*

1. IF the *Conuſee upon a Statute Merchant makes Aſſignment after* that he has had *Execution* of the Land by the Statute, Then the Tender of the Money ſhall be made to the Aſſignee, quod nota; And Quære, if it be not good to the Conuſee himſelf. Br. Tender, pl. 38. cites 15 E. 3. & Fitzh. Reſponder, 1.

Tender muſt be to the *Conuſee of a Statute*, and not to the *Aſſignee*. Per Hale Ch. J. Vent. 211. Paſch. 24 Car. 2. B. R. Anon.

2. Tender *to the Aſſignee of the Feoffee*, upon Defeaſance of a Releaſe of Right was pleaded; And quære of it. Br. Tender, pl. 17. cites 17. Aſſ. 2.

Br. Conditions, pl. 103. S. C.

3. Where the *Defendant in Debt will tender the Money to the Sheriff in Pais, or in Præcipe quod reddat will offer to render the Land in Pais to the Demandant*, yet the *Sheriff ſhall not ceaſe to make the Summons, or ſerve the Proceſs*; For if ſuch render may be good againſt the Will of the Parties, then the Plaintiff or Demandant ſhall loſe his Damages, which is not Reaſon. Per Thirning. Br. Tender, pl. 9. cites 11 H. 6. 62.

4. If obligee aſſigns A. to receive the Money at the Day and Place limited in the Bond, a Tender *to A.* is ſufficient. Mo. 37. pl. 120. Trin. 4 Eliz. Anon.

5. *But* where the *Condition is to pay Money to a Stranger*, the Payment be made at the Peril of the Obligor. Mo. 37. pl. 120. Anon.

6. Rent was reſerved payable *at Lady-day or a Month after*; Tender at the Houſe of Leſſor, and Payment there *to the Daughter-in-law of Leſſor (who had formerly received the Rent by Order of Leſſor)* between Lady-day and the Month after, is no good Tender, becauſe before the Month End Leſſor could not diſtrain or have Debt for the Rent. But where the Reſervation is at Lady-day, and the Month after is given only for ſaving a Re-entry, there ſuch Tender was held good by Wray Ch. J. 2 Le. 130. pl. 173. Hill. 28 Eliz. B. R. Crop v. Hambledon.

Mo. 223. pl. 363. S. C. reports the Tender to his Perſon. —— Godb. 38. pl. 43. Croppes's Caſe S. C. reports it tender'd to the Daughter-in-law, and they ſuppoſed Leſſor's Refuſal to be trickiſh; And Judgment againſt him. —Cro. E. 48. S. C. reports that the 2 firſt Payments were *to the Servant*, a 3d Payment to the Leſſor, a 4th Payment to the ſame Servant, who within the 20 Days tender'd it to the Leſſor; per Cur. The Tender out of the Land, at any Time within the Month, is good; And the *Tender by the Servant was as Servant of the Leſſee for that Time*, and all one as if Leſſee had tendered it.

7. A. *was obliged to* B. to the Uſe of C. *to deliver a Cheſt to C. who refuſed to receive it* upon the Tender at the Day; the Obligation was ſaved, becauſe the Obligation was to the Uſe of C. For he ſhall not take Advantage of his own Act. Cited by Glanvile, Cro. Eliz. 755. pl. 16. Paſch. 42 Eliz. in C. B. in Caſe of Huiſh v. Philips, as adjudged between Carne and Savery.

Upon Error brought of this Judgment, it was reſolved, that tho' J. B. was a Stranger to the Recognizance, yet it being averr'd to be made to his Uſe, he ought at his Peril to be ready at the Place every Day to receive it; otherwiſe the Recognizance is not forfeited, when the other does not tender it.

8. Audita Querela by H. ſet forth, That he was *bound in a Statute of 600 l. to P. the Defendant, to the Uſe of J. B.* with a *Defeaſance*, That *if he paid ſuch Sums at ſuch ſeveral Days to J. B. it ſhould be void*; and *that at every of the ſaid Days and Places, he was paratus* to pay the ſaid Sums, *and obtulit them*; and that J. B. was not there. The Defendant *pleaded, That* * *ſuch a Day J. B. was at the Place*, &c. *and demanded the* Sum, *and neither the Plaintiff, nor any for him were there* to pay it, *abſque hoc*; that *the Plaintiff obtulit* the ſaid Sum at the ſaid Day. Upon Demurrer, it was inſiſted for Defendant, That on this Matter an Audita Querela lies not, becauſe J. B. is a Stranger to the Statute; and tho' the Plaintiff tender'd to a Stranger who refuſed, yet the Recognizance is forfeited; for he muſt, at his Peril, procure the Stranger to accept it, when the Act is to be done by a Stranger. But all the Court held, that the Tender was a ſufficient Performance, the Defeaſance being made to the Uſe of J. B. but had he been a meer Stranger, and not to have any Benefit thereof, it would be otherwiſe. Cro. E. 755. pl. 18. Paſch. 42 Eliz. C. B. Huiſh v. Philips.

Judgment was affirm'd. Cro. J. 13 pl. 17. Paſch. 1 Jac. B. R. Philips v. Rice Hugre.——It was not any Duty in J. B. but it is as a Penalty inflicted upon H. that he ſhould pay to J. B. and ſo being a collateral Duty, payable only to J. B. a Stranger, J. B. ought to be there in Perſon, or by Attorney, to receive it; and H. is not conſtrain'd to exceed the Words of the Defeaſance. Per tot. Cur. Yelv. 38. S. C. in B. R.

* It ſeems, by Yelv. ut ſupra, that the Plea of Defendant was, That H. (the Plaintiff) non obtulit at every of the ſaid Days &c. pro Placito dicit quod J. B. dicit, which the Book ſays is as if P. (the Defendant) had told a Tale out of J. B.'s Mouth.

9. A Mortgagee after ſettling an Account with B. the Mortgagor and Time agreed upon for diſcharging the Mortgage died, leaving 4 *Executors in Truſt for his Daughter*; B. on the Day tendered the Money to *one of the Executors* who *refuſed to accept the Tender, neither of them having proved the Will*; Then B. made a like Tender to another of the Executors, who refuſed likewiſe giving the ſame Reaſon. Decreed that this was a good Tender, and that any or either of the Executors might have given a good Diſcharge before Probate, eſpecially when as appeared in the Caſe, they afterwards proved the Will, and ſo were Executors ab Initio; And the Infant Heir at Law was to convey the Inheritance deſcended to her according to the Act 7 *Annæ*, for obliging Infant Truſtees to aſſign and convey. Hill. 1729, at Ld. Chancellor's. Abr. Equ. Caſes 318. Auſtin v. Executors of Sir Wm. Dodwell.

(E) Good. *How.*

1. CONdition was *that the Feoffee ſhall render* certain *Tynn at ſuch a Day*, and he tendered and the other refuſed. The Queſtion was, Whether he ſhall tender the *Price as it was at the Time of the Payment or as it is now* &c. Br. Conditions, pl. 113. cites 30 Aſſ. 11.

S. P. Br. Tender, pl. 39. cites 1 R. 3.

2. It was agreed in Avowry, that where the *Lord diſtrains for 2 Rent Days Arrear*, and the *Tenant offers the one*, the Lord is bound to receive it, and if he diſtrains he does a Tort. Br. Tender, pl. 2. cites 2 H. 6. 1.

3. *But*

3. *But* if he diſtrains *for the Rent of one Day, and Tenant offers Part of it*, the Lord is not bound to receive it, but he may diſtrain. Note the Diverſity. Br. Tender, pl. 2. cites 2 H. 6. 1.

S. P. Br. Tender, pl. 39. cites 1 R. 3.——*So* of the *Part of a Debt.* Br. Tender, pl 39. cites 1 R. 3.——*But if he accepts Part after Judgment*, he cannot demand the reſt. Br. Tender, pl. 39. cites 1 R. 3.

4. The Feoffee may tender the Money *in Purſes or* * *Bags, without ſhewing or telling the ſame*; for he does that which he ought, viz. to bring the Money in Purſes or Bags, which is the uſual Manner to carry Money in, and then 'tis the Part of the Party, that is to receive it, to put it out and tell it. Co. Litt. 208. a.

* S. P. If in Fact there was ſo much Money in them to ſatisfy the Debt; and if there is any *bad Money* in the Bags, and the Mortgagee accepts it, the Mortgagor is not bound to change it. 5 Rep. 115. **Wade**'s Caſe, and ſaid there to have been ſo reſolved in **Winter**'s Caſe, and in the Caſe of **Vane v. Studley**, who put the Money into his Purſe, and after took it out, and told it over again, and found counterfeit Pieces.

So where he brought in a Bag, and caſt it *on the Table before* the Obligee, it was held good. Noy 67. Flower's Caſe.

But where Mortgagor came at the Day and Place, and ſaid to the Mortgagee, *Here I am ready to pay you the* 200*l.* and yet held it all the Time *on his Arm in Bags*, it was adjudged no Tender; for it might be Counters or baſe Money for any Thing appeared; And per Anderſon, it is no good Tender to ſay *I am ready* &c. Noy 74. Suckling v. Coney.

5. *Mortgage* by A. to B. for 400 l. payable at a Day and Place certain. C. prevailed upon B. at the Day to take the Money at C.'s Houſe, and the *Money was told and delivered in Bags to B.* but Differences ariſing between A. and B. C. ſaid if they would not agree they ſhould not have his Money. Per Cur. This was no ſufficient Tender; whereupon A. requeſted C. that he might have the Money to carry to the ſaid Porch of the ſaid Pariſh Church, who was contented, and there B. came to receive it, and A. would not pay it. It was moved, That this was a good Payment to diſcharge the Mortgage; for the Money was told in the Houſe of C. and B. there put it up into Bags; and the ſame is a good Payment and Receipt. But it was anſwered, That this is no Payment; for it was not the Money of A. but of C. as appears by the Words of C. (ſcil.) If they could not agree, they ſhould not have his Money; alſo A. requeſted C. that he might have the Money to carry to the Porch of the Pariſh-Church aforeſaid, by which it appears that it was not A.'s Money. And for that Cauſe it was alſo the Opinion of the Court, that the ſame was not any ſufficient Tender. 2 Le. 213. pl. 268. Trin. 31 Eliz. B. R. Winter v. Loveday.

Ow. 34. S.C. but it is only a very ſhort Note of it.

6. If a Man tenders *more than he ought to pay*, it is good enough, and the other ought to accept ſo much thereof as is due to him. The 3d Reſolution, 5 Rep. 115. a. Trin. 43 Eliz. in C. B. Wade's Caſe.

7. A Man cannot make a Tender, unleſs he *ſhews for what Purpoſe* he makes ſuch Tender; Per Doderidge J. Lat. 70. in Caſe of Warner v. Harding.

8. If a 3d Perſon *puts* the Ring (or other *Thing to be tender'd) into the Hands of the Perſon to whom the Tender is to be made*, and at the ſame Time *declares for what* the other tenders the Ring, 'tis good; Per Doderidge, to which Crew Ch. J. agreed. Lat. 109. in Caſe of Wardner v. Hardwin.

9. The *Defendant agreed to pay* 1500 *l.* to the Plaintiff, *upon* his *aſſigning a Judgment*. Ld. C. Macclesfield declared, that where there are no Words to determine the Priority of the Acts, a middle Way is to be choſen. The Party is *not obliged to make an abſolute Tender* of the Money firſt, *but* by ſuch Words as theſe, *I tender you the Money ſo as you make an Aſſignment*. 2 Barnard. Rep. in B. R. 308. Trin. 6 Geo. 2. in Caſe of Anvert v. Ennover, cites it as Trin. 13 Ann. the Caſe of Turner v. Goodwyn.

10. An

10. An Account was ſettled between B. Mortgagor and A. Mortgagee of what would be due at ſuch a Time, when the Money was agreed to be paid and received, and the Sum was agreed to be 4479 *l.* At the Day fix'd B. tender'd a *Bank Bill of* 4500 *l. to C. the Executor of* the Mortgagee, *to take thereout what was then due for Principal and Intereſt.* C. refuſed to accept the Tender, whereupon B. *ask'd C. if he objected to the Legality of the Tender*, being in a Bank Bill, and not in Money, and that *if he did he would preſently turn it into Money.* Lord Chancellor held that this Tender of a Bank Note was not ſtrictly legal, but ſince it was prov'd that B. offer'd to turn it into Money, it became thereby a good Tender. Abr. Equ. Caſes 318. Hill. 1729. Auſtin v. Executors of Sir Wm. Dodwell.

(F) Place. *At what Place* it may, or ought to be.

1. TEnder of *Homage in a Foreign County*, in which the Land does not lie, is a good Tender. Br. Tender, pl. 30. cites 21 Aſſ. 14.

2. Tender of *Rent* is ſufficient *upon the Land*, and the other cannot diſtrain. Br. Tender, pl. 18. cites 30 Aſſ. 38.

But in *Debt for Rent upon a Leaſe, Tender* of the Rent *upon the Land*, and Refuſal by the Plaintiff, is no Plea. Br. Tender, pl. 22. cites 14 E. 4. 4. ——*Contra in Avowry* for the ſame Rent. Ibid.

But the Book makes a *Quære*, if the Lord had diſtrain'd *for a Fee*, or *Honour*, or for *Suit or Caſtle-Guard*, *or* for *Homage*, what Tender ſhall be made there. See Br. Tender, pl. 31. And 30 Aſſ. 38.

3. If a Man *holds Lands in the County of D. by* 3 *d. Rent*, of which the *Lord has been ſeiſed Time out of Mind at S. in another County*, if the *Lord diſtrains upon the Land*, and the *Tenant tenders the Rent upon the Land*, this is a good Tender, and he ſhall not be compell'd to go to a Foreign County where &c. to tender it there. Br. Tender, pl. 31. cites 30 Aſſ. 38.

4. Where *Rent is reſerved upon a Leaſe for Life*, rendring Rent at Eaſter, *and for Default* of Payment *a Penalty of* 10 *l.* if the *Tenant tenders the Rent to the Leſſor, or is ready to pay upon the Land*, this ſhall excuſe the Penalty. Br. Tender, pl. 11. cites 22 H. 6. 57. Per Newton.

5. If a *Feoffment* in Fee be made, *reſerving* a yearly *Rent*, and for Default of Payment a Re-entry &c. the Tenant needeth not to tender the Rent, but *upon the Land*, becauſe this is a Rent iſſuing out of the Land, which is a Rent Seck; for if the Feoffor be ſeiſed once of this Rent, and after cometh upon the Land &c. and the Rent is denied him, he may have an *Aſſiſe of Novel Diſſeiſin*; for tho' he may enter for the Condition broken, yet he may either relinquiſh his Entry, or have an Aſſiſe. Litt. S. 341.

6. If the Feoffee comes to the Feoffor *at any Place, upon any Part of the Ground at the Day of Payment*, and offers his Rent, tho' not at the moſt notorious Place, nor at the laſt Inſtant, the Feoffor is bound to receive it, or elſe he ſhall not take any Advantage of any Demand of Rent for that Day. Co. Litt. 202. a.

7. Tender being *to be made at a certain Place*, cannot properly be made any where elſe; Per Cur. Freem. Rep. 149. pl. 169. Paſch. 1674. in Caſe of Marſhall v. Wiſdale.

(G) No

(G) *No Place being limited.* In what Caſes it muſt be to the Perſon.

1. WHERE a *Place certain is limited*, and he tenders there, it is ſufficient, tho' none be there to receive it, by ſome, and ſo is Littleton. But *where no Place is limited*, he ſhall tender to the Perſon, or upon the Tenements. Contrary upon the Tenements by Littleton, upon Mortgage; and Payment elſewhere, where the Party receives it, is good. Br. Conditions, pl. 103. cites 17 Aſſ. 2.

Br. Tender, pl. 17. cites S. C.

2. In *Debt of* 20*l.* the *Plaintiff declared upon Indenture made of a Leaſe for Term of Years to the Defendant, rendering* 10*l. Rent at Eaſter, and other Covenants*, and ſhew'd what &c. ex utraque Parte, *and ad omnes conventiones prædict. perimplendas, each of them for his Part bound themſelves to the other in* 20*l.* and that the Defendant did not pay the 10l. at Eaſter laſt, and therefore he demanded the 20l. The Defendant *pleaded, That at Eaſter* &c. *he was all the Day upon the Land, ready* to pay the 10l. *and none came of the Part of the Plaintiff to receive &c.* And per Newton, Aſhton, and Port. in Debt upon a Leaſe for Term of Years, *Tender upon the Land is a good Plea in Excuſe of Damages: But where a collateral Surety is found by another Deed, or the Party binds himſelf by Obligation to pay it at the Day in the Indenture*, this does not depend upon the Leaſe, therefore there he ought to inquire him out where he is, and to tender Payment to him. But in this Caſe where it is in the Indenture of Leaſe, this refers to the Payment in the Indenture of Leaſe, which is to be made upon the Land, and therefore a good Plea; quod nota, *Diverſity* where it is *by the Indenture of Leaſe*, and where it is *by another Indenture or Obligation*. Br. Tender, pl. 11. cites 22 H. 6. 57.

Br. Dette, pl. 102. cites 22 H. 6. 5.—If a Man *leaſes for Years, rendering Rent at Michaelmas, and other Covenants*, if he be bound in *an Obligation to pay the Rent preciſely*, there he ſhall ſeek the Leſſor. Br. Tender, pl. 20. cites 6 E. 6.—— Br. Tender, pl. 11. cites ſuffices, becauſe *there the Payment is of the Nature of the Rent reſerved.* Contra in the firſt Caſe. Br. Tender, pl. 20. cites 6 E. 6.——Br. Tender, pl. 11. cites S. C.

S. C.——*But* if he be bound *to perform the Covenants* &c. there Tender upon the Land

3. Some ſay, if the *Feoffor* upon Condition be *upon the Land ready to pay*, at the Day ſet, and the *Feoffee is not then there*, the Feoffor is quit, and excuſed of the Payment, for that no Default is in him. But ſome think that the Law is contrary, and that he is *bound to ſeek the Feoffee*, if he be *in England*. As if a Man be *bound in* 20*l.* upon Condition *to pay to the Obligee, at ſuch a Day*, 10*l.* the Obligor muſt ſeek the Obligee, if he be in England, and at the Day tender unto him the ſaid 10l. Litt. S. 340.

It has been oftentimes reſolved, that ſeeing the Money is a Sum in Groſs, and Collateral to the Title of the Land, that the Feoffor muſt tender the Money to the Perſon of the Feoffee, according to the latter Opinion; and it is not ſufficient for him to tender it upon the Land; otherwiſe it is of a Rent that iſſues out of the Land. But if the *Condition* of a Bond or Feoffment be *to deliver* 20 Quarters of *Wheat*, or 20 Load of *Timber*, or ſuch like, the Obligor or Feoffor is not bound to carry the ſame about, and ſeek the Feoffee; but the Obligor or Feoffor, before the Day, muſt go to the Feoffee, and know where he will appoint to receive it; and there it muſt be deliver'd. And ſo note a Diverſity between Money and *Things ponderous*, or of great Weight. If the Condition of a Bond or Feoffment be to make a Feoffment, there it is ſufficient for him to tender it upon the Land, becauſe the State muſt paſs by Livery. Co. Litt 210. b.

4. If the *Obligee* &c. be *out of the Realm* of England, the Obligor &c. is not bound to ſeek him, or to go out of the Realm unto him; and becauſe the Feoffee is the Cauſe that the Feoffor can't tender the Money, the Feoffor ſhall enter into the Land, as if he had duly tender'd it according to the Condition. Co. Litt. S. 210. b.

(H) Time. *At what Time* it may or ought to be made.

Br. Tender, pl. 11. cites S. C. ——— Where a Man *leaſes* Land *for Years, rendering Rent, and for Default* of Payment *to re-enter*, it ſuffices for the Leſſee to *tender* the Rent *upon the Land the laſt Hour of the laſt Day of the Month, if the Money can be number'd in this time*; and ſo it ſuffices for the Leſſor to demand it the ſame Hour. Br. Tender, pl. 41. cites it as agreed, 4 M. 1. in the Serjeants Caſes.—B. N. C. pl. 483. cites S. C.—S. P. Br. Entre Cong. pl. 90. cites 6 H. 7. 3.

1. WHERE a Man leaſes rendering Rent, and for Non-payment by one Month to re-enter, and the *Tenant tenders upon the Land all the Day*, and the *Leſſor does not come*; or if he *tenders to the Perſon of the Leſſor, and he refuſes it*, in thoſe Caſes, if he does not pay within the Month, the Leſſor cannot enter; per Newton. Brooke ſays, *Quære* inde; for it has been uſed, that if he *demands it the laſt Day of the Month*, or the laſt Inſtant, and the other does not pay, that he may re-enter. But ſee there, by the Opinion of Newton, that the Tenant who tenders ought to be there all the Day. Quære inde; for it ſuffices to the Leſſor to come the laſt Inſtant of the Day. Br. Conditions, pl. 60. cites 22 H. 6. 57.

2. If a Man be *bound in a ſingle Obligation*, and no Day of Payment is limited, this is not payable before *Requeſt*; quod nota bene. Br. Tender, pl. 14. cites 14 H. 8. 29.

3. If the Lord or his Bailiff comes to *diſtrain* the Beaſts or Goods of his Tenant *for* his *Rent behind*, the Tenant before the Diſtreſs (that he may keep and uſe his Beaſts or other Goods) may upon the Land tender the Arrearages; and if, after that, a Diſtreſs be taken, it is wrongful. And if the Lord have diſtrain'd, if the Tenant, *before the Impounding* of them, tender the Arrearages, the Lord ought to deliver the the Diſtreſs; and if he does not, the Detainer is unlawful. 2 Inſt. 107.

* S. P. *But if by Uſage* of a Company, the time of Transfer is at a *ſet Time*, that *muſt be averr'd*. As if the Uſage be, that the Books are open till Six o'Clock only; the proper time to come will be about Five, and to ſtay till Six. And Judment for Defendant per tot. Cur. 12 Mod. 533. Trin. 13 W. 3. Lancaſhire v. Killingworth, cites Shales v. Seignoret. ——— 3 Salk. 342, 343. S. C. accordingly. ——— Ld. Raym. Rep. 688. S. C. & P. accordingly.

4. Tho' where the *Time* of Payment, by force of a Condition, *being* * *indefinite*, the moſt convenient time is the laſt Hour of the Day appointed, in which the Money may be told before Sun-ſet; yet if *Tender* be made *to the Perſon at the Place* ſpecified, *at any time of the Day*, and refuſed, the Condition is ſaved, and no new Tender need be at the laſt Inſtant. For by the very Letter of the Condition the Money is to be paid upon the Day indefinitely, and convenient time before the laſt Hour of the Day is the extreme time appointed by the Law, to the Intent the one ſhall not prevent the other, but both be there at the ſame time. But if both meet at any time of the ſame Day, and the Debtor makes Tender at the Place to the Debtee, and he refuſes, the Penalty is ſaved for ever. Reſolved. 5 Rep. 114. b. Trin. 43 Eliz. C. B. Wade's Caſe.

5. Condition for Payment of Money at or before ſuch a Day; upon which Debt was brought, and the Defendant *pleaded*, *That he was at the Place at a Day before, and tender'd* the Money; *and* that the *Plaintiff* was *not there* to receive it; and held no good Plea. For tho' he had Election to pay before, or at the Day, yet he cannot make Tender before the Day, if Plaintiff be not there willing to receive it; and you cannot compel him to receive it ſooner. Therefore the laſt Day, which is the Day appointed by both Parties, they ought to meet, one to tender, the other

other to receive. Per Cur. 12 Mod. 422. Mich. 12 W. 3. B. R. in Caſe of Hammond v. Ouden.

(I) Time. *Notice.* In what Caſes, *where no Time is limited,* Notice muſt be given.

1. IF a Man be *bound to pay 20 l. at any time during his Life, at a Place certain,* the Obligor cannot tender the Money at the Place when he will; for then the Obligee ſhould be bound to perpetual Attendance. Therefore the Obligor, in reſpect of the Uncertainty of the Time, muſt give the Obligee Notice, That on ſuch a Day, at the Place limited, he will pay the Money; and then the Obligee muſt attend there to receive it; for if the Obligor then and there tender the Money, he ſhall ſave the Penalty of the Bond for ever. Co. Litt. 211. a.

2. *So* if a Man make *a Feoffment in Fee upon Condition,* if the Feoffor, at any time during his Life, pay to the Feoffee 20 l. at ſuch a Place certain, that then &c. In this Caſe, the Feoffor muſt give Notice to the Feoffee when he will pay it; for without ſuch Notice, the Tender will not be ſufficient. Co. Litt. 211. a. See Condition, (F. c) pl. 1.

3. But in both the above Caſes, if at any time the Obligor or Feoffor *meets the Obligee* or Feoffee *at the Place,* he may tender the Money. Co. Litt. 211. a.

4. If *A.* be *bound to B.* with Condition, *That C. ſhall infeoff D. at ſuch a Day,* C. muſt give Notice to D. thereof, and requeſt him to be on the Land at the Day, to receive the Feoffment; and in that Caſe he is bound to ſeek D. and to give him Notice. Co. Litt. 211. a.

5. A *Bargain and Sale* of Lands was made by A. *to B. and C. with a Power of Revocation upon the Tender of 20 s. to them, or either of them, at a certain Place.* The Tender was made accordingly; but neither *B. or C.* was there preſent, neither *had* they *any Notice of the Time of the Tender.* It was held, that this was no Performance of the Condition, to avoid the Bargain and Sale. Moor 602. pl. 833. in Chancery, Trin. 42 Eliz. Lady Burgh v. Williams, Powell, & al'.

6. The Defendant was *bound to deliver* 10 *Quarters of Corn* to the Plaintiff, *at or before ſuch a Day*; and he pleads that he tender'd it to him at ſuch a Place before the Day, and none would receive it, and does *not ſay that he went to him before to know where he would receive* it, and tender'd it accordingly; and it was held no good Plea. Freem. Rep. 433. pl. 582. Trin. 1676. Harvey v. Jackſon.

(K) To whom, and How, *to revoke Grants &c.*

1. COnuſee of a Fine made a *Leaſe for Life to a Stranger, Remainder to the Queen* by Deed inroll'd, *upon Condition to be void upon Tender of ſo much Money to the Stranger Tenant for Life*; One Queſtion was, whether the *Tender* of this Money *to the Stranger ſhall deveſt the Remainder out of the Queen.* Adjudged that it ſhall deveſt it without Office, becauſe the Condition is not to be performed to the Queen, but to the Tenant for Life. Mo. 546. pl. 729. Hill. 40 Eliz. Hemley v. Brice. Hemſley v. Price, S. C. Cro. E. 639. pl. 41. Mich. 40 & 41 Eliz. B. R. reports, That all the Court, except Gawdy, held, That the Entry is lawful upon the Tenant for Life, and the Franktenement being defeated, the Queen's

Queen's Eſtate is defeated, ſhe being the Perſon againſt whom the Freehold was demandable and recoverable; but that if the Queen had had the immediate Eſtate, it had been otherwiſe.

2. Power reſerved upon Feoffment by A. to B. that if A. or his Aſſigns, ſhall tender 1 s. *to B. or his Aſſigns*, at or in &c. B. died, leaving a Daughter, and his Wife enſeint of a Son; A. pays the 1 s. to the Daughter, who was *not 3 Years old*, and then revoked and altered the Uſes; this is a good Tender and Revocation. Ley 55. Trin. 15 Jac. Allen's Caſe.

3. A *Mortgage was forfeited*; Mortgagor afterwards meeting the Mortgagee, ſaid, I have Money, now I will come and redeem the Mortgage; Mortgagee replied, He would hold the mortgaged Premiſſes as long as he could, and when he could hold them no longer, let the Devil take them, if he would. *After Mortgagor went to Mortgagee's Houſe, with Money more than ſufficient to redeem, and tender'd it there*; But it does not appear that the Mortgagee was within, or that the Tender was made to him. It was decreed a Redemption, and the Defendant to have no Intereſt from the Time of the Tender, becauſe of his *Wilfulneſs*. Chan. Caſes 29. at the Rolls, Mich. 15 Car. 2. Manning v. Burges.

(L) Tender *of Amends. To whom* it may be.

S. C. cited per Cur. Cro. J. 377. pl. 4. in Caſe of Wingfield v. Bell.

1. TEnder of Amends *to the Bailiff* is not good; for he cannot deliver the Diſtreſs after it is taken, any more than he can change the Avowry of his Maſter &c. Reſolved 5 Rep. 76. a. Paſch. 43 Eliz. B. R. Pilkington's Caſe.

——Roll. Rep. 258. in S. C.——Cro. E. 813. pl. 1. Pilkington v. Haſtings, S. C. all the Court held that the Tender to the Servant was not ſufficient, eſpecially the Maſter being preſent at the Diſtreſs; but if the Servant only had diſtrained, Gawdy ſaid, that then the Tender to him might have been more colourable; And Popham ſaid, if it had been *to the Bailiff of the Manor*, it might perhaps have been good, but not to a Servant who only join'd in the Diſtreſs; and therefore adjudg'd for the Avowant.——The Offer of Amends cannot be made *to him that makes Cognizance*. Brownl. 173. Hill. 9 Jac. Roberts v. Young.

Holt ſaid, that it was not yet ſettled whether, *after Return irrepleviſable*, if Party tenders Arrears to *Bailiff*, it be good to intitle him to Action for *Detainer* againſt Principal, tho' it be ſo ſettled in Caſe of Tender to Principal in Carpenter's Caſe, 8 Co. And he ſaid that he was not ſatisfied with Pilkenton's Caſe in that Point; for if Bailiff may not diſtrain, nor receive Money tender'd, why ſhall his Receipt abate a Writ? 12 Mod. 354. in Caſe of Horn v. Luines.

(M) *Damage feaſant. Tender of Amends.* At what Time, and how much.

F. N. B. 69. (G) in the new Notes there (a) cites 27 E. 3. 8. b. 45 E. 3. 9.

1. * IF a Man takes Beaſts Damage feaſant, and the other offers ſufficient Amends, and he *refuſes to re-deliver* them, now if he ſue *Replevin* he ſhall recover *Damages* for the *Detinue* of them, and not for the Taking them, becauſe the Taking was lawful. F. N. B. 69. (G)

But if the other had them in the Pound before Amends tender'd, it is then too late to tender the Amends; and on the Avowry the Defendant ſhall have no Return till a new Tender, and then the Party may have Detinue; Quære. 13 H. 4. 17. 14 H. 4. 4. And if he tenders before the Taking, the Taking

Taking is tortious. 7 E. 4. 8. And if immediately on the Taking, the Detainer is ſo, and he may recover Damages for it, and no Return ſhall be awarded to the Lord. 45 E. 3. 9.——S. P. 2 Inſt. 107.——S. P. *But* Tender *after Impounding* makes neither the one nor the other tortious; for then this comes too late, becauſe then the Cauſe is put to Trial at Law to be determined. But after the Law has determined it, and the Avowant has Return irrepleviſable, yet if Plaintiff makes him ſufficient Tender, he may have Action of *Detinue* for the detaining them after, or he may, upon Satisfaction made in Court, have Writ for the Re-delivery of his Goods. 8 Rep. 147. a. b. in a Nota of the Reporter, in the 6 Carpenter's Caſe, cites 13 H. 4. 17. b. 45 E. 3. 9. Regiſt. Judicial 37.

* S. C. cited 8 Rep. 146. b. Per Curiam, in the 6 Carpenter's Caſe.——And in Litt. Rep. 34. Paſch. 2 Car. in C. B. Arg. in Caſe of Beare v. Hodges.——And in Het. 16. S. C. which ſeems to be a Tranſlation from Litt. Rep.

2. In Replevin the Defendant avows for Damage feaſant; the Plaintiff replies that the Day after the Diſtreſs taken, he tender'd ſufficient Amends, viz. 6 d. which the Defendant refuſed; upon which the Plaintiff *demurr'd, becauſe the Tender was not before the Impounding.* Per Gawdy, The Tender is good, altho' the Cattle be impounded; and if the Party that diſtrained refuſes it, the Owner may take them out of Pound. And it is clear, if the Tender were before the Impounding, he might take them out; Quod fuit conceſſum: Whereupon the Court gave Day to the Defendant to ſhew Cauſe to the contrary, otherwiſe Judgment ſhall be given for the Plaintiff; but Tanfield at the Bar, ſaid it was adjudged in Sir **Henry Cromwell**'s Caſe in C. B. that Tender after Impounding comes too late. Cro. Eliz. 332. pl. 10. Trin. 36 Eliz. B. R. Nevill v. Seagrave.

When a Diſtreſs is taken for Damage feaſant, the Party may tender Amends till the Beaſts are impounded, but after they are in Cuſtodia Legis, then the Tender comes too late. Reſolved per tot. Cur. 5 Rep. 76 a. Paſch. 43 Eliz. B. R. Pilkington's Caſe.——Cro. E. 813. pl. 1. **Pilkington v. Haſtings and Peacock**, S. C. accordingly, and cited 13 H. 4. 7. 27 E. 3. 88.——S. C. cited Litt. Rep. 355. Hill. 6 Car. in C. B. in the Caſe of **Jennings v. Couſins**, and agreed to be good Law, that it ought to be before the Impounding.——Het. 165. S. C. accordingly.

3. In Replevin the Defendant avowed for Damage feaſant; the Plaintiff replied, that he tender'd Amends *after the Taking, and before the Delivery* of the Cattle. The whole Court held the Replication naught; that the Tender was ill, becauſe the Words (Before the *Delivery*) *implies that they were impounded*; and it is not ſhewn in certain that the Tender was before. And Judgment for the Defendant. Het. 165. Hill. 6 Car. C. B. Jennings v. Couſins.

Litt. Rep. 355. S. C. accordingly, and Het. ſeems to be only a Tranſlation from Litt. Rep.—Freem. Rep. 339. pl. 419.

Trin. 1673. **Ayre v. Ruſhton**, Same Plea of Tender of Amends Poſt Captionem & ante Deliberationem; and the Court reſolved it was naught; for the Tender ought to be before the Impounding, according to **Pilkington**'s Caſe. 5 Co. 76. Et *ante Deliberationem* implies, that it was after the Impounding, and ſo comes too late. Twiſden ſaid, Perhaps he might mean that the Tender was before the Replevin, and ſo might be good by Stat. 21 Jac. 1. cap. 16. But per Curiam, That extends only to Actions of Treſpaſs.

4. Replevin, the Defendant juſtifies Damage feaſant; the Plaintiff replies, that *after the Impounding* he tender'd Amends, viz. 5 s. And the Defendant demurs, and Judgment was given without Argument for the Defendant; for Tender after Impounding is too late, and this *is not within the Statute of* 21 *Jac.* of Tender before Action brought; for that is in Actions Quare clauſum fregit, and not in Replevin. Freem. Rep. 527. pl. 711. Trin. 1680. C. B. Twinning v. Stephens.

5. If Beaſts *have done Damage* To-day, *and gone off*, and *come again* at another Time, and are doing Damage, and are taken for that, and the Owner tenders *Amends for that Damage*, the Party cannot juſtify keeping them for the firſt Damage; Per Holt Ch. J. 12 Mod. 660. Hill. 13 W. 3. in Caſe of Vaſper v. Edwards.

(N) Tender *and Refuſal.* In what Caſes it ſhall be a *Diſcharge of the Debt.*

1. IN Debt upon a Leaſe for Years rendring Rent a *Tender of the Rent upon the Land, and Refuſal* by the Plaintiff, is no Plea. Contra in an Avowry. Br. Avowry, pl. 140. cites 14 H. 4. 4.

2. Where a Man is *bound in* 60 *l. to pay* 40 *l.* if he *pleads Tender of the* 40 *l. in Action of Debt brought againſt him of the* 60 *l.* he ought to ſay that he is yet ready, and always has been to pay the 40 l. and bring the Money into Court, becauſe *the leſſer Sum is Parcel of the greater Sum* expreſs'd in the Obligation, and the Refuſal of this ſhall not ſerve it; for it is Parcel &c. Br. Tout temps priſt, pl. 31. cites 20 E. 4. 1. Per Brian & Cur.

But if the Obligation be of 60 l. *to infeoff the Plaintiff by a Day, or to deliver to him a Horſe* &c. *which is not Money*, tender by the Defendant and Refuſal by the Plaintiff is ſufficient for the Defendant for ever. Br. Tout temps priſt, pl. 31. cites 20 E. 4. 1. per Brian & Cur.

3. Where the *Defendant pleads Tender* of the Money, *and brings it into Court*, and the *Plaintiff takes another Iſſue for making the Defendant to forfeit the whole Obligation, if* the *Iſſue paſſes againſt the Plaintiff*, he has loſt the Money tender'd for ever. Br. Conditions, pl. 171. cites 21 E. 4. 25.

As if an *Obligation of* 100 *l.* be made with Condition for the Payment *of* 50 *l.* at a Day, and at the Day the Obligor tenders the Money, and the Obligee refuſes the ſame; yet in Action of Debt upon the Obligation, if the Defendant pleads the Tender and Refuſal, he muſt alſo plead, that he is yet ready to pay the Money, and *tender the ſame in Court*; but *if the Plaintiff will not then receive it*, but takes *Iſſue upon the Tender*, and the ſame be found againſt him, he has * loſt the Money for ever. Co. Litt. 207. a.——S. P. Hob. 198, 199. Obiter, in Caſe of Brickhead v. Archbiſhop of York.

* For he has renounc'd the Condition, and the Benefit of it, by not praying Judgment for the 50 l. and there is no Confeſſion in this Caſe. Jenk. 102. pl. 99.

The *Reaſon* wherefore in the Caſe of the Obligation, the Sum mentioned in the Condition is not loſt by the Tender and Refuſal, is not only for that it is a Duty and Parcel of the Obligation, and therefore is not loſt by the Tender and Refuſal, but alſo for that the Obligee has Remedy at Law for the ſame. And in this Caſe *Liberata Pecunia non liberat offerentem.* Co. Litt. 207. a.

4. If a *Feoffment* be made in Mortgage, *upon Condition that the Feoffor ſhall pay* ſuch a Sum *at ſuch a Day* &c. if * *Tender* of the Money *is made* &c. and the *Feoffee refuſes* to receive it, by which the *Feoffor or his Heirs enter* &c. then the Feoffee has no † Remedy by the Common Law to have this Money, becauſe it ſhall be accounted his own Folly that he refuſed the Money, when a lawful Tender of it was made unto him. Litt. Sect. 335.

* Here is implied at the due Time and Place, according to the Condition. Co. Litt. 207. —

† The Reaſon is, becauſe *the Money is* ‡ *collateral to the Land*, and the Feoffee has no Remedy therefore. Co. Litt. 207. a.

‡ See pl. 8. the Caſe of Genne v. Tinker.

5. Note, that *in all Caſes of Condition for Payment of a certain Sum in groſs, touching Lands* or Tenements, if lawful Tender be once refuſed, he which ought to tender the Money is of this quit, and fully diſcharg'd for ever after. Litt. S. 338.

This is to be underſtood, that he that ought to tender the Money is of this diſcharged for ever to make any other Tender, but *if it were a Duty before*, tho' the Feoffor enters by Force of the Condition, yet the Debt or Duty remains; as if A. borrows 100 l. of B. and after mortgages the Land to B. upon Condition for Payment thereof, if A. tender the Money to B. and he refuſes it, A. may enter into the Land, and the Land is freed for ever of the Condition, but yet the Debt remains, and *may be recovered by Action of Debt*; *but if* A. without any Loan, Debt or Duty preceding, infeoff B. of Land, upon Condition for the Payment of 100 l. to B. *in Nature of a Gratuity* or Gift: In that Caſe, if he tender the 100 l. to him, according to the Condition, and he refuſes it, B. has no Remedy therefore; and ſo is our Author in this and his other Caſes of like Nature to be underſtood. Co. Litt. 209. a. b.

6. If

6. If a Man make an *Obligation* of 100 l. with Condition *for the Delivery of Corn* or Timber, &c. *or* for the *Performance of an Arbitrement* of the doing of any Act, &c. this is *collateral* to the Obligation; that is to say, is not Parcel of it; and therefore a Tender and Refusal is a perpetual Bar. Co. Litt. 207. a.

7. *A.* by Indenture *articled to pay to B.* 110 *l. at a certain Day, and B.* by the same Indenture *articled upon the Receipt to give an Acquittance*, and also *to enter into Bond of* 400 *l. to A. to save him harmless from all Claims to certain Lands* &c. *A. tender'd* the 110 l. but *B. refused* to receive it and to give A. Acquittance, and likewise to enter into the Bond. After the Court had taken Time to advise, Glyn Ch. J. said, that here is no Breach of Covenant alledged to ground the Action upon; For the Articles express, that upon the Receipt of the 110 l. the Defendant would give the Acquittance and enter into Bond, and the Breach alleged is, that the Plaintiff tender'd the 110 l. at the Day, and the Defendant refused to receive it, and has not sealed the Acquittance, nor given the Bond of 400 l. and it may be it was the Intent of the Parties, that it should be in the Election of the Defendant either to receive the 110 l. or not to receive it, and the Plaintiff is not prejudiced by the Defendant's not receiving of it; For if he should sue for the 110 l. the Plaintiff may plead *this Tender and Refusal* against him, and that *will be judged a Payment*, and when he sues you for the 110 l. you may sue him for the Acquittance and the Bond. Nil capiat per Billam, nisi &c. Style 481. Trin. 1655. London v. Craven.

S. C. cited 6 Mod 35. per Holt Ch. J. in Case of Squire v. Grevil, but cites it by the Name of Lutton v. Craidon, in the latter End of Styles, That where a thing is awarded to be done on Payment and Receipt, Tender of the Payment and Refusal intitles the Party to it as much as an actual Payment; And said, That the Authorities have been so ever since. ——— But in 2 Ld. Raym. Rep. 964. in S. C. by Name of Squire v. Grevet, it is mention'd as said, by Holt Ch. J. that a Tender and Refusal has been formerly held no Performance without actual Payment as in the Case of * Hunt v. Craven; But that it has been adjudged otherwise ever since.

* This seems to mean the Case of London v. Craven, which is above, and cited contra per Holt, in 6 Mod. 35. For I do not find any other Case of like Name and like Point in all the Books of Reports.

8. Debt upon a *Bond, that the Defendant and 2 others should perform an Award* between them and the Plaintiff. The *Defendant pleaded the Award*, which was, *that he should pay to the Plaintiff* 20 *s. and likewise* 20 *s. to each of the others*; and that he tender'd his 20 s. which the *Plaintiff refused* to accept. The Plaintiff *replied, That* on such a Day, *after the Refusal, he demanded* the 20 s. of the Defendant, which he then refused to pay. And upon Demurrer, the Court held this Replication idle, because by the first Refusal the 20 s. being a *Sum collateral to the Obligation*, was lost for ever. 3 Lev. 24. Mich. 33 Car. 2. C. B. Genne v. Tinker.

9. *Award was* to pay 10 l. to B. and upon Payment B. to release. B. would not receive the 10 l. because he would not release. Resolved, B. was as much oblig'd to release upon the Tender and Refusal, as if he had actually received the Money. 1 Salk. 75. pl. 14. Trin. 2 Annæ, B. R. Simon v. Gavil.

6 Mod. 33. Squire v. Grevel, S.C. accordingly. —— 2 Ld. Raym. Rep. 961. Squire v. Grevet, S C. accordingly. ——— Vent. 167. Mich. 23 Car. 2. B. R. in Case of Isaac v. Levingham, the same Point exactly was cited by Twisden J. to have been resolved. —— By Tender of the 10 l. the Obligation is saved. Cro. E. 4. pl. 1. Pasch. 24 Eliz. B. R. Eccleſtade v. Maliard.

(O) Tender

(O) Tender and Refuſal. In what Caſes it ſhall be a Diſcharge *of Intereſt.*

1. IF Money be tender'd, and *none ready to receive* it, and afterwards he to whom the Money is payable *demands the Money*, and the other refuſes to pay; and afterwards an *Action is brought*, and a Tender pleaded, Defendant ſhall pay *Damages from the Time the Money was demanded.* Per Cur. Brownl. 71. Paſch. 12 Jac. Anon.

2. Tho' a *Bond* be forfeited, if the Money be tender'd afterwards, no Intereſt ſhall be allow'd after the Tender. Toth. 89. cites 12 Car. Malton v. Pennell.

See (K) pl. 3. S. C.

3. If *Morgagor tenders* the Money, and *Mortgagee refuſes* it, Mortgagee ſhall have no Intereſt from the Time of the Tender. 2 Freem. Rep. 174. pl. 230. 26 Oct. 15 Car. 2. Manning v. Burgeſs.

4. A Deed was in Nature of a Mortgage, and Covenant to reconvey on Payment. The Money was tender'd at the Day and Place, and refuſed. Decreed the Money *without Intereſt from* the Time of *the Tender*, and to reconvey; tho' the Plaintiff ought to make Oath, that the Money was kept, and no Profit made of it. 2 Chan. Caſes, 206. Trin. 27 Car. 2. Lutton v. Rodd.

5. On a Bill to foreclоſe a Mortgage, Defendant anſwer'd, That 2 *Perſons* (naming them) offer'd to pay, and *tender'd to the Plaintiff all his Principal and Intereſt*, then due on the *Mortgage*, and this before a Declaration in *Ejectment* was deliver'd; and Defendant brought a Croſs Bill to redeem. Decreed the Principal, and Intereſt to be paid to the *Time of the Tender*, at a Place and Time to be appointed by the Maſter, diſcounting the mean Profits &c. Fin. R. 379. Trin. 30 Car. 2. Newby v. Cooper.

6. A. lent B. 1000 l. in London, for ſecuring which B. mortgaged Lands to A. but in the Mortgage-Deed no Place was mention'd where the Payment ſhould be. But afterwards B. gave 6 *Months perſonal Notice in Writing* to A. *that he would tender the Money and Intereſt ſuch a Day and Hour in Lincoln's-Inn Hall*, which he accordingly did. B. brought a Bill for a Re-aſſignment, and to ſtop Payment of Intereſt. It was inſiſted, that in this Caſe the Tender muſt be to the Perſon. But Ld. C. King ſaid, That the Money being lent in Town, and perſonal Notice given for Payment thereof, and no Objection made by A. to the Place at the Time of the Notice, it would be hard to make B. travel with ſo much Money to Oxford, where A. lived; but that *it ought to appear that B. from that Time always kept the Money ready:* Whereas it being proved, that B. was not ready to pay it, the Intereſt muſt run on. And decreed A. to re-aſſign to B. or his Order. 2 Wms.'s Rep. 378. Mich. 1726. Gyles v. Hall.

7. A. Mortgagor, and B. Mortgagee in Fee, ſettled an Account, and agreed on a Day for Diſcharge of Principal and Intereſt. B. died before the Day, leaving 4 *Executors in Truſt for his Daughter and Heir.* A. at the Day tender'd the whole Money *to one of the Executors, who refuſed to accept it, becauſe neither of the 4 had proved the Will.* Then A. tender'd it to another, who refuſed it for the ſame Reaſon, and becauſe it was in a *Bank Bill*; but as to that, A. of himſelf had propoſed to turn it into Money, if he objected to the Bill. Lord Chancellor held, That tho' the Tender of a Bank Note might not be, ſtrictly ſpeaking, legal; yet the *Offering to turn it into Money*, made it good; that any or either of the Executors might have receiv'd and diſcharg'd the Debt, before Probate; and that their being Executors in Truſt for an Infant, did not put them on a better Foot than B. himſelf would have been, had he been living. And decreed a Redemption, on Payment of Principal and Intereſt to the Day agreed upon, and no longer, and no Coſts on either Side;

Side; and the Infant Heir, on Payment to the Executors, to convey as by the Act 7 *Annæ*. Abr. Equ. Caſes, 318, 319. Hill. 1729. Auſtin v. Executors of Sir Wm. Dodwell.

(P) Tender and Refuſal. Bar *of Coſts and Damages.*

See (Q) pl. 14.

1. A. Recover'd Debt, and then brought a new Action of *Debt on the Judgment*; and Defendant pleaded a Tender of the Money *before the Action brought, & Uncore Priſt.* The Plaintiff could have no Coſts. Vent. 21. Paſch. 21 Car. 2. B. R. Anon.

2. Though a Tender is made, and the Plaintiff refuſes the Money, yet the Tender *cannot be pleaded in Bar* of the Action; neither *in Debt nor Aſſumpſit*, but in Bar of the Damages only; for the Debtor ſhall nevertheleſs pay his Debt. Per Holt Ch. J. Lord Raym. Rep. 254. Mich 9 W. 3. Giles v. Hartis.

3 Salk. 343. S. C. — The pleading a Tender in Aſſumpſit, may excuſe from *Damages for the Delay*; but not as to the principal Damage. Comb. 334. Trin. 7 W. 3. B. R. in Caſe of Broome v. Pines.

Tender can be pleaded to an *Avowry* only in Excuſe of Damages; and if pleaded in Bar, it is ill. Per tot. Cur. Ld. Raym. Rep. 644. Hill. 12 W. 3. Horne v. Lewin.

3. In an *Indebitatus Aſſumpſit*, if the Tender had been *pleaded at the Day* of the Promiſe, *with Touts temps Priſt*, Holt Ch. J. doubted, whether it would be in Bar of the Action or of the Damages. He ſaid, that in this Action, if it ſhould be in Bar of the Damages, as it is in Debt, it would be a Bar of the whole Demand; for ſince Indebitatus Aſſumpſit is to recover uncertain Damages, the Plea which will bar the Plaintiff of his Damages, will bar him of his whole Demand. Per Holt Ch. J. Ld. Raym. Rep. 254. Giles v. Hartis.

(Q) Pleadings.

1. IN *Replevin*, and Avowry for Rent, it is a good Plea to ſay, that he *tender'd at the Time of the taking*, and the Defendant refuſed, without Tender now again; for it ſhall not be tender'd but upon the Land; Per Cur. Br. Conditions, pl. 38. cites 7 H. 4. 18.

2. A Man granted an *Annuity till the Plaintiff be promoted to a Benefice*, and in Writ of Annuity the Defendant *pleaded that he tender'd a competent Benefice pending the Writ, and the Plaintiff refuſed*, he need not to tender the Arrears incurr'd before the Writ brought; for the Benefice cannot be always void; and alſo if the Annuity be determin'd, he ſhall not recover any Thing upon this Writ; quod nota. Br. Tender, pl. 15. cites 14 H. 7. 31. and 15 H. 7. 1.

3. *Debt upon an Obligation to pay* 10 *l.* the *Defendant pleaded Tender thereof, and that the Plaintiff refuſed*, and *Iſſue* was not taken upon the Refuſal, but *upon the Tender*; for there can be no Refuſal unleſs there were a Tender; and therefore the *Plaintiff took the Refuſal by Proteſtation, & pro placito that he did not tender.* Br. Iſſues Joines, pl. 91. cites 16 H. 7. 13.

4. If a Man be *bound by Obligation, that J. N. ſhall perform all Covenants contained in ſuch an Indenture*, of which *one is, that J. N. ſhall pay* *Contra if he had been*

bound to the Plaintiff, to pay 20 l. to a Stranger, and he refuſed, there the

pay to the Obligee 10 *l.* there if he *ſays that J. N. offer'd, and the Plaintiff,* viz. *the Obligee refuſed,* this is a good Plea; for tho' *J. N. is a Stranger* to the Obligation, yet the Plaintiff is privy. Br. Tender, pl. 1. cites 27 H. 8. 1.

Obligation is forfeited; and in that Caſe he *ſhall not ſay that he or J. N. has been always ready, and yet is,* becauſe it is for Performance of Covenants; and alſo J. N. who is to pay, is a Stranger to the Obligation; Note the Diverſity. Ibid.

If *Covenant* be *to pay* a Sum *to a Stranger at ſuch a Day and Place,* Tender and Refuſal is no Excuſe of Non-performance; Per Holt Ch. J. 12 Mod. 441. Hill. 12 W. 3. B. R. Anon.

5. Debt upon *Bond* conditioned *to pay to the Obligee, or to his Aſſigns, at ſuch a Day and Place,* 20 *s.* The Defendant *pleaded that the Plaintiff appointed* and aſſigned *one A. to receive the ſaid Money of him at the ſaid Day and Place; and that he tender'd it to the ſaid A. who refuſed* to receive it. This was adjudged a good Plea, without alleging Payment in Fact; and it is not like a Condition to pay the Money to a Stranger; for there the Payment muſt be at the Peril of the Obligor. And Dyer held that the Iſſue would be better on the Tender than on the Payment; and Leonard and Whetly affirm'd the ſame. Mo. 37. pl. 120. Trin. 4 Eliz. Anon.

Anderſon Ch. J. put a *Difference* between the Caſe, in 22 H. 6. 57.

6. An *Award* was, *that the Defendant ſhould pay to the Plaintiff* 10 *l.* who *pleaded* that *he was ready* &c. *and yet is, without ſhewing any Tender;* and for that Reaſon it was held ill by the whole Court. Le. 71. pl. 95. Mich. 29 & 30 Eliz. C. B. Brett v. Andrews.

and the Caſe at the Bar; For in our Caſe the *Obligation* doth *precede the Duty* which accrues by the award Subſequent, but in the former Caſe the *Duty* did *precede the Obligation,* which was made for the further Aſſurance of the Duty; And here the Defendant ought to have pleaded the Tender. Le. 71. pl. 95. Mich. 29 & 30 Eliz. C. B. Bret. v. Audars.

7. Tender of *Amends* is no Plea, where the *Treſpaſs was voluntary,* as for Battery, or Breaking his Cloſe, or putting Cattle into his Grounds; Per Popham and Williams J. Noy 12. Sir G. Walgrace's Caſe.

Yelv 59. S. C. ſays, It was adjudged una Voce, that the Payment belonged to the Lord without Tender; for it may happen that the Infant may be eloign'd, or Travel beyond Sea in his Father's Life-Time,

8. In *Intruſion, Maritagio non ſatisfacto, Plaintiff did not allege any Tender.* Upon Demurrer to the Declaration, all the Court (Gawdy abſent) reſolved, without hearing of any Argument, That for the Value of the Marriage, Tender is not requiſite; for it is due de mero Jure without any Tender, and the *alleging of Tender is but Surpluſage,* and gives Colour to traverſe it, whereas it is *not traverſable.* And Williams ſaid, That he had known it to be ſo ruled in C. B. and in the Exchequer; wherefore they gave Rule to enter Judgment accordingly, unleſs &c. And at another Day Stephens moved to be heard to argue it for the Defendant; and Gawdy ſaid, that he much doubted thereof, by Reaſon of the Diverſity of Opinions in the Books concerning that Queſtion; but becauſe the other Juſtices had reſolved it, they without further Argument adjudged it for the Plaintiff. Cro. J. 66. pl. 6. Paſch. 3 Jac. in B. R. Palmer v. Wilders.

so that the Lord cannot make a Tender, and the Statute which ſays, De Mero Jure, ſhews that the Value is not a Thing given by any ſpecial Law, but by the Common Law and Rule of Reaſon in *Recompence of the Loſs of Services,* which the Lord has by the Nonage; And alſo in this Action the Tender is not traverſable. Quod Nota.—5 Rep. 126. b. S. C. accordingly. Palmer's Caſe. ——In Valore Maritagii, it was adjudged upon Demurrer, That the Tender was not traverſable in this Action, [and that for the Reaſons mention'd above.] But Warburton ſaid, That *for an Heir Female,* becauſe the Lord has 2 Years after her Age of 14 to make Tender of Marriage, *the Tender is traverſable.* Cro. J. 151. pl. 13. Hill. 4 Jac. B R. the Lord Darcy v. Page.

So in Debt upon *Bond to pay Rent* &c. the Defendant *pleaded* that *he was ready*

9. An *Award,* that the Defendant ſhould enjoy a Houſe for 3 Years and a Half, and ſhould pay Half-yearly for it 13 l. at Michaelmas and Lady-day; and if he fail'd of Payment, the Award for enjoying to be void. He *pleaded that he tender'd* the Money *at the Day and Place,* and that none were there to receive it; but did not *ſet forth that he tender'd it at the laſt Hour of the Day.* It was held not good; and Judgment for the

the Plaintiff. Cro. J. 423. pl. 4. Paſch. 15 Jac. B. R. Furſer and Bond v. Prowd.

to pay the Rent due *on the Premiſſes*, but *Nobody was there to receive* it, *and that afterwards obtulit* to pay the Money *to the Plaintiff, but he refuſed*; And upon a ſpecial Demurrer, The Court held the Tender on the Land not well pleaded, it not being ſhewn that it was made in *convenient Time* on the Lands, *before the Sunſet*; But this was cured by pleading the Tender to the Plaintiff himſelf afterwards. And adjudged for the Plaintiff. 1 Lutw. 590. Paſch. 9 W. 3. Keating v. Iriſh.

10. Where upon a Demiſe *Rent is covenanted to be paid at a Place certain*, and an Action is brought for the Rent, it is no good Plea by the Defendant that he made a Tender of the Rent, unleſs he plead the Tender to have been made at the Place where the Rent was agreed to be paid; and Judgment was given accordingly. Freem. Rep. 148. pl. 169. Paſch. 1674. Marſhall v. Wiſdale.

11. Tender and Refuſal is no Plea in *Debt on Bond to ſave harmleſs* from another Bond. Vent. 261. Trin. 26 Car. 2. B. R. Anon.

12. Debt by A. againſt W. upon *Bond*, conditioned *to pay Money for B. (who had entered into a Bond to pay the ſame) to A. the Obligee at his Houſe on the 27th of July, if he would deliver up the firſt Bond uncancell'd, and aſſign the ſame to W. the Defendant.* W. the Defendant, *pleaded that B. did not pay* the Money, *whereupon the Defendant went to A.'s Houſe on the 27th of July an Hour before Sun-ſet, and there ſtaid till after Sun-ſet, paratus to pay* the Money, *but that A. was not there, nor any other for him ready to receive it, or to deliver up the Bond*, & hoc &c. The Plaintiff demurr'd generally, and had Judgment; For per tot. Cur. This Plea was ill, for *Want of Obtulit ſolvere*, becauſe *the Tender*, and *not the Paratus, is traverſable*, and the Tender muſt be made before the other is bound to deliver up the Bond. 3 Lev. 103. Paſch. 35 Car. 2. C. B. Cole v. Walton.

13. *Caſe* &c. by Husband and Wife *for Money lent by the Wife dum ſola*; then they *allege a ſpecial Requeſt by the Wife dum ſola, and another by the Husband after the Marriage.* Defendant *pleaded* in Bar, that he was *always ready* to pay &c. *and that he tender'd it before the Action brought*; and upon Demurrer to this Plea, the Plaintiffs had Judgment, becauſe it *appeared that the Tender was pleaded after two Requeſts*, one by the Feme dum ſola, and the other by the Plaintiffs after Marriage. 1 Lutw. 224. Hill. 2 & 3 Jac. 2. Johnſon & Uxor. v. Mapletoft,

14. Where a Tender and Refuſal is pleaded either *on a ſingle Bill, or other ſimple Speccialty*, the Defendant need not *conclude in Bar* to the Action, but only *in Diſcharge of the Damages*; for in this Caſe the Tender is not a Diſcharge to the Action, or to the Payment of the Money which is ſtill due notwithſtanding the Tender; for that is only to excuſe the Damages; Per Holt Ch. J. Carth. 133. Paſch. 2 W. & M. B. R. Anon.

The Reporter adds, Nota alſo, that in both theſe Caſes the Pleader ought to conclude with a Profert hic in Curia. Carth. 133.

15. *But* where Tender and Refuſal is pleaded in an Action *for a Penalty* on a Bond, with a Condition to pay a leſſer Sum, there the Defendant muſt conclude in Bar to the Action; becauſe a Tender of a leſs Sum on the Day had diſcharged the Penalty; and therefore it is a good Bar to the Action brought for the Penalty; Per Holt Ch. J. Carth. 133. Anon.

16. In *Reſcous* &c. the Plaintiff declared, that he had *diſtrained 5 Hogs doing Damage* &c. and would have impounded them, and had *actually put one in the Pound* &c. The Defendant pleads, That after the Taking, and before the Reſcous, he tender'd to the Plaintiff 10 s. which was a ſufficient Amends; And upon a Demurrer the Court were all of Opinion, that the *Tender came too late for the Damage* done *by that Hog which was in the Pound*, and therefore he *ſhould have traverſed that one Hog was in the Pound.* 2 Lutw. 1259. Trin. 7 W. 3. Alwaies v. Broom.

17. Indebitatus *Aſſumpſit* &c. for ſeveral Sums upon ſeveral Promiſe; *Defendant after an Imparlance alledged, that the ſeveral Sums, for which the Plaintiff had declared, amounted to* 66 *l.* and *as to* 64 *l.* 7 *s. part thereof, he pleaded Non Aſſumpſit*; *And as to the reſt* he pleads in Bar, *that the ſeveral*

But in Debt *for Rent* the Defendant pleaded a Tender *af-*

ter Imparlance; and it was adjudg'd a good Plea. Comb. 50. Paſch. 3 Jac. 2. B. R. Dalby v. Smith. —— In Debt on

veral Promiſes ſet forth by the Plaintiff *were but one Contract for an Horſe, and that before the Action brought, he tendered the Reſidue* (viz.) 1. l. 13 s. *to the Plaintiff, which he refuſed; and that he was and ſtill is ready to pay the ſame* &c. Upon a Demurrer, it was reſolved, that the Plea was ill by Reaſon of the Imparlance, and alſo becauſe it is uncertain upon whch of the Promiſes the Money was tender'd. 1 Lutw. 238. Hill. 11 W. 3. Morris v. Coles.

Bond, condition'd to pay a Sum certain, a Tender may be pleaded *after Imparlance.* Per Holt Ch. J. Ld. Raym. Rep. 254. Mich. 9 W. 3. in Caſe of Giles v. Hartis.

18. He that makes a Tender, muſt ſtay till *Sun-ſet*, unleſs ſpecial Circumſtances ſet forth make Alteration. 2 Salk. 624. pl. 3. Trin. 13 W. 3. B. R. in Caſe of Lancaſhire v. Killingworth.

2 Salk. 623. pl. 2. Hill. 10 W. 3. B. R. Sweetland v. Squire. S. P. and ſeems to be S. C. only the Year is miſ-printed 10 W. 3. inſtead of 10 Annæ. Beſides that, I

19. *Indebitatus Aſſumpſit* was brought *for Goods ſold and delivered*, Defendant pleaded in Bar, That before the Time of bringing the Action he made Tender of the Money, and that ever ſince the Tender Paratus fuit to pay the Money. It was inſiſted, that the Bar was not compleat enough; For he ſhould have pleaded, that he has *been Ready* to pay the Money, *not only ever ſince his Tender, but from the Time the Goods were delivered* viz. from the Time *the Money became due.* And the Court ſeemed to think this a material Objection; For it may be the Money was demanded before the Tender, and then there is a good Cauſe of Action. 10 Mod. 81. Hill. 10 Ann. B. R. Whitlocke and Squire.

have a MS. Report of the Caſe of Sweetland v. Squire as in Hill. 10 Ann. B. R. accordingly.

Tender and Refuſal is no Plea in *Aſſumpſit*; but the Defendant muſt pay the Plaintiff when he will have it. Per Holt. Cumb. 334. Trin. 7 Ann. B. R. Broom v. Pine.

20. In an Action of *Debt, by an Officer of a Borough, for a Copy of the Poll at an Election of Burgeſſes for Parliament*, the Defendant pleaded, That he was ready to pay what was due for the Copy. And the Court agreed, that the Tender was good; for till the Officer demands ſomething, or delivers a Copy of the Poll, the Party cannot know what to tender. As where there is a Demand for a Copy of a Commitment &c. upon the Statute 31 Car. 2. it is only neceſſary to ſay, That he was ready to pay for it. And ſo a Judgment was affirm'd by all the Judges, and afterwards it was affirm'd in Parliament. Comyns's Rep. 279. 288. pl. 153. Paſch. 4 Geo. 1. Philips v. Smith.

21. A Motion to ſet aſide Judgment ſigned after Plea of Tender delivered; The Defendant was by Rule obliged to plead an Iſſuable Plea; a Tender is no iſſuable Plea within the Meaning of this Rule; therefore the Judgment was held good. Rep. of Pract. in C. B. 134 Mich. 10 Geo. 2. Daverſhill v. Barret.

(R) Pleadings. In what Caſes a *Refuſal* muſt be *alleg'd as well as a Tender.*

S. C. cited per Cur. Vent. 109. in Caſe of Buckler v. Millerd.

1. A. Promiſed to pay B. ſuch a Sum of Money at ſuch a Place, and in Conſideration thereof B. promiſed, *on Payment of the ſaid Sum, to ſurrender to A. a Leaſe for Years.* A. tender'd the Money, and B. did not ſurrender the Leaſe. A. brought Aſſumpſit againſt B. and alleg'd, that he obtulit the Sum; But does not ſay, that B. refuſed, and therefore it was held not good. And Coke ſaid, that Wittenhall's Caſe was

was adjudged, that Tender, *without alledging a Refuſal*, is not good. Cro. E. 889. Trin. 44 Eliz. B. R. Lea v. Exelby.

2. Action upon a *Promiſe*, that the Defendant, in *Conſideration* that the Plaintiff would pay him a certain Sum *of Money*, promiſed *to aſſign* him *a Term*; and the Plaintiff averr'd a Tender of the Money, but that the Defendant did not aſſign. And after Verdict it was moved in Arreſt of Judgment, That the Plaintiff did not intitle himſelf to an Action, for that he did *not aver a Refuſal, tho' he had averr'd a Tender*; But it was there adjudg'd *well after Verdict*; *but* alſo held, that it would be *bad on Demurrer*. Sid. 13. pl. 3. Mich. 12 Car. 2. B. R. Ball v. Peake. S. C. cited 12 Mod. 530. per Holt Ch. J. in Caſe of Lancaſhire v. Killingworth.—And in Ld. Raym. Rep. 687. in S. C.

S. C.——And in Comyns's Rep. 117.

3. An *Agreement* was made by one *to build a Houſe*, and for that the other was to pay him ſo much *Money for Building*. The Plaintiff averr'd, That he made a *Tender to build* the Houſe, but not that the other *had refuſed to ſuffer him* to build it. All the Court were of Opinion, That the Tender, without Averment of a Refuſal, was not good; but being *after Verdict* it was held well. 2 Lev. 23. Mich. 23 Car. 2. B. R. Opy v. Peters. Vent. 177. 214. Peters v. Opie, S. C. ——2 Saund. 350. S. C.—S. C. cited by Holt Ch. J. 12 Mod. 530. in Caſe of Lancaſhire v. Killingworth ——And in 2 Salk. 123. in S. C.—And in Ld. Raym. Rep. 687. in S. C.——And in Comyns's Rep. 117. in S. C.

4. Debt upon *Bond to pay* 12 *l. on* 15 *Aug. and on* 15 *Feb. by equal Portions*. The Defendant *pleaded*, *That on* 15 *Aug.* there *was* 6 *l. due*, and no more; *and that he* (the Defendant) *on the ſaid* 15 *Aug. at B. obtulit ſolvere* the ſame, *and was ever afterwards ready* to pay it; *and* after that, (viz.) *on the* 1 *Decemb.* &c. *did pay it to the Plaintiff, which he did accept*, Unde petit Judicium &c. Upon Demurrer the whole Court held the Pleading inſufficient, becauſe it is *not ſaid that the Plaintiff refuſed*: Otherwiſe if a Place of Payment had been in the Condition, and it had been ſhewn in Pleading, that the Party who was to receive the Money was not there, and the Acceptance after the Day ſignified nothing. 2 Vent. 107. Mich. 1 W. & M. in C. B. Buckler v. Millerd. S. C. cited 12 Mod. 530. per Holt Ch. J. in Caſe of Lancaſhire v. Killingworth.

5. Defendant *covenanted* with the Plaintiff, that *upon two Days Notice, within a Year*, to be *given at Hudſon-Bay Houſe*, he would *accept* of 1000 *l. Stock* in ſuch a Company, *and* would *pay* 2000 *l. at the Transferring thereof*. The Declaration avers, That within the Year, viz. ſuch a Day, he left *Notice in Writing* for K. the Defendant, to come to Hudſon's-Bay Houſe the 4th of November, which was alſo within the Year, *to accept the Transfer*; that the Plaintiff was there on the ſame Day *ready, and did tender a Transfer* of the ſaid Stock to the Defendant; but that the Defendant did not come and accept it, or pay the 2000 l. Per Holt Ch J. He ought to have *averr'd the Tender and Refuſal*; and in that Caſe to aver a Tender, without averring a Refuſal likewiſe, would not do. 12 Mod. 529. Trin. 13 W. 3. Lancaſhire v. Killingworth.—Cites 16 El. 31. 17 Ed. 3. 11. Ld. Raym. Rep. 687. S. C. accordingly.——2 Salk. 623. pl. 3. S. C. And per Cur. When both Parties meet at the Time and Place, he that pleads a Tender muſt alſo plead a Refuſal, otherwiſe

ſuch a Plea is naught upon Demurrer, but good after a Verdict; And if the Defendant be abſent, he muſt ſhew that, and alſo that himſelf was at the Time and Place, and tender'd.——S. C. cited 8 Mod. 106. in the Caſe of Blackwell v. Naſh.——Comyns's Rep. 116. pl. 31. S C. accordingly; and that in ſuch Caſes the later Way of Pleading is, that the Defendant did not come, nor any other for him, tho' this is not of Neceſſity; for if a Man pleads a Tender and Refuſal, it is ſufficient to ſhew the Refuſal, without ſaying at what Time the Refuſal was; for a Refuſal by the Party, at any Time or Place, is ſufficient. But if a Mean pleads Notice given, by which it appears that the Defendant was not preſent when the Act ought to have been done, then the Plaintiff muſt ſay that he was ready at ſuch a Time, viz. to the laſt Part of the Time when the Thing was to be done; and that the Defendant, or any for him, did not come. And the Reaſon of all thoſe Caſes is, that when the Plaintiff himſelf is to do an Act, and that Act is not done, he ought to ſhew to the Court that he had done every Thing that was in his Power, and cited Hob. 107. 1 Cro. 694. 8 Co. 92. And therefore Judgment was given for the Defendant by the whole Court.——3 Salk. 342. S. C.

(S) Bar, in what Actions.

In *Replevin* the Defendant *avow'd the taking* the Cattle *Damage-feasant.* The *Plaintiff* replied, and *disclaim'd any Title* to the Place where &c. *but set forth, that his Cattle ent'er'd* into the

1. *REplevin of* 300 *Sheep.* As *to* 200, *the Defendant pleaded Ne priſt pas; and as to* 7, *he took them Damage feasant*; and as *to the reſt he ſaid we purſued them by reaſon of the* 7, *abſque hoc that we took them.* The *Plaintiff maintain'd the taking all, except the* 7; and *as to the* 7, *he ſaid we met you immediately upon the taking, and proffer'd* 6 *d. for the Damages*; and *averr'd, that the Damages did not amount to more, Judgment* &c. Horton demanded Judgment; For now you have confeſs'd the taking rightful, and therefore ought to have Writ of Detinue. Per Hull; The Chaſing after the Tender was tortious. Defendant ſaid, he took and impounded them before he tender'd. Skrene, Immediately upon the taking we tender'd; Priſt; and the other econtra. Therefore it ſeems that Replevin *lies after the Tender.* Br. Replevin, pl. 21. cites 12 H. 4. 23.

Defendant's Ground *againſt his Will*, and did Damage; *and that immediately after* the Treſpaſs, *he tender'd to Defendant* 5 *s.* Amends, *which he averr'd was ſufficient*, but Defendant refus'd &c. Upon Demurrer the Court gave Judgment una Voce for the Avowant; for they were of Opinion, that the Statute 21 Jac. extends not to this Caſe, but only to Actions of Treſpaſs, and *not to Replevins*, which remain as they were at Common Law, and therefore it is clear that the Tender ought to be before the Impounding. 2 Lutw. 1594. Hill. 9 W. 3. Allen v. Bayley.

In *Replevin* the Defendant *avow'd for Damage feasant*; the Plaintiff replied a Tender of Amends after the taking. It was *moved in Arreſt of Judgment*, That the Tender's not being pleaded to be before the Impounding, this is determined to be bad upon a general Demurrer in Lutw. 1596. and therefore he thought it might be taken Advantage of as well in this Way. The Ch. J. ſaid, That Caſe was certainly Law; and Dilkington's Caſe, 5 Coke, is to this Purpoſe; but he obſerved, that the Defendant had *joined Iſſue upon the Sufficiency of Amends*; *and by that means* had *waived*, as to *the Irregularity of the Tender. But* he own'd, that if this Action had been *in Treſpaſs*, it would have been otherwiſe, even upon a general Demurrer; for this Statute ſays in general, that a Tender of Amends may be well pleaded in Treſpaſs before the Action brought. Barnard. Rep. in B. R. 309. Paſch. 2 Geo. 2. C. B. Baker v. Johnſon.

Br. Conditions, pl. 62. cites S. C.

2. *Refuſal of a Stranger to the Obligation*, is a good Plea in Bar. Br. Tender, pl. 12. cites 15 E. 4. 5.

S. P. And the Defendant pleaded That he tender'd ſufficient Amends, and the

3. Treſpaſs of breaking his Cloſe, and ſpoiling his Graſs, the *Defendant ſaid, That the Treſpaſs did not exceed* 10 *s. and he tender'd him ſufficient Amends.* And it was held no Plea, but a void Tender. *Contrary in Avowry* for Damage-feaſant, elſewhere. Br. Treſpaſs, pl. 214. cites 21 H. 7. 30.

Plaintiff refuſed the ſame, and demanded Judgment &c. And upon a Demurrer, the Opinion of the Court was, That this is no Plea in Treſpaſs, but in a Replevin it is a good Plea. Sed non dixerunt cauſam diverſitatis. Ow. 48. Mich. 32 & 33 Eliz. Kent v. Wichall, cites 21 H. 7. 30. 9 H. 7. 22. F. N. B. 69. (G) 31 H. 4. 17.

It was agreed, that in Treſpaſs the Defendant may plead the Treſpaſs to be involuntary, and diſclaim in the Title, *without pleading the Statute* of 21 Jac. for *it is a general Statute.*

4. 21 *Jac. cap.* 16. *S.* 5. Enacts, That *in all Actions of Treſpaſs, Quare clauſum fregit, wherein the Defendant or Defendants ſhall diſclaim, in his or their Plea, to make any Title to the Land in which the Treſpaſs is by the Declaration ſuppoſed to be done; and where the Treſpaſs is by Negligence or unvoluntary, the Defendant or Defendants ſhall be admitted to plead a Diſclaimer, and that the Treſpaſs was done by Negligence, or unvoluntarily, and to tender or offer ſufficient Amends for ſuch Treſpaſs before the Action brought; whereupon, or upon ſome of which, the Plaintiff or Plaintiffs ſhall be forced to join Iſſue; and if the ſaid Iſſue be found for the Defendant or Defendants, or the Plaintiff or Plaintiffs be nonſuited, ſuch Plaintiff or Plaintiffs ſhall be clearly barr'd from the ſaid Action or Actions, and all other Suits concerning the ſame.*

Litt. Rep. 355. Hill. 6 Car. C. B. Jennings v. Couſins.

Treſpaſs

Treſpaſs quare Clauſum fregit. The Defendant pleaded according to this Statute, *That he tender'd Amends before the Action brought, viz. the 2d Oct. 7 Car.* The Plaintiff *replies, That before ſuch Tender he ſued a Latitat, Teſte the laſt Day of Trinity-Term before, and* upon that *procured the Defendant to be arreſted, intending to declare in Treſpaſs.* It was thereupon demurr'd, and reſolv'd, That this Tender came too late; for as well as a Tender after an original Writ comes too late, ſo after an Arreſt upon a Latitat; for the *Tender by the Statute is intended* to be *immediately after the Treſpaſs*, and before any Suit commenced; wherefore it was adjudged for the Plaintiff. Cro. C. 264. pl. 11. Trin. 8 Car. B. R. Watts v. Baker.——See (M) pl. 4.

5. Where a *Cuſtom* was *to be excuſed from Suit* of Court *by Payment of* 8 *d. to the Lord*, and 1 d. to the Steward by Copyholders living at ſuch Diſtance, and ſuch Excuſe to be for a Year, it was held by all, that Tender and Refuſal was as much as Payment. Vent. 167. Mich. 23 Car. 2. B. R. Iſaac v. Ledgingham.

6. A Man cannot plead a Tender and Touts temps priſt in a *Quantum meruit*, becauſe the Demand is intirely uncertain; nor could a Man plead Tender of Amends in Bar of any *voluntary Treſpaſs at common Law, except in* Caſe of *Damage-feaſant*, to prevent the Impounding of Cattle, until the Statute of 21 Jac. 1. cap. 16. Ld. Raym. Rep. 255. Mich. 9 W. 3. in Caſe of Giles v. Hartis.

For more of Tender in General, ſee **Condition, Rent, Stocks, Tout temps Priſt**, and other Proper Titles.

Tenures.

(A) Tenures. *Antiquity.*

1. **IN the Eſcuage and Roll in the County of Lincoln with Maſter Bradſhaw in the Exchequer, upon a Voyage into Scotland, Anno. 1 E. 3. Rot. 17. there is** Comes Albermarle tenet Helewell per Baroniam de Domino Rege in Capite de Conqueſtu; **And in the ſame Roll, another holds of ſuch who holds of ſuch Honor,** de Conqueſtu; **and others hold of ſuch an one who holds over by a** Knights Fee &c. de Conqueſtu, **and ſo in divers other Rolls of it. But** always it is ſaid **to be** held of the King de Conqueſtu, and not of any other. **But it is there many times ſaid, that ſuch an one holds of the King,** and of others alſo, De * Antiquo Feoffamento; **and** of others, De novo Feoffamento. **Quære what is intended thereby.**

Whether theſe Tenures were introduced here by. Will. the Conqueror, or were in Uſe here before his coming, has been a matter much diſputed, and many learned Men have been engaged in the Controverſy; But it ſeems that the greater Part of thoſe who were particularly learned in Matters of Antiquity, were of Opinion agreeably to Roll, that the Conqueſt was their utmoſt Æra.

* Feodum *Antiquum* is that which has been in ſome of the Family of the preſent Poſſeſſor, of whatever Kindred they were of the Father's Side, for more than 4 Deſcents. Feodum *Paternum*, is that which has been held by his lineal Anceſtors to the 4th Degree, as Avus Proavus, Abavus, Atavus. And Feodum *Novum*, is that which was firſt given to the Perſon enjoying it, and which he came not into by Succeſſion to his Father. See Spelm. Gloſſ. 220. Verbo Feudum. —— Freigius de Feudis, is much in the ſame Words with Spelman.

Ancient

Ancient Fee is where the Feodary and his Anceſtors Time out of Mind, have held ſuch a Fee, and here the Feodiſts place a Medium between theſe two, viz. Paternal Fee which comes by four Degrees of Diſcent, and they define that to be the ancient, which deſcends from more. Cowel's Inſtitutes. Lib. 2. Tit. 3. S. 9.

Dr. Brady in his Introduction to old Engliſh Hiſtory 187. cites the following Records thereby to explain the Meaning of the Novum and Vetus Feoffamentum, viz.

Carta Albani de Hairun.

Domino ſuo excellentiſſimo Henrico Regi Angliæ Albanus de Hairun, veſtræ excellentiæ notifico, quod ego, in Hertfordſcira feodum unius Militis de veteri fefamento, de vobis principaliter teneo, & quod de novo fefamento nichil habeo, nec Militem Feoffatum aliquem habeo. Valete.

Carta Matthæi de Gerardi-villa.

Marthæus de Gerardi villa tenet in Capite de Domino Rege Feodum unius Militis de veteri Fefamento & nullum habet Militem Fefamentum [Feoffatum] nec habet aliquid de novo.

Carta Willielmi Filii Roberti.

Kariſſimo Domino ſuo Henrico Regi Angliæ, Willielmus Filius Roberti Salutem; Sciatis quod de vobis teneo feodum unius Militis Pauperrimum, nec alium in eo feodavi, quia vix mihi ſufficit, & ſic tenuit Pater meus. Valete.

And Pag. 188, adds, That, By theſe Records the meaning of Vetus & Novum Feoffamentum is very apparent, that it was called ſo in *reſpect of Time only*, and not in reſpect of the Original Feudataries, or their Sub-Feudataries or Tenents in Capite, and Tenents by meſne Tenure in Military Service. —— And Ibid. Pag. 215, cites Jani Anglorum facies Nova pag. 236 &c. where ſpeaking of Vetus & Novum Feoffamentum that Author ſays, That the old Feoffment was of ſuch Fees as were granted from the Crown, and that the new Feoffment was of ſuch Fees as were granted by the Tenants in Capite to others by Sub-Infeodations, or ſuch as the Tenents in Capite held by meſne Tenure, the Dr. obſerves, that the Word Feoffment is derived from the French Word Fiefment, which ſignifies infeoffing, or giving of a Fee, and that from the Word Fief, a Fee; That in the Writings of the Feudiſts, we find Vetus Feodum & Novum, and cites Hottom. de Feud. diſput. c. 6. Coll. 819 B. that an old Fee is that which was given by the Predeceſſor of the preſent Lord, or which was granted to the Predeceſſor of the Vaſſal; for always an old Fee is ſo called, in reſpect it hath deſcended or gone in Succeſſion; But a new Fee is that which is given by the preſent Lord to the preſent Vaſſal; And again in Lib. 2. Feud. Tit. 3 Sect. That is called a new Fee which was given to the preſent Feudatory; And that is called an old one, which was given by his Parents or Anceſtors.

The Introduction to the Law of Tenures, pag. 25. (m) as to the Antiquum & Paternum, cites Crag. de Jure Feud. fol. 6. That Paternum ſive Antiquum dicitur id, in quo quis Patri, Avo aut alicui Majorum ſuccedit. And Quod Jure Succeſſionis ad Aliquem devolutum Stry. Exam. jur. Feud. cap. 3. Q. 9. Quicunque ex ſuperioribus id acquiſivit. Feud. Lib. 2. Tit 5. And as to the Novum, Quod de Novo acquiſitum fuit & habet Initium in Perſona Inveſtiti, nec a Progenitorum Succeſſione provenit, cites Zaſius in uſus Feud. Fol. 6. Crag de Jure Feud. fol. 55. Hanneton de Jure Feud. 30. And Stry Exam. Jur. Feud. cap. 3. Q. 12.

(B) *What Things* may be *held*.

In Quare Impedit, the Plaintiff intitled himſelf that

1. AN Advowſon in Groſs **lies in Tenure.** 42. E. 3. 7. 1 H. 4. 1 b. 21 E. 3. 5 b. **admitted.** 25 E. 3. 54. **admitted. Contra** 33 H. 6. 35.

the Advowſon was held of him by Homage and Fealty, and was appropriated in Mortmain, and it is not contradicted, but that the Advowſon well lies in Tenure, and it was brought by a common Perſon againſt an Abbot. Br. Tenures, pl. 15. cites 21 E. 3. 5. —— And ſuch a Caſe the ſame Year fol. 29. by the Earl of H. againſt the Dean and Chapter of H. and was of an Advowſon in Groſs, and counted that it was held of him, and that it was aliened in Mortmain, and he preſented as Lord immediate within the Year, nota. And tit. quare Impedit 73. It is admitted, that Advowſon in Groſs of a Provoſtry, may well be held in Capite, and thereby the King ſhall have the Prerogative of all his other Lands held of others; And in another Quare Impedit after the King counted that the Advowſon in Groſs was held of him, and made Title by Deſcent to 4 Daughters, and that the youngeſt was in his Ward, and admitted for good; Quod nota. Br. Tenures, pl. 15. cites 21 E. 3. 5.

The King counted of Advowſon in Groſs held of him, and that the Tenant died without Heir, by which he preſented, and well; quod nota of Advowſon in Groſs in Tenure. Br. Tenures, pl. 10. cites 24 E. 3. —— Br. Quare Impedit, pl. 99. cites 24 E. 3. 69 S. C.

In Quare Impedit, the Plaintiff counted that J. N. held of him certain Lands and Advowſon in Chivalry, and intitled himſelf to the Preſentation by Ward of the Heir &c. and the other made Bar. And ſo

ſo it ſeems that an Advowſon lies in Tenure. Br. Tenures, pl. 18. cites 24 E. 3. ——— And in a Quare Impedit 14 H. 7. 6 & 15 H. 7, 8. it is agreed that the Advowſon lies in Tenure, Scil Advowſon *which was appendant to a Manor, and is ſever'd after*, and this by the Juſtices, and that a common Perſon may give it to hold of him; But Quære inde, and where he ſhall diſtrain; For if he can have no Means to come to the Tenure, then it ſeems that the Advowſon in Groſs cannot lie in Tenure, for Ceſſavit & Præcipe quod reddat, does not lie. Br. Tenures, pl. 18. ——— See pl. 7.

Advowſon may lie in Tenure. As where Manor and Advowſon are held, and the Advowſon is made in Groſs, the Advowſon is held Pro particula; per Littleton and others for the beſt Opinion. And per Davers and Heuxſt [Hengton] Ceſſavit lies of Advowſon, and in Writ of Right of Advowſon the Summons ſhall be at the Church or at the Doors thereof. And Grand Cape lies in it, and the Lord may diſtrain in the Glebe, Scil. the Beaſts of the Patron, but not the Beaſts of the Incumbent or Parſon. Br. Tenures, pl. 4. cites 33 H. 6. 34.

Writ of Right of Advowſon ſhall ſuppoſe that he holds the Advowſon. Br. Tenures, pl. 18. (bis) cites 14 H. 7. 26 & 15 H. 7, 8. ——— See Pl. C. 498. b. 499. a. in the Caſe of Grendon v. The Bp. of Lincoln.

2. Land held ſince Time of Memory becomes a Priory; **This ſhall not deſtroy the Tenure.** 42 E. 3. 7.

3. Land which has been a Priory Time out of Mind &c. **may be held.** 42 E. 3. 7.

4. *Piſchary* does not lie in Tenure; for the Soil may be to one and the Piſchary to another, and then the Lord cannot diſtrain. Br. Tenures, pl. 75. cites 32 E. 3. Fitzh. Scire Facias 100.

5. It was agreed that *Remainder* is held, and by Eſcheat thereof, the Seigniory is extinct, and the Lord may have Action of Waſt, as he in Remainder might have had in his Life. Br. Tenures, pl. 107. cites 3 H. 6. 1.

6. Aſſiſe of certain *Wax and Cotton to make a Tapor to burn in the Church of Laiton* in the County of Eſſex, and the Abbot of Stratford brought thereof Aſſiſe for the not rendering thereof, and it was held *Rent Service* and a good Tenure; And yet he ſhould not have thereof any Profit nor Avail, and becauſe he ſhould have Diſtreſs in the Land of the Defendant, therefore Tenure. Br. Tenures, pl. 50. cites 35. H. 6, 7.

7. In Quare Impedit, it was ſaid, that *Meſnalty* lies in Tenure by a Meſne, Contra of an * *Advowſon*; For this *is appendant to the Land or Manor* to which &c. *but not Parcel.* So of *Common*, and *Villein Regardant*, *Way*, *Courts*, *Leets*, *Waifs*, *Strays* &c. for *thoſe do not lie in Tenure unleſs of the King*; For he † may diſtrain in other Land; contra of a common Perſon; Quod nota, by the Opinion of the Court. But Advowſon lies in Tenure, per Vaviſor and Davers, contra Townſend and Brian. Br. Tenures, pl. 34 cites 5 H. 7. 36.

* See pl. 1.
† All the Editions are (Ne poit) cannot, but miſprinted.

[B 2.] *Of what Thing* to another.

See (E)

See (G) pl. 5. S. C. ——— Tayle (A) pl. 1. S. C.

[1.] 4. **IF a Meſne gives the Menalty in Tail, the Law will create a Tenure between the Donee and Donor.** 1 H. 4. 3. b.

[2.] 5. **A Man may hold Land** of 2 Manors. 17 E. 3. 13.

[3.] 6. As **a Man [ſeiſed of 3 Manors] might before the Statute [make Feoffment to another in Fee,] and ſo now [ſince the Statute, make Feoffment] in Tail, [he] may give Parcel of one Manor and Parcel of another Manor to hold by certain Services, [as one Tenancy,] and the Services ſhall be regardant to both [all] the Manors.** 17 E. 3. 13.

What is taken in within the Crotchets is ſupply'd out of the Year Book to make the Meaning more clear.

4. Where a Man *holds* of another *of* his *Manor by Suit to his Mill*, and the *Lord grants the Mill and Suit*, yet the *Heir of the Lord ſhall have the Suit, if he makes a new Mill*; for the Tenure is to the Manor of the Grantor

Br. Tenures, pl 58. cites 19 E. 2. & Fitzh. Aſſiſe 399.

Grantor or to his Perſon and not to the Mill, which Suit remains with the other Services. Per Herle. Quære. Br. Aſſiſe, pl. 458. cites 31 E. 1. & 19 E. 2.

Fol. 500.

(C) *What Services* may be *reſerved. Againſt the Law.*

1. A Man may hold by Marchet [agreement] that when his Daughter or Siſter commits Fornication, or be eſpouſed without leave of the Lord, that he ſhall pay 5 s. 8 d. to the Lord; For he may bind him to it by his own Agreement. 15 E. 3. Aid. 33. admitted.

Br. Tenures, pl. 109. cites S. C.

2. A Man, before the Statute, by Feoffment, and at this Day, by Gift in Tail, may reſerve Tenure *to make a Beacon or* to make *a Bridge* at B. *or to keep the Caſtle of the King* adjoining to the Sea, And this is good, inaſmuch as he has Advantage thereof, *becauſe it is for the Commonwealth*, and ſo he had Advantage; Contra if he gives Land to one to give Rent to a Stranger, or * to ride along with a Stranger; For there is no Commonweal. But Gift of Land to find a Chaplain to chaunt in a certain Place is good Tenure; becauſe he has Benefit by Reaſon of Orizons. 11 H. 7. 12. b. pl. 3. per Fineux.

* Original is (Equit')

3. A Reſervation of *Things which lie only in Prender* or Uſage, cannot make a Tenure; And therefore if a Man ſeiſed of Land and Wood, before the Statute of Quia emptores terrarum, does thereof enfeoff a Stranger, and after the ſaid Statute *gives* the ſame *Land and Wood* in Tail, or leaſes the ſame for Life unto a Stranger, *reſerving* unto the Feoffor, Donor, or Leſſor *Common for* 4 *Beaſts in the ſame Land*, and to ſuffer the Feoffor, Donor, or Leſſor *to take yearly in the ſame Wood*, 3 *Loads of Eſtovers for Fewel*; This Reſervation is void to make any Tenure, and this cannot be ſaid a Reſervation, becauſe the Feoffor, Donor, or Leſſor cannot take Profit thereof but only by his own Act, and a Man *cannot do Service unto himſelf*; And therefore ſuch Reſervation is void, if it be not by Deed indented, and then he ſhall take the ſame by way of Grant of the Feoffee, Donee, or Leſſee. Perk. S. 702.

See (E)

(D) In what Caſes it may be *created by expreſs Words. Of what Thing by the King.*

S. P. And the King may diſtrain in all other Lands of the Party for ſuch Things as he reſerves upon the Tenure of the Rent. Contra of a Common Perſon. Brooke ſays, And ſo ſee that the King may reſerve Tenure upon a Rent which does not lie in Tenure. But it was ſaid that if a common Perſon gives his Seigniory to hold of him, this is good; but the Land of Tenant ſhall not be charg'd with Diſtreſs, unleſs the Beaſts of the Grantee [Grantor] come there, by the beſt Opinion. Br. Tenures, pl. 7. cites 44 E. 3. 35.

1. The King may grant his Fee Farm of a Vill, and reſerve a Tenure. 44 E. 3. 45. 1 H. 4. 3. b. 44 Aſſ. 22. by all the Juſtices.

* S. P. And by Alienation thereof without Licence, the King may ſeiſe. Br. Tenures, pl. 93. cites 3 E. 3. Fitzh. Avowry 738.

† Br. Tenures, pl. 98. cites S. C.

2. The King may grant * a Rent to be held of him, and this ſhall be a good Tenure. † 10 H. 6. 12.

3. And

3. **And the King may grant** this Seigniory over, and the Rent ſhall be held of the Grantee. 10 H. 6. 12.

4. **The King may grant** a Seigniory **over to hold by certain Services of him.**

5. Where the *King gives Land, and reſerves ſome Tenure in ſpecial*, the Tenure ſhall be ſuch as it is reſerv'd, be it Socage or otherwiſe. And if he grants Land, and reſerves nothing, nor ſpeaks of any Thing, in this Caſe the Grantee ſhall hold in Chivalry for the Non-certainty; quod non negatur. Br. Tenures, pl. 3. (bis) cites 33 H. 6. 7.

6. Archbiſhop of C. was ſeiſed of the Manor and Borough of S. in Right of his Biſhoprick, and the Prior of M. was ſeiſed of a Houſe held of the ſaid Archbiſhop, as of his ſaid Manor &c. Afterwards in 30 H. 8. the Archbiſhop gave the ſaid Manor and Borough, with Confirmation of the Dean and Chapter, to the King. Then the ſaid Prior ſurrender'd, and ſo the King was ſeiſed of the Manor and Borough, and likewiſe of the ſaid Houſe. The King by Letters Patents gave the Houſe and other Lands to J. S. and T. S. in Fee, *Tenend' in libero Burgagio per Fidelitatem tantum & non in Capite, pro omnibus Serviciis & Demandis.* Afterwards E. 6. gave the Manor and Borough to the Mayor and Commonalty of London. J. S. and T. S. convey the Houſe to W. in Fee. W. died without Heir. The Queſtion was, what Tenure was reſerved by the Words and Grant by H. 8. to J. S. and T. S. It was ſaid, it could not be a Tenure *in Burgage*, becauſe no Rent is reſerv'd, according to Litt. S. 162, 163, 164. And Anderſon Ch. J. at the firſt ſtrongly inſiſted upon it. Another Matter was, that one Tenure only is reſerv'd for all the Lands and Tenements; ſo that, ſhould the Tenure reſerv'd be adjudg'd to be Burgage, then Lands at the Common Law out of Boroughs ſhould be held in Burgage; beſides, a Tenure in Burgage cannot be created without theſe Words, *Ut de Burgagio*; and to that Purpoſe Shute J. agreed. 4 Le. 207. pl. 333. Mich. 32 Eliz. B. R. Waite v. Cooper.

(E) Tenure created by expreſs Words. Of what Thing. *By common Perſon.*

1. A Seigniory **may be granted** at the Common Law **by a common Perſon reſerving a Tenure** for the Poſſibility of Diſtreſs by the Eſcheat of the Tenancy. 44 Aſſ. 22. **Quære.**

2. [So] if Meſnalty be given in Tail, **a Tenure may be reſerv'd of it for the Poſſibility of the Diſtreſs by the Eſcheat of the Tenancy.** 1 H. 4. 1. b.

3. So **if a Man holds a** Manor by certain Services, thoſe Services **may be granted (it ſeems it is intended in Tail) to hold by certain Services. Dubitatur.** 14 H. 6. 24.

4. **A common Perſon cannot grant a** Rent **to be held of him.** 10 H. 6. 12. Br. Tenures, pl. 105. ſays,

See Vet. N. B. among the Additions of Eſcheat, That *Rent* lies in Tenure, and *Writ of Eſcheat lies thereof, ſuppoſing* that it is held &c. and yet the Land is held in Fact; quod nota; therefore Quære of this Book. And in the Additions of Ejectione Cuſtodiæ, there it is ſaid that Writ of Ejectione Cuſtodiæ lies of Rent 13 E. 3. But Parn and Trewe held, that Rent does not lie in Tenure; and ſo is the Law, unleſs of the King, as it ſeems.—And Br. Intruſion, pl. 8. cites 11 H. 4. 82. and ſays, That Rent does not lie in Tenure; Per Norton Arg. But per Hank If there be Lord, Meſne, and Tenant, and the Meſne dies, and a *Stranger gets the Rent*, the Lord ſhall have Writ of Ward, ſuppoſing the Rent to be held of him; and if the *Meſne dies without Heir*, he ſhall have *Writ of Eſcheat, ſuppoſing the Rent to be held.* Per Hill, It may be that he ſhall have ſuch Writ, *but in the Count he ſhall declare that the Land is held by the Rent*; and in your Caſe if he demands the Ward, he ſhall ſay Terram ſuam tenuit &c. without ſaying any Thing of the Rent; and by him this Default in the Count *ſhall abate the whole Count and the whole Writ*, becauſe it comes by his own Shewing; and cites Mich. 19 E. 3. Fitzh. Tit. Gard

Gard 40. to the ſame Purpoſe; and ſo, he ſays, it ſeems that it ſhall abate.——Br. Eſcheat, pl. 7. cites S. C.——Br. Tenures, pl. 14. cites S.C.

5. If a Man be ſeiſed of a Manor in Fee, in which Manor there is a Mill for the Grinding of Wheat and other Grain, and before the Statute of Quia emptores Terrarum he does infeoff certain Tenants of the Manor of Parcel of the Manor, *doing Suit at his Mill*; this is a good Tenure by the Word (Doing) Perk. S. 638. cites 9 Aſſ. 24. & M. 9 E. 3. 35.

6. A Man may hold *of J. W. as of his Manor*, but *not as of his Houſe*. Br. Tenures, pl. 47. cites 8 H. 4. 1. Per Gaſcoigne.

7. *And* a Man may hold of the King, or of a common Perſon, *as of his Perſon*; and ſo is 2 H. 4. 3. Quod nota bene; for it is good Law. Br. Tenures, pl. 47. cites 8 H. 4. 1. Per Gaſcoigne.

8. If a Man had given Land *to an Abbot* or Prior in Fee before the Statute of Quia emptores Terrarum, *to find a Lamp* &c. this is a Tenure, as appears in a Ceſſavit. Br. Tenures, pl. 62. cites 45 E. 3. 15.

9. Avowry made for Tenure of 10 Acres of Land for *Suit to the Leet* of the Defendant. And per Fineux Ch. J. A Man may hold by Suit to the Leet, and to be *Cryer at the Leet*, or to be *Collector of Amercements of the Leet*, or to *repair a Bridge*, High *Way*, or the like, *or to keep a Beacon* for Fear of Enemies, or the like. Br. Tenures, pl. 35. cites 12 H. 7. 18.

10. The *King may licence the Tenant to give in Tail to hold of himſelf*, and ſo, to make Feoffment to hold of himſelf and the King; *and other Lords may licence the Tenant Paravail to make Feoffment in Fee to hold of himſelf*; and this *notwithſtanding the Statute of Quia Emptores* Terrarum; For this was made in Advantage of them, and therefore they may diſpence with it. Per Fitzherbert J. Br. Tenures, pl. 2. cites 27 H. 8. 26.

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* *Theſe Words ſeem not to belong to this Diviſion.*

(F) *Of whom* [a Man] ſhall hold by Creation * of the King, [or others.] At *Common Law.*

* Fitzh. tit. Aſſiſe, pl. 183. cites S. C. Br. Tenures, 24. cites S. C.

1. BEfore Quia Emptores Terrarum, **if the** Tenant had made Feoffment in Fee, **the Feoffee ſhould hold** of his Feoffor and not of the Lord Paramount. 4 H. 6. 20. * 3 Aſſ. 8. **Contra** 33 E. 3. Annuity, 52.

——Br. Tenures, pl 21. cites 4 H. 6. 20. S. P. per Cottiſmere. But if he had ſaid Tenendum de Capitali Domino, he ſhould hold of the Chief Lord.

If he had made the Feoffment generally without Reſervation of any Tenure, the Feoffee ſhould have holden of the Feoffor, as he held over; For Example, if he had holden by Knights Service, the Feoffee, by Creation of Law, had holden by Knights Service of the Feoffor, in Reſpect of the Tenure over by him; And therefore, *if the Lord had confirmed the Eſtate of the Feoffor*, viz. the Meſne *to hold by Fealty only* (which was Socage) the Tenure between the Tenant and the Feoffor ſhould be Socage alſo; becauſe *the Tenure created by Law follows the Tenure, in reſpect whereof it was created.* 2 Inſt. 501.

2. [But] **If** Tenant in Tail makes Feoffment in Fee, **Feoffee ſhall hold of the Lord Paramount, and not of the Donor.** 48 E. 3. 9. b. 4 H. 6.

3. So **if Tenant in Tail** leaſe for Life, **which is a Diſcontinuance, by which he has a Reverſion in Fee, he ſhall hold of the Lord Paramount.** 4 H. 6. 21. **Quære.**

4. If

4. If ſince [the Statute De] Donis, the Tenant gives in Tail the Donee ſhall hold of the Donor, and not of the Lord Paramount. 4 H. 6. 20, 21. b. adjudged. 3 Aſſ. 8 Dub.

Where there is Lord *and Tenant by Chivalry*, or otherwiſe, and the *Tenant infeoffs N. who gives to the Son* of the Tenant *in Tail*, *Tenendum de Capitali Domino*, and the *Donee dies*, the Iſſue ſhall hold it of his Donor, and he over of the Lord, but the Iſſue in Tail, nor the Tenant in Tail ſhall not hold of the Lord immediately; per Danby Ch. J. clearly; Quod nota, and ſo is 4 H. 6. But Littleton made a Doubt, becauſe no Notice was given to the Lord of the Feoffment. Br. Tenure, pl. 37. cites 2 E. 4. 6.

5. So if the Tenant of the King gives in Tail, the Donee ſhall hold of the Donor, and not of the King. 4 H. 6. 22. b. adjudged.

Where *Tenant of the King gives in Tail*, the *King may chooſe to take the Tenant in Tail for his Tenant or the Donor*, and this as well before Licence as after Licence; for the Licence of Alienation is a Pardon for the Treſpaſs, but this is no Concluſion to the King; But if he takes the one for his Tenant, as by the Ward of the Heir of the one, or the like, he ſhall not have the other after; For he has determined his Election; per Fitzherbert J. But ſee Contra 4 H. 6. 20, per Judicium. Br. Tenures, pl. 2 cites 27 H. 8. 26.

6. If before Quia Emptores a Man had alien'd in Fee by Deed, reſerving a Rent, this ſhould create a Tenure without doubt. Contra 33 E. 3. Annuity, 52.

7. [So] If before Quia Emptores Terrarum a Man had alien'd in Fee reſerving a Tenure to his Heirs, this had been a void Reſervation, and by Creation of the Law he ſhall hold of him as he holds over. Co. Litt. 99. b.

Fol. 501.

8. In Aſſiſe [it was ſaid] for Clear Law, that where *City*, *Borough*, *or Vill is leaſed to the Mayor*, *Burgeſs &c. in Fee Farm*, thoſe who hold Burgages or Land therein *hold them immediately of the Mayor*, Burgeſs and Corporation, and *not of the King immediately*. Br. Tenures, pl. 57. cites 49 E. 3.

9. It is a Law ordain'd, that if a Man *aliens in Mortmain*, and the *King ſeiſes and grants it over*; This *ſhall be held of the Chief Lords*. Br. Tenure, pl. 3. (bis.) cites 33 H. 6. 7.

10. When a Man made *Feoffment of Parcel of his Manor before the Statute* to hold of him, this was *intended to hold of the Manor*, and *not of his Perſon in Groſs*; Quod nota. Br. Avowry, pl. 60. cites 22 H. 6. 50.

11. If before the Statute of Quia Emptores Terrarum, there had been *Father and 2 Daughters*, and the *Father*, *being ſeiſed of one Acre* of Land, *enfeoffs* thereof *his eldeſt Daughter to hold of him and his Heirs by Fealty and 12 d.* and the *Father dies*, and the *Seigniory deſcends unto the two Daughters*; Now the eldeſt Daughter ſhall hold of her younger Siſter by Fealty and 6 d. Perk. S. 656.

12. If a *Man ſeiſed* of Land in Fee *in Right of his Wife*, and before the Statute of Quia Emptores Terrarum, the *Husband alone enfeoffs* a Stranger, *without ſaying more*, the Feoffee ſhall hold of the Husband by ſuch Services, as the Husband and his Wife held over; For the Husband alone did not hold over. *But* if the *Husband and Wife had joined* in the Feoffment; *to hold of the Husband*, theſe Words (to hold of the Husband) are void. And the Feoffee ſhall hold of the Husband and Wife by ſuch Services as they held over; So that if the Husband dies, and the Wife after his Death accepts of the Services from the Feoffee, ſhe ſhall not avoid the Feoffment in a Cui in Vita. Perk. S. 660.

And if the *Husband, and Wife had joined* in the Feoffment, *to hold of the Wife* without more ſaying, the Feoffee ſhall hold of the Husband and Wife; So that if the *Wife dies*, the *Feoffee ſhall hold of the Husband until the Feoffment be avoided by the Heir* of the Wife in a Cui in Vita &c. and then the Heir ſhall hold of the Lord Paramount. Perk. S. 660.

(G) *What Tenure the Law will create without expreſs Reſervation.*

And ſo ſhould the Heirs of the Feoffee; But if the

1. FEoffee before Quia Emptores **ſhould hold by the** ſame Services as Feoffor held over. 45 E. 3. 15 b. 3 H. 6. 11. Co. Litt. 99. b.

Feoffor himſelf holds over by Knights Service during his Life and no longer, and that after his Death his Heirs ſhall hold by Fealty only, or by other Services, now the Feoffee and his Heirs ſhall hold of the Feoffor and his Heirs by like Services, Mutatis Mutandis. Perk. S. 698.

If before the Statute of Quia

2. [So] Feoffee of Part, **before the Statute, ſhould hold by the ſame Services as Feoffor** &c. 3 H. 6. 11.

Emptores Terrarum, there were 2 *Jointenants* of Lands or Houſes in Fee, which they held *by Fealty, and* 2 *s. Rent, or* by Fealty and *a Horſe*, and they *enfeoff a Stranger* of the Lands or Houſes *to hold of one of them by Fealty and* 12 *d.* The Feoffee ſhould hold the Moiety of him by Fealty and 12 d. becauſe by the Feoffment he did depart but with a Moiety in right, and yet he ſhall have the whole Rent which is Reſerved, notwithſtanding that it be a ſeverable Rent, becauſe it is reſerved only to him, and he may well reſerve the ſame unto him alone, notwithſtanding that he joined in Feoffment with his Companion &c. And the Feoffee ſhall hold the other Moiety of the other Jointenant (to whom the Reſervation was not made) by Fealty, and 12 d. Rent, and he and his Companion ſhall hold together the whole Land over by 2 s. becauſe then the Rent is ſeverable, and if they themſelves hold the ſame Land over by a Horſe, then it is ſaid, that the Feoffee ſhall hold the ſame Moiety of him by Fealty and a Horſe. Tamen Quære, becauſe he was Party unto the Reſervation made unto his Companion &c. *But if* the Jointenants had *enfeoffed a Stranger to hold both of them, or of one* of them, *and expreſſed no Services*, they are void Words, and the Feoffee ſhall hold of them as they held over. Perk. S. 652.

For the Tenant ſhall not do the Service to the Chief Lord as for himſelf, but for the Co-

3. [So] **if before Quia Emptores, the** Tenant by Knight Service granted **the Land** Tenendum per 1 d. for all Services, & faciendo capitalibus Dominis feodi debita Servitia pro prædicto, **tho' by the firſt Words he ſhould hold without more Words by Socage, yet by the laſt Words he ſhould hold by ſuch Services as he held over.** 49 E. 3. 11. **Curia.**

nuſor [of the Fine by which the Grant was made] who is his Meſne, and ſo he holds of the Meſne immediately by thoſe Services; and therefore the Iſſue taken was, whether the Meſne held over of the Lord Paramount in Chivalry, or in Socage, and not whether the Tenant [Plaintiff] held of the Defendant his Meſne, in Chivalry or in Socage; Quod nota. And per Perſey, By this Tenure, viz. Faciend' Servitia debita Capitali Domino &c. he ſhall pay the Rent &c. to him for the Meſne, but ſhall not do Homage, Fealty &c. which are Services Corporal; for thoſe ſhall be done by the Meſne himſelf. Note the Diverſity. Br. Tenure, pl. 10. cites 49 E. 3. 10.

Perk. S. 635. S. P. of a Fine by Grant and Render, and ſays, That in this Caſe the Conuſee holds of the Conuſor by Knight Service, notwithſtanding that he expreſsly ſays that he ſhall do the Services Capitalibus Dominis; for by theſe Words in this Caſe he ſhall not hold De Capitali Domino, becauſe there is a Tenure before expreſs'd in the Fine, viz. by theſe Words, Reddendum inde ad Feſtum &c. which Words make a Tenure of the Conuſor; ſo that if he ſhall hold De Capitali Domino, then he ſhall hold the Land of two ſeveral Lords, which the Law will not ſuffer in this Caſe. But if theſe Words were not in the Note of the Fine, viz. Reddendum inde ad Feſtum, viz. annuatim &c. pro omnibus ſerviciis ſecularibus & demandis, then by the other Words the Conuſee ought to hold of the Lord Paramount by the like Services as the Conuſor held &c.

Co. Litt. 143. a. S. P. — Litt. S. 19. S. P. that Donee ſhall

4. **If a** Tenant gives in Tail, **Donee ſhall hold by the ſame Services as Donor holds over.** 1 H. 4. 2. 4 H. 6. 20. **adjudged; for Donor has the Ward of the Donee. Co. Litt.** 23.

hold by the ſame Services as Donor does to his next Lord Paramount, except the *Donees in Frankmarriage*, who ſhall hold quietly from all Manner of Services, unleſs from Fealty, till the 4th Degree paſt, and then the Iſſue ſhall hold of the Donor, or his Heirs, as they hold over. ——— And Coke in his Comment, pag. 23. ſays, the Reaſon is, that when by Conſtruction of the Statute of W. 2. there was a Reverſion ſettled in the Donor, by Reaſon of the Donee's having an Eſtate of Inheritance, the Judges reſolved that he ſhould hold of his Donor, as his Donor held over; as if the Tenant had made a Feoffment in Fee at the Common Law, the Feoffee ſhould have holden of the Feoffor as he held over; and before the Statute of W. 2. the Donee had holden of the Donor as of his Perſon, and now of him

him as of his Reverſion; But if a Man makes a * *Leaſe for Life, or Years, and reſerves nothing*, he ſhall have Fealty only, and no Rent, tho' the *Leſſor holds over by Rent* &c. And this that Littleton ſays is regularly true, if the Donor makes no ſpecial Reſervation; for then the ſpecial Reſervation excludes the Tenure which the Law would create.

* Co. Litt. 143. a. S. P.

If he gives the Tenancy in Tail Tenendum de Capitalibus Dominis, this Tenendum is void, becauſe that the Law has made a Tenure betwixt the Donor and the Donee &c. And then if the Tenendum ſhould be good, he ſhould hold the ſame Land of 2 Lords, which the Law will not ſuffer; if not, that it be by Matter of Concluſion &c. Perk. S. 637.——2 Inſt. 505. S. P.

5. So **if a** Meſne gives **the Meſnalty** in Tail, **the Donee ſhall hold of him by the ſame Services as he holds over.** 1 H. 4. 3. b. Lord, Meſne and Tenant were, the

Meſne acknowledged by Fine Sur Render to hold in Tail by 1 d. and rendring to the Lord the Services due. And by ſome, the Tenant ſhall hold of the Conuſor, and ſhall not render theſe Services, but only for the Conuſor, and not for himſelf; Quære. Br. Tenures, pl. 51. cites 21 E. 3. 49.

6. [But] **if** Tenant by Grand Serjeanty of the King gives in Tail, **the Donee, tho' he cannot hold by Grand Serjeanty, yet he ſhall hold by Knight Service, becauſe it was included in Grand Serjeanty. Co. Litt.** 23. The Reaſon why Donee ſhall not hold by Grand Serjeanty is, be-

cauſe no Man can hold by Grand Serjeanty but of the King only; and therefore ſince Grand Serjeanty includes Knight Service, he ſhall in this Caſe hold of the Donor by Knight Service. Co. Litt. 23. a.

7. **If there be** Lord, Meſne, and Tenant by Knight Service, **and the** Lord releaſes to the Meſne to hold in Socage, **the Law will alter the Tenure of the Tenant; for he alſo ſhall hold in Socage [only.]** 49 E. 3. 10. b. Br. Tenures, pl. 10. cites S. C. Per Perſey, quod Belk.

omnino conceſſit.——So if the Meſne releaſes to the Tenant, the Tenant ſhall hold per eadem Servitia & Conſuetudines, as the Meſne did. 2 Inſt. 502.

8. **If there be** Lord, Meſne, and Tenant by ſeveral Services, **and the** Tenant gives in Tail, and **after the Donor** dies without Iſſue, **by which his Reverſion eſcheats to the Meſne; in this Caſe the Donee ſhall hold as the Meſne holds over, and not as the Donor held, becauſe the Meſnalty is now extinct. Co. Litt.** 23. As if the Tenant holds by 4 d. and the Meſne by 12 d. and the Tenant

gives in Tail, without reſerving any Thing; ſo that he [the Donee] holds by 4 d. in reſpect of the Tenure over, and after the Reverſion eſcheats, now Donee ſhall hold by 12 d. For the Meſnalty, which was 4 d. is extinct, and the Law reſerv'd the Tenure upon the Gift in Tail, in reſpect of the Meſnalty; and when the Meſnalty is extinct, the former Rent between the Donor and Donee is extinct alſo; and then by the ſame Reaſon that the Donee ſhall take Advantage, if the Donor by Releaſe or Confirmation had holden by leſſer Services, by the ſame Reaſon he ſhall be prejudiced when he holds by greater Services. Co. Litt. 23. a.

9. **If a Man** ſeiſed in Fee in Right of his Feme, Tenant by Knight Service, gives it in Tail, **it ſeems that the Donee ſhall hold this of him by Knight Service; for till the Feme, or her Heir, purges the Diſcontinuance, the Baron and his Heirs ſhall hold it of the Lord Paramount by Knight Service. Contra Co. Litt.** 23. Co. Litt. 23. a ſays, the Donee ſhall not hold of the Baron by Knight Service, be-

cauſe his Wife held the Land, and the Baron had nothing but in her Right; and in that Caſe the Baron had gain'd a Reverſion by Wrong; and therefore ſuch a Donee ſhall do Fealty only.

If Husband ſeiſed of Land in Right of his Wife, makes a Feoffment in Fee, the Feoffee ſhall hold as the Wife held; for the Husband had nothing but in her Right. 2 Inſt. 502.

10. **If** Tenant by Knight Service makes Gift in Tail, reſerving Fealty and Rent, **the Donee ſhall hold in Socage by Fealty and Rent. Co. Litt.** 23.

11. It ſeems, that if a Man *gives Land pro Homagio & Servitiis to J. N. rendring* 6 *d.* that *he ſhall render* 6 *d. and Fealty, but not Homage*; for this

this does not come in Reddendo. Br. Tenures, pl. 78. cites 28 E. 3. Fitzh. Avowry 141. Brooke ſays, Quod quære; for it is not ſo ſaid there.

12. If 2 *Jointenants* were of Land, and before the Statute of Quia emptores Terrarum *one* of them *infeoffs a Stranger* of what thereof belongs unto him, *without reſerving any Thing*, the Feoffee ſhall hold of his Feoffor, by the Moiety of the Services by which the Feoffor and his Joint Companion held over, if they held over by ſeveral Services &c. And notwithſtanding this Feoffment the Feoffor, and he, who was his Joint Companion, ſhall hold the ſame Land over of their Lord as they held before, ſo as the Avowry of the Lord is not altered by this Feoffment. Perk. S. 653.

(H) What Tenure the Law will create *upon Extinguiſhment of the Tenure.*

1. **If a** Meſnalty **comes by** Eſcheat to the Lord, **the Seigniory is extinct, and yet the Lord ſhall hold by the ſame Services as he held before. Co. Litt. 99. b.**

2. If there are *Lord, three Daughters meſnes, and Tenant*, and *two of the Daughters releaſe to the Tenant, or purchaſe of the Tenant*, there they two hold two Parts of the Lord paramount by Extinguiſhment of the Meſnalty, and the third Part of the other Siſter; ſo that the Lord ſhall make ſeveral Avowries, and ſhall have ſeveral Actions; and in the Caſe of the Releaſe the Tenant ſhall hold two Parts of the Lord Paramount, and the third Part of the Siſter who did not releaſe. Br. Tenures, pl. 23. cites 36 H. 6. 7.

Litt. S. 140. S. P. and Coke, Pag. 99. b. in his Comment thereupon ſays, that hereby it appears that if the Seigniory be transferr'd by Act in Law to a Stranger, and thereby the Privity is alter'd, then the Tenure in Frankalmoigne is turn'd to a Tenure in Socage by Fealty, and that this new Tenure created by Law ſhall, upon the Eſcheat, drown the Seigniory; for *always the Seigniory, nearer* to the Land, *drowns the Seigniory*, which is *more remote* off; and yet the Lord in this Caſe, to whom the Meſnalty is eſcheated, ſhall hold by the ſame Services that he held before the Eſcheat.

3. *Lord, Meſne and Tenant by Frankalmoigne*; the *Meſne dies without Heir*; the Tenant ſhall hold of the Lord by ſuch Services as the Meſne held of the Lord; becauſe the Lord cannot have the ſame Services of the Tenant as the Meſne had; for *Service of Frankalmoign remains always in the Blood of the Donor*, and no other can have them beſides the Donor and his Heirs &c. *But if the Lord can have the Services which the Meſne had before* of the Tenant, then he ſhall not have the ſame Services as he had of the Meſne before. 7 E. 4. 12. a. Per Needham.

4. *As* if there are *Lord Meſne and Tenant*, and the *Tenant is an Abbot in Jure Eccleſiæ*, and *holds of the Meſne by* 12 *d. and Fealty*, and the *Meſne holds* over of the Lord *by* 20 *s.* &c. in this Caſe if the *Meſne dies without Heir*, the Tenant ſhall hold of the Lord by 12 d. only, becauſe the Lord is nearer to the Land than he was before, and ſo may have the ſame Services as the Meſne had &c. 7 E. 4. 12. a. Per Needham.

(I) *Of*

(I) *Of whom* he ſhall hold. *By expreſs Reſervation.*

1. IF at Common Law the Tenant made Feoffment Tenendum de Capitalibus Dominis, he ſhould not hold of the Feoffor, but of the Lord Paramount. 4 H. 6. 20.

2. If Tenant, ſince Donis Conditionalibus, gives in Tail Tenendum de Capitalibus Dominis, yet he ſhall not hold of the Lord Paramount, but of the Donor; for the Donor has a Reverſion, and ſo a Tenure * incident thereto, and therefore ſhall not hold of both. 4 H. 6. 21. b. 2 H. 4. 6.

* Fol. 502. K. C. was ſeiſed of *two Manors* in Fee, and held them of the King in Chivalry *in Capite*, and *had Iſſue A. and B.* and *leaſed the Manor to C. for* Term of *his own Life*, and the Remainder *to B. his younger Son, in Tail Tenendum de Capitali Domino*; the Remainder *to the right Heirs of the Donor*. And the *Donor died*; and the *Remainder deſcended to A. the eldeſt Son*, and *B. the youngeſt Son enter'd* as in his Remainder; and the *King was always ſeiſed of the Services by the Hands of A.* and not by the Hands of B. And afterwards *B. died*, *H. his Son within Age*; and *it was found by falſe Office, that B. was ſeiſed in Fee*, and held of the King in Chief, and died ſeiſed his Heir within Age. And came *A. the eldeſt Son*, and travers'd *the Office* for this Matter. And it was demurr'd for the King; and after great Argument it was awarded, That the Hands of the King ſhould be amov'd, and that A. ſhould be reſtored to the Ward; for it was agreed, that *this Remainder to the right Heirs of R.* the Donor, *is only a Reverſion*; for the Fee was never out of him. And where the King has a very *Tenant in Fee-Simple*, ſo long as the Fee is not out of him, ſo long he *reſts Tenant of the King*; *and he ſhall have the Eſcheat of him, if he be attainted of Felony*; *and* alſo *the King cannot have two ſeveral Tenures of one and the ſame Land, Simul & Semel*, that is to ſay, one of the Donor and another of the Donee; and therefore if the Donee ſhall be immediately Tenant to the King, then the Donor ſhall hold of none; which is not ſo, but the *Donee ſhall hold of the Donor, and the Donor of the King*, ut ante Donum. And per Haul and June; At the firſt it was in the Election of the King to have elected the Donor or the Donee for his Tenant; but where by the Acceptance of the King of the Services by the Hands of the Heir of the Donor, he ſhall hold of him. But the Judgment was as above; therefore Brooke ſays, it ſeems to him that this Opinion is not Law. Br. Tenures, pl. 21. cites 4 H. 6. 20.

Where there is *Lord and Tenant by Chivalry*, or otherwiſe, and the *Tenant infeoffs N. who gives to the Son* of the Tenant *in Tail Tenendum de Capitali Domino*, and the *Donee dies*, the Iſſue ſhall hold it of his Donor, and he over of the Lord; but the Iſſue in Tail, nor the Tenant in Tail, ſhall not hold of the Lord immediately; quod nota, per Danby Ch. J for clear Law, and ſo is 4 H. 6. But Littleton makes a Doubt, becauſe no Notice was given to the Lord of the Feoffment. Br. Tenures, pl. 37. cites 2 E. 4. 6.

3. So if the Tenant of the King gives in Tail Tenendum de Capitalibus Dominis, yet he ſhall hold of the Donor, and not of the King; for the ſaid Words are void. 4 H. 6. † 41. b. *Champernoun's* Caſe adjudged.

† This ſeems to be miſprinted, there being no ſuch Page, and ſhould be 4 H. 6. 20. b. ——Br. Tenures, pl. 21. cites S. C. accordingly, that thoſe Words, if referr'd to the Donee, are void; but where Gift is made in Tail, the *Remainder over in Fee*, there the Tenant in Tail ſhall hold of the chief Lord. Note the Diverſity. Per Cheyney & Martin, Juſtices.

If the *Tenant of the King gives in Tail*, and the *Tenant in Tail dies ſeiſed*, the King ſhall not have any thing thereby; for *the Tenant in Tail holds of his Donor*, and the King may receive the Rent and Services of the Donor by the Hands of the Tenant in Tail, and yet he holds of the Donor. Per Wood, Keble, and Tremaile, J. quod affirmatur per omnes. Br. Tenures, pl. 96. cites 4 H. 7. 16.

4. At the Common Law, before the Statute of Quia Emptores Terrarum, if a Man had granted Land to hold of his Heirs, it would be a void Reſervation to his Heirs, and the Law would create a Tenure of himſelf, as he held over. Co. Litt. 99. b.

See Reſervation, (C) pl. 4.

5. If Lands held of a common Perſon come to the King by Eſcheat by Attainder of the Tenant of Treaſon, and the King grants thoſe Lands to another by theſe Words, Tenendum de Capitali Domino per Servitia Debita & Conſueta, they ſhall be held of the chief Lords as they were before, and not of the King. ‡ 33 H. 6. 7. by Priſot. Co. 6. *Molyns* 6. Reſolved.

‡ Br. Tenures, pl. 3. cites S. C. —S. C. cited and relied ſtrongly on, per Cur. 6 Rep. 6. a. in Molyns's Caſe, and ſays that with this accords 8 E. 3. 283. And as to the Caſe of 27 H. 8. [which is at

at Br. Parliament. pl. 77. and is in at Tit. Statutes (E. 8) pl. 2. and at pl. 9. below] it was anſwer'd and reſolved, That that Caſe was not like to this Caſe, for a Saving cannot ſave that which is not in Eſſe; But in the ſaid Book (of 27 H. 8.) it is further ſaid, viz that (Here are not Words of Gift or Reviving.) But that here in the Caſe at Bar, (viz. Molyns's Caſe) the Grant of the King amounts in Judgment of Law to a Reviving of the ancient Seigniory. Hill. 40 Eliz. in Scaccario.——S. C. of Molyns cited 8 Rep. 77. a. and affirm'd for good Law.

This Caſe was affirm'd for clear Law. 9 Rep. 131. a. Trin. 9 Jac. in the Court of Wards, in Bewley's Caſe, which ſee, Infra, pl. 20.

6. If the King Lord, B. Meſne, and C. Tenant, are of a Manor, and the Tenant is attainted of Treaſon, and Office is found thereof, and after the King grants the Manor to J. S. in Fee Tenendum de nobis Hæredibus & Succeſſoribus noſtris, & aliis Capitalibus Dominis feodi illius per Servitia inde debita & de jure conſueta; this ſhall revive the Tenure of the Meſne, and of the King as Lord Paramount. Co. 6. *Molyns*, 5. b. 6. Reſolved.

So if the *King* be *Lord*, *A. Meſne*, *C. Meſne*, *and D. Tenant*, and the *Tenancy comes to* the Hands of *the King by Forfeiture or Conveyance*, the *King grants* the Lands *to another in Fee*, (*Tenend' de Capitali Domino per ſervitia debita*, & conſueta) this Grant ſhall revive not only the immediate Tenure of C. but of A. and of the King alſo; albeit the Tenend' de Capitali Domino be in the ſingular Number, (as the Statute ſpeaks) yet it is as much as Capitalibus Dominis. 2 Inſt. 501, 502.

7. But in the ſaid Caſe, if the King grants the Land to J. S. Tenendum de Nobis, this ſhall not revive the Tenure of the Meſne, but he ſhall hold of the King only. Co. 6. *Molyns*, 6.

8. If the King purchaſes Land held of other Lords, all the Seigniories by this are extinct; and if the King afterwards grants the Land to another to hold of him, he ſhall hold only of the King. 47 E. 3. 21. b.

See Supra, pl. 5. 6. in the Notes.—If the King has a Tenancy by Forfeiture or Purchaſe, if he does by Cov n alien them to hold of himſelf, the Lord may ſue by Petition, and have a Scire Facias againſt the Patentee to repeal the Patent, and to reſeiſe the Land, and then it ſhall be granted Tenendum de Capitali Domino. F. N. B. 159. (A) in the new Notes there (c) cites 20 Aſſ. 124. 46 E. 3. Petition 19. 17 E. 3. 59. but ſays it is intended of an Alienation in Fee, and cites 3 E 3. 10.

9 If the King has Land by Forfeiture of Treaſon, by this all Tenures are extinct as well of the King as of others; and if this Land be after given to another by Parliament, ſaving to all others their Rights, Rents, Services, &c. there the Seigniories of common Perſons are not revived. 27 H. 8. Brook. Parliament. 74. [Br. N. C.] 27 H. 8. S. 92. Davies Proxies 4. becauſe the ſaving cannot ſave that which is not in Eſſe.

10. A. acknowledged to B. by *Fine for Term of his Life Tenendum de Capitali Domino*; and the Fine was rejected by reaſon of the Reverſion in the Conuſor. *But* it was received *Tenendum of the Conuſor, and rendering to the chief Lord the Service due for the Conuſor*, quod nota, and not for himſelf. Br. Tenures, pl. 67. cites 14 E. 3. and Fitzh. Fine 55.

11. *Fine* was levied to A. *to hold of the Donor in Chivalry*, the *Remainder to B. in Tail to hold of the Donor by the 12th Part of a Knight's Fee, and doing to the chief Lord the Service due for the Donor*; and it was received; for then the Donee ſhall make 2 Eſcuages, one to the Donor, and another to the chief Lord for the Donor; and therefore theſe Words *(Doing to the chief Lord) were ouſted* &c. And ſee there that the *Tenant for Life* may hold *by one Service, and he in Remainder by another* Service. Br. Tenures, pl. 68. cites 19 E. 3. & Fitzh. Fine 71.

12. If there were *Lord*, *Meſne*, *and Tenant*, and before the Statute the *Tenant infeoffs a Stranger* of the Tenancy, *to hold of the Lord Paramount*, the ſame is void. *But if* the Feoffment were made *to hold of the Meſne*, it were good; and he ſhall hold of him by the ſame Services, which the Feoffor held of the Meſne; but the Tenant cannot make a new Tenure between his Meſne and his Feoffee by new Services, for to the

the Services reſerved, the Meſne is a Stranger. And if the *Tenant* had *enfeoffed a Stranger*, before the Statute &c. *to hold of him and the Meſne*, the Feoffee ſhould have holden only of his Feoffor. Perk. S. 667. cites T. 7 E. 4. 11. and P. 2 E. 4. 5.

13. And if the *Tenant* before the Statute had *enfeoffed J. S. to hold of the Meſne and T. K.* the Feoffee ſhould have holden only of the Meſne. Perk. S. 668.

14. If before the Statute there had been a *Woman Seignoreſs*, and Tenant, and the Woman *had taken Husband*, and the *Tenant enfeoffed a Stranger to hold of the Husband*, it is a void Tenure, and the Feoffee ſhall hold of his Feoffor &c. Perk. S 668.

15. And if there had been 2 *joint Lords and Tenant*, and before the Statute the *Tenant* had *enfeoffed a Stranger to hold of him, and one of the joint Lords*, it is a void Tenure, and the Feoffee ſhould hold of his Feoffor. Perk. S. 668.

16. If Lord and *Tenant* had been before the Statute *of* 2 *Acres* of Land, and the Tenant had thereof *enfeoffed a Stranger to hold one Acre of the Lord Paramount*, and to hold *the other* Acre *of himſelf*, the ſame is good &c. Perk. S. 670.

So if there had been *Lord and* 2 *joint Tenants*, before the Statute, &c. and they had *enfeoffed a Stranger*, and *one of them had aſſign'd the Feoffee to hold of the Lord Paramount*, and the *other had aſſign'd the Feoffee to hold of himſelf* &c. the ſame had been good &c. Perk. S. 669.

17. If Lord and Tenant had been before the Statute &c. and the *Lord granted his Seignory unto a Stranger*, and the *Tenant enfeoffed another Stranger to hold of the Grantee of the Lord*, the ſame had amounted unto an Attornment, and alſo to make a new Tenure; and yet the Grantee is a Stranger unto the Reſervation of the Seigniory between the Grantor and the Tenant. But as to that, it may be ſaid, that there is a *Privity by Matter en fait*, viz. by the Grant with the Attornment; and ſo it ſhall be, notwithſtanding the Lord had granted it unto the Uſe of the Grantor &c. And the ſame Law is where a *Meſnalty eſcheats*, mutatis mutandis. Perk. S. 669.

18. If the Feoffor &c. or Donor &c or Leſſor for Life, had *reſerved unto him* upon the Feoffment before the Statute; Or had reſerved unto him upon the Gift or Leaſe, after the ſaid Statute, *Knights Service, or Fealty, and* 10 *s. or a Horſe &c.* and dies, his *Heir ſhall have only Fealty*; becauſe the Reſervation does not extend unto the Heir of the Feoffor, Donor, or Leſſor. Perk. S. 699.

19. Tenant for Life and Tenant in Tail are not wholly excluded out of the Statute of *Quia Emptores* &c. cap. 3. by Force of the Words there (in feodo ſimplici;) For where the whole Fee Simple paſſes out of the Feoffor, there this Act *extends to Eſtates for Life and* in *Tail*, as if an Eſtate for Life, or in Tail be made of Land, the *Remainder in Fee*, there then Tenent for Life or in Tail ſhall hold de Capitali Domino by Force of this Act, but *otherwiſe* it is *when a Reverſion remains in the Donor or Leſſor*. For if a Man at this Day make Gift in Tail, Tenend' de capitalibus dominis feodi &c. theſe Words are void, and he ſhall hold of the Donor. 2 Inſt. 505.

20. Tenant was attainted of Treaſon, and his Manor &c. forfeited to E. 2. who granted the ſame to J. S. in Fee, *Tenendum de Nobis* & Hæredibus noſtris per Servitium feodi militis in perpetuum, and 10 l. Rent, *Et faciendo aliis Capitalibus Dominis feodi illius, ſi qui fuerint, Redditus & Servitia inde debita antequam ad manus noſtras taliter devenerunt, ſalvis Nobis & Hæredibus noſtris feodis militum &c.* Reſolved by the 2 Chief Juſtices, and Chief Baron, That the Tenure of the Meſne is revived, notwithſtanding the King firſt of all reſerved to himſelf other Services, viz. Knight-Service, where the *Meſne before the Attainder held of the King in Socage*; and tho' the King has reſerved other Rent, yet becauſe the

Ibid. 131. the Reporter cites 2 E. 3. 33. or 60. b. 8 E. 3. 283. 17 E. 3. 59. b. 25 E. 3. 46. 46 E. 3. Tit. Petition, 19. 49 E. 3. 10. 22 Aſſ. 53. 31 Aſſ. 30.

4 H. 6. 20. 33 H. 6, 7. And ſays, Nota upon the ſaid Books a *Diverſity* between *Creation of a new Tenure without any Aſpect to an ancient Right*, for there the firſt Reſervation ſhall ſtand, and between *Reſtitution of an ancient Tenure*; For this ſhall be preferred before the Reſervation which is mention'd firſt. Nota a good Diverſity.

the King, for his Honour, &c. expreſsly intends to revive the Meſnalty, (which by the Tenant's Attainder was extinct, according to the Rigor of Law) the Clauſe of Revivor ſhall be conſtrued to precede, and the Reſtitution of an ancient Right ſhall be preferr'd. 9 Rep. 130. b. 131. Trin. 9 Jac. in the Court of Wards. Bewley's Caſe.

See (F a.) pl. 17, 18.

(K) *Upon what Reſervation* [the Tenure] ſhall be by Knight Service of the King, and *where without Reſervation.* Tenure by *Knight Service of the King.*

* Br. Tenures, pl. 3. at the End. S. P. cites S. C.

1. IF the King grants Land and reſerves no Manner of thing, nor ſpeaks of any thing in this Caſe for Non-Certainty, it ſhall be adjudged by Knight Service. * 33 H. 6, 7. by Priſot. Co. 9. Lowe, 123.

Br. Tenures, pl. 7. cites 44 E. 3. 45.

2. If the King grants the Farm of a Vill in Fee to hold of him by the Services due and accuſtomable, this ſhall be a Tenure by Knight Service; For it ſhall be by the Services which are moſt for the King's Advantage, Scilicet, by Knight Service. 44 Aſſ. 22. by all the Juſtices adjudge. 44 E. 3. 45.

* Br. Tenures, pl. 7. cites S. C.

3. So if the King leaſes for Life a Farm of a Vill, and after confirms to him in Fee to hold, per Servitia inde debita & conſueta, it ſhall be by the Services which are moſt for the King's Advantage That is to ſay, by Knight Service. 44 Aſſ. 22. adjudged. * 44 E. 3. 45.

So where the King granted Lands Tenendum de nobis &c. by the Service of a *red Roſe yearly* at the Feaſt of St. John the Baptiſt *pro omnibus aliis Servitiis.* It was objected that Tenure cannot be by Service of a Roſe only pro omnibus aliis Servitiis, becauſe Homage or Fealty at leaſt, is incident to every Tenure; and therefore ſince other Services ſhall be annex'd, it ſhall be ſuch as is the beſt for the King and the moſt high, which is Knight Service, and this for the Uncertainty. But reſolved, That ſince Fealty is incident to every Rent-Service, the Law annexes Fealty to the ſaid Rent, and then the Words *Pro omnibus aliis Servitiis, ſhall be intended ſuch Services which the Law does not imply* or add thereto; So that the Tenure ſhall be by a Roſe and Fealty. 6 Rep. 6. b. 7. a. Paſch. 43 Eliz. In Scaccario, Wheeler's Caſe. —— Cites S. C.

4. If the King grants Land and reſerves 10 s. Rent a Year, and does not mention how it ſhall be held, it ſhall be held by Socage, in as much as there is a ſpecial Reſervation made. See 33 H. 6, 7.

* Br. Tenures, pl. 3. cites S. C. but Brooke ſays, Quære, hoc.

5. If the King grants Land Abſque aliquo inde reddendo, yet he ſhall hold by Knight Service. Co. 9. *Lowe.* 123. * 33 H. 6, 7. by Priſot.

—— But it was reſolved, that by Operation of Law, it ſhall be held of the King in Capite by Knight Service, according to the Rate and Proportion of the Land which belongs to a Knight's Fee: And the principal Caſe is more ſtrong, becauſe the King, upon the Grant of the Services, limited the Tenure to be by Fealty only for all Services, Exactions, and Demands. 9 Rep. 123. b. Trin. 7 Jac. in the Court of Wards. Anthony Low's Caſe.

6. The

6. The Beginning of a Manor was, when the *King gave* 1000 *Acres of Land*, or a greater or leſſer Parcel of Land unto one of his Subjects, and his Heirs, *to hold of him and his Heirs*, which Tenure is Knights Service at leaſt. Perk. S. 670.

(L) Tenure *in Capite. What Perſon may create it.*

1. A Count Palatine, who has Jura Regalia **granted to him, may create a Tenure in Capite to hold of himſelf; for by the Grant it is in a Manner disjoin'd from the Crown and out of the King (and he is made a Petty King.) Da. 1. County Palatine.** 62. 66. See (M) pl. 4.

2. But **it ſeems the** King cannot grant ſuch Power to a particular Man, without granting ſuch Royal Juriſdiction as the Count has.

3. **It appears that** Land was held of the Earl of Cheſter in Capite. D. 13. El. 303. 19 El. 359.

4. So **Land was held** of the Biſhop of Durham **in Capite.** 10 El. 277. 57. D. 277.

5 But **a Tenure in Capite cannot be created** by a Subject who is merely in Condition of a Subject, and has no ſuch Power granted to him. Da. 1. 66. b. D. 30. H. 3. 44. Tenure in Capite *is only of the Perſon of the King*, and *not where he holds of him as of an Honour, Manor, Caſtle* &c. *unleſs of certain ancient Honours* as appears in the Exchequer, and likewiſe how a Man ſhall hold of the King, and of the ancient Lord by Recovery by Default in Præcipe in Capite, where the Land is not held of the King in Fact, and this by Reaſon of the Concluſion. Br. Tenures, pl. 65. cites F. N. B. Fol. 5. —— Br. Tenures, pl. 99. cites S. C.

No Tenure created by a Subject, tho' it be a Tenure in Groſs of his Perſon, can by any Poſſibility grow or aſpire to be a Tenure in Capite of the King. And therefore if the Prince or other Subject create ſuch Tenure of his Perſon, and after is made King, this does not become Tenure in Chief. Arg. Dav. Rep. 59. a. in the Caſe of the County Palatine of Wexford.

6. As the Prince cannot **create a Tenure in Capite.** D. 30. H. 8. 44. See (L. 2) pl. 11.

7. **Land cannot be** held of the Duke of Cornwall **in Chief by Knight Service.** P. 9 H. 5. B. R. Rot. 85. **admitted. Contra** 43 Aſſ. 15. **admitted.**

(L. 2) * *What ſhall be ſaid* a Tenure in Capite.

See (A a.) * Tenure in Capite ex Vi Termini, is a Tenure in groſs, and it may be holden of a Subject; but being ſpoken generally, it is Secundum excellentiam intended of the King; for he is Caput Reipublicæ. Co. Litt. 73. a.

1. A Man may hold of the King in Capite as of an Honour, which was the ancient Inheritance of the Crown; **this appears by the Writ founded upon the Statute of** 1 E. 3. cap. 12, 13. **quod Vide Fitz. Na. 175. a. where Fitzherbert obſerves this accordingly. It ſeems the Reaſon is, becauſe by Preſcription the Tenements held of thoſe Ancient Honours have uſed to draw the ſame Prerogative as other Tenures in Capite.**

Regularly a *Tenure of the King, as of his Perſon*, is a Tenure in Capite, ſo call'd Propter excellentiam, becauſe the Head is the principal Part of the Body, and he that holds of any common Perſon as of his Perſon, he in Truth holds in Capite; but again, *Propter excellentiam*, it is only in common Underſtanding applied to the King, and that a *Seigniory of a common Perſon is called a Tenure in groſs*, that is, by itſelf, and not link'd or tied to any Manor &c. Co. Litt. 108. a.

Br. Tenures, pl. 61. cites S. C

2. **If a Man** holds of the King as of his Crown of the Honour of Berkhamſtead, **this is a Tenure in chief.** 21 E. 3. 41. b.

That in Ward the Prince counted that a Man held of the King in Chivalry as of his Crown, of the Honour of Birkhamſtead by Service of Chivalry; and that the King had given the ſame Honour to him and his Heirs Kings of England &c. Brooke ſays, That ſo it ſeems that ſome *Honour may be held in Capite.* And yet ſee Magna Charta, that all Honours are not in Capite; for it is not properly in Capite, but where he holds of the King as of his Perſon, and not of the Manor or Honour.——S. C. cited Arg. Dav. Rep. 59. a. in the Caſe of the County Palatine of Wexford, that the Prince ſhall not have the Prerogative of Capite Tenure during the Life of the King.

An *Honour* is the moſt noble Seigniory of all others, and originally created by the King, but may afterwards be granted to others. Co. Litt. 108. a.

It is a Tenure in Capite, and by Knights Service; and it may be that in Ancient Time he ſhould guard the Caſtle; and that now the King has taken the Rent for the ſame, and yet the taking the Rent does not alter the Nature of the Tenure. Quære. F. N. B. 256. (A)

3. [So] **if a Man holds of the King** as of his Honour of H. by the Service of Render of 10 s. ad Wardam Caſtri Dover, **this was a Tenure in Capite. This appears by the Writ of Livery in the Regiſter 296. b. which ſee alſo in Fitz. Na. 225. E. and there 256. A. Fitz. obſerves upon the Writ this to be a Tenure in chief.**

A Manor was held *per Redditum* 8 *s.* 1 *d. ad Wardum Caſtri de Dover* &c. Reſolved that this is a Socage Tenure. Litt. Rep. 47. Trin. 3 Car. C. B. Stevens v. Holmes.

4. **In** Time of E. 2. a Man held of the King in Capite ut de Honore Abbathiæ Mariæ. **This appears by the Writ in Fitz. Na. 256. a.**

Some Honours be in Capite, as Part of Peverel, and of others. Br. Livery, pl. 58. cites 29 H. 8.

5. **There** are 4 Honours, of which Land being holden, they are Tenures in Capite, **that is to ſay, they ſhall ſue Livery, and the King ſhall have the ſame Prerogatives by them as by other Tenures in chief of his Perſon, and thoſe are** Bononia, Haggonett, * Peverell, and **Parcel of** Dover, **and the Courſe of the Court of Wards is agreeing herewith for thoſe at this Day. Co. Litt. 77. for all except Dover. But there is mentioned alſo the Honour of** † Ralegh; **but ſee 34 H. 8. S. 330. Brook cites 3 E. 3. Rot. 2. in the Exchequer, that this is not Tenure in chief.**

* It was held accordingly.

Ley. 52. Trin. 17 Jac. in the Court of Wards in **Churche's Caſe**, for the Manor of Wood Mortimer in Eſſex; and there ſaid that this Honour of Peverel (there call'd Penerel) was call'd and known by the ſeveral Names of *Hatfield Peverell*, ſometimes *Peverel London*, and ſometimes the Honour of *Hatfield Peverel of London*; but that all was in Truth but one Honour, and not diverſe.

† It was *found that a Man held of the King in Chivalry in Capite, as of his Honour of Raylegh*; and it was taken to be *no Tenure in Capite, but* Tenure *of the Honour*; and therefore the Heir ſhall have Ouſter le Main of his other Lands, which ſhould not be if it had been in Capite; for then the King ſhould have all in Ward by his Prerogative. Br. Tenures, pl. 94. cites 3 E. 3. Rot. 2. in the Exchequer. And ſuch another Matter there 5 H. 6. Ro. 4. Ex parte Remembr' Theſaurarii; *But* otherwiſe it is, *if the Honour be annexed to the Crown*; for *then the Honour is in Capite.* And Anno 11 H. 7. the Honour of Raylegh was annexed to the Crown, therefore now this is in Capite. But *where the King gives Land to hold* of him *by Fealty, and* 2 *d. pro omnibus Serviciis, this is Socage in Capite*; for it is of the Perſon of the King. Contra if it was to hold as of the Manor of B. Note the Difference. Br. Tenures, pl. 94. cites 33 H. 8.

There is a manifeſt *Difference between* the

* Fol. 504.

6. So **a Man may hold in Capite** as of the Dutchy of Lancaſter, **which is a County Palatine. Co. Litt. 77.**

7. **If a Man holds** of the King, as of his Principality of Wales, by the * Service of going into the War of the Prince at the Charges of the Prince, **this is not any Tenure in chief.** † D. 17. 18 El. 344. 3.

Caſe of the *Principality of Wales*, 17 El. 345. a. *and* the Caſe of the *County Palatine*; for where before the Subjection of Wales to the Crown of England, a Man held Land of the Prince of Wales by Service to go in his War; this was not Tenure of which the Common Law could take Notice; for this Principality of *Wales was not governed by the Common Law, but was a Dominion by itſelf*, and had its proper Laws and Cuſtoms: And for this Reaſon when this Country was reduced under the Subjection of the Crown of England, ſuch Tenure as was of the Prince of Wales, could not become a Capite Tenure of the King of England. *But every County Palatine*, as well in Ireland as in England, *was originally Parcel of the ſame Realm*, and *derived from the Crown, and* was *always governed by the Laws of England*, and the Lands there were held by Services aud Tenures, of which the Common Law took Notice, tho' the Lord

Lord had a ſeveral Juriſdiction and Seigniory ſeparate from the Crown; and therefore the *Tenure in Capite of the County Palatine, is of the ſame Nature with the Tenure in Capite of the King*, and ſo being come to the Crown, ſhall be Tenure in chief of the King, as it was before of the County Palatine. And the Reaſon of this Difference appears fully in 19 H. 6. 12. Reſolved per Cur. Dav. Rep. 67. a. Trin. 9 Jac. in the Exchequer, the Caſe of the County Palatine of Wexford.

† D. 344. b. 345. Ap-David's Caſe.——S. C. cited D. 359. b. Marg. pl. 3. and that it was only a Meſne Tenure——S. C. cited Arg. Dav. Rep. 59. b. in the Caſe of the County Palatine of Wexford. And ſays, See the Statute of Magna Charta, cap. 32. and the Book of 28 H. 6. 11. b. to this Purpoſe.

8. If the King grants Land to hold of any of thoſe ancient Honours by Knight Service, **and not in Capite, this is a Tenure as of the Honour, and not a Tenure in Capite. Maſter Cholmley ſaid that this was one *Clark*'s Caſe, in the Court of Wards. 7 Car. ſo reſolved per Curiam.**

Ley's Rep. 7. Paſch. 7 Jac. [and not 7 Car.] ſeems to be S. C. and it was found

that that the Land was held of the Honour of Peverel by Knight Service, and not in Capite; and the Doubt was, becauſe it appears 29 H. 8. Br. Livery 58. that but Part of Peverel is in Capite; whereupon the Chief Juſtices and Chief Baron Aſſiſtants reſolved that it was a mean Tenure by Knight Service; for the expreſs finding it not to be in Capite, imports the Land to be Parcel of that Part of the Honour of Peverell which is no Parcel of the old Honour of Peverell; And it was decreed accordingly.

9. If a Man holds of a common Perſon, as of an Honour or Manor by Knight Service, and this Honour or Manor comes to the King by *Eſcheat, that is to ſay, Attainder &c. or by Purchaſe, or the like, he ſhall hold of the King, as of the Honour and Manor as before, and ſhall not hold in chief. D. 30 H. 8. 44. 27. 1 El. 168. 18 D. Palatine 63. Magna Charta, cap. 31. † 29 H. 8. S. 113.

It ſeems this is not Tenure in chief commenc'd in Ancient Times upon the Grants

of the King to defend their Perſons, and their Crown and Royalty againſt Enemies and Rebels. D. 44. pl. 28. Gilbert's Caſe.

* Co. Litt. 108. a. S. P.

† Br. Tenures, pl. 61. cites 29 H. 8. S. C. ——Br. Livery, pl. 57. cites S. C.

10. If the King gives Land to hold of him, as of an Honour or Manor, which is not any of the Ancient Honours, **this is not a Tenure in Capite. D. 30 H. 8. S. 113.**

It is all one where the King gives Land Tenendum *de*

nobis ut de Manerio &c. in Capite, and where the Words are tranſpoſed, viz. *De nobis in Capite ut de Manerio* &c. For when in the Beginning or End it is expreſsly limited to be held Ut de Manerio, the Tenure of the Perſon is abundant. 12 Rep. 135. Eſtwick's Caſe.——This was held as a Meſne Tenure, and not a Tenure in Capite. Ibid. 136. cites Baron Luke's Caſe.

11 **A Tenure in Capite** ought to commence and take its original Creation by the King himſelf, **and not by any Subject. D. 30 H. 8. 44. 29. [30] For this Tenure, which is created by a Subject, cannot by any Means after be a Tenure in chief.**

12. **A Tenure in Capite** is a Tenure of the King as of his Crown, that is, as he is King, and of his Perſon. **Co. Litt.** 108.

And not when it is holden of

the King, as of any Honour, Caſtle, Manor &c. Co. Litt. 108. a.——F. N. B. 5. (K) accordingly, and that becauſe the Writ of Right, in ſuch Caſe of its being held of an Honour &c ſhall be directed unto the Bailiff of the Honour or Caſtle, or Manor to do Right. But when the Lands are held of the King as of his Crown, they are not held of any Manor, Caſtle, or Honour, but meerly of the King as King, and of the King's Crown as of a Seigniory by itſelf in groſs, and in chief above all other Seigniories.——D. 44. b. Mich. 30 H. 8. pl. 44 S. P **Gilbert's** Caſe; and that if Writ of Right be brought of Lands held of the King in chief, the Writ ſhall be directed to the Sheriff.

13. If a Man holds of a common Perſon in groſs, as of his Perſon, and this Seigniory eſcheats to the King (**tho' it be by Attainder of** Treaſon) **he holdeth [of the] Perſon of the King, yet he doth not hold in Capite, becauſe the Original Tenure was not created by the King. Co. Litt.** 108.

S. P. Arg. Dav. Rep. 59. a. in the Caſe of the County Palatine of Wexford.

14. If

Br. Tenures, pl. 61. cites 29 H. 8. S. C. —S. C. cited Arg. Dav. Rep. 59. a. in the Caſe of the County Palatine of Wexford.

14. If the King purchaſes a Manor, of which J. S. holds in Chivalry; and after the King grants over the Manor to J. D. excepting the Services of J. S. Now J. S. holds of the King as of his Perſon, yet he ſhall not hold in Capite, that is to ſay, to ſubject him to the Prerogative of the King of a Capite Tenure, but ſhall hold as he held before; for the Act of the King ſhall not prejudice the Tenant. 29 H. 8. S. 113.

S. C. cited Arg. Dav. Rep. 59. a. in the Caſe of the County Palatine of Wexford.

15. If the Prince, before Quia Emptores Terrarum, had created a Tenure of his Perſon, and after had been made King; yet this is not a Tenure in Capite, becauſe in the Creation it was not a Tenure in Capite. D. 30. H. 8. 44. 30. [31]

Yet the Seigniory is gone, and the Meſnalty is come in lieu thereof. Ibid. —2 Le. 80.

16. If the King Lord, Meſne, and Tenant are, and the Meſne holds of the King in Capite, and after the Meſne dies without Heir, or is attaint of Felony, or dies, and the King is Heir to him, or the King purchaſes the Meſnalty, yet the Tenant ſhall not hold in Chief, becauſe this Tenure was not derived from the Crown, but by a Meſne. D. 30. H. 8. 44. 30. [31]

pl. 169. 29 Eliz. in the Exchequer, the Biſhop of London's Caſe. The Meſne held in Chief, and the Tenant by Knight's Service, and the Manor eſcheated by Attainder. The Queſtion was, If the Tenancy ſhould be holden in Chief. Manwood ſaid, it had been held, That no Tenure in Capite may be, unleſs by Creation of the King.——2 Le. 214. pl. 347. Mich. 29 Eliz. S. C. in almoſt the ſame Words.

17. If the King at this Day gives Land in Tail, to hold of him in Capite, this Tenure is a Tenure in Capite of the Perſon of the King, and not incident to the Reverſion, nor ſhall paſs by Grant of the Reverſion. D. 30. H. 8. 44. 35. [36]

He that holds of the King, muſt hold of the Perſon of the King, and not of any Honor, Barony, Manor, or Seigniory; and it appears farther in our Books, that *he that holds* of the King *in Chief*, *muſt not only hold of the Perſon of the King*, *but the Tenure muſt be created by the King*, or ſome one of the Progenitors, or Predeceſſors, Kings of this Realm, to defend his Perſon and Crown, otherwiſe he ſhall have no Prerogative by reaſon of it; for no Prerogative can be annex'd to a Tenure created by a Subject. Note, here is not named the Honour of Lancaſter, which was an ancient Honour ever ſince the Conqueſt, which E. 3. raiſed to a County Palatine, as in the 4 Part of the Inſtitutes, cap. Duch. of Lancaſter, appears. 2 Inſt. 64. cites 28 H. 6. 11. per Tours les Juſtices. 1 E. 6. Bro. Trav. 53. Stamford Prerog. 29 b.

18. *Magna Charta*, *cap.* 31. *If any Man hold of any Eſcheat*, *as of the Honor of Wallingford*, *Nottingham*, *Boloin*, *or* * *of any other Eſcheats which be in our Hands*, *and are Baronies*, *and die*, *his Heir ſhall give none other Relief*, *nor do no other Service to us than he ſhould to the Baron*, *if it were in the Baron's Hand.*

And We in the ſame Wiſe ſhall hold it as the Baron held it; neither ſhall we have, *by Occaſion of any Barony or Eſcheat*, *any Eſcheat or keeping of any of our Men*, *unleſs he that held the Barony or Eſcheat otherwiſe held of us in Chief.*

* This is *intended of Common Eſcheats.* Br. Livery &c. pl. 58. cites 29 H. 8.——Lord Coke ſays, ſome Queſtion has been made of theſe Words; for ſome have ſaid, that theſe Words are to be underſtood of Common Eſcheats, *as where the Lord dies without Heir*, *or* where he *is attainted of Felony*. *But where* the Lord is *attainted of High Treaſon*, there the King has the Land by Forfeiture of whomſoever the Land is held, and not in reſpect of any Eſcheat by reaſon of any Seigniory. And therefore where William Riparave, a Norman, held Lands in Fee of the King, as of the Honour of Peverell, and Riparave forfeited his ſaid Land for Treaſon, and the King ſeiſed it as his Eſcheat of Normandy. In this Caſe the Land ſo forfeited was no Part of the Honour, as it ſhould have been, if it had come to the King as a common Eſcheat; for it comes to the King by reaſon of his Perſon and Crown, and therefore if he grant it over &c. the Patentee ſhall hold it of the King in Chief, and not of the Honour. And all this is to be agreed; but yet the Tenants that held before of the Honour by Knights-Service, cannot hold of the King in Chief. 1. For that they hold not of the Perſon of the King, but of the Honour. 2. Becauſe the Tenure was not created by the King, or any of his Progenitors, as has been ſaid. 2 Inſt. 64, 65.

And ſo does Bracton, who wrote ſoon after the Statute, expound this great Charter to extend to Forfeiture of Baronies for Treaſon, as of the Normans. 2 Inſt. 65.

And yet, *to* make an *End* of *all Ambiguities* and Queſtions, *the Statute of* 1 *Ed.* 6. *was made*, which is, as the Words be, a plain Declaration and Reſolution of the Common Law. Likewiſe the Statute of 1 E.;

E 3. which provides, That where the Land that is holden of the King, as of an Honour, is aliened without Licence, no Man ſhall be thereby grieved, is alſo a Declaration of the Common Law. 2 Inſt. 65.

By this Chapter it appears, that a Subject may have an Honour. 2 Inſt. 65.

19. Complaint was made at the ſecond Parliament in Anno 1 E. 3. as appears cap. 13. That *Lands, held of the King as of Honours*, were ſeiſed for Fines for Alienation, as well as if they had been held in Capite, by which the King wills, that ſuch Seiſures afterwards ſhall not be made. Brooke ſays, And ſo ſee that ſuch Tenure *is not in Capite*. Br. Tenures, pl. 100.

20. In Aſſiſe the Plaint was of an Office, viz. that he held the *Uſhery of the Exchequer, whereof the Serjeanty of C. B. is Parcel*, in Chief of our Lord the King. Br. Tenures, pl. 25. cites 8 Aſſ. 7. Brooke ſays, Quod nota, an Office held in Capite.

21. It is admitted, that a Man may hold *of the King in Capite in Socage as well as in Chivalry*; And ſo is the Law at this Day clear. Br. Tenures, pl. 46. cites 47 E. 3. 26.

22. Note per Bromley, that it is held, That if [it be found that] a Man *holds of the King of his Dutchy of Lancaſter, Per quæ Servitia Juratores ignorant*, it ſhall be taken as Service of Chivalry in Capite as in other Caſes of the King; For Dutchy Land given by the King paſſes from the King by Livery of Seiſin, and ſhall be as it had been in Manibus Ducis. Br. Tenures, pl. 1. cites 26 H. 8. 9.

23. The King may create a Tenure of him in Chief, if he *reſerves it to his Perſon and as a Service in Groſs*; But if he reſerves the Tenure as of his Manor, Honor, or Caſtle, this clearly is no Tenure in Chief; for the Services are regardant to the Manor, Honor, or Caſtle, and not relating to the King's Perſon. D. 44. pl. 29. Mich. 30 H. 8. Gilbert's Caſe.

24. *Grand Serjeanty* is Tenure in Chief; For ſuch Tenure is of none but the King. D. 44. b pl. 30. Mich. 31 H. 8.

25. A Tenure *of the King as of his Honor of Glouceſter*, whereof *two Parts came to the King by Deſcent or Purchaſe, and the third Part by the Attainder* of the late Duke of Buckingham, ſhall not be accounted a Tenure in Chief of the King, as of his Perſon, nor ſhall give Prerogative of other Lands to the King. D. 58. pl. 6. Trin. 36 H. 8. ſays, it was ſo decreed in the Caſe of the Heir of **Arthur de Clopton**, who was in Ward to the King, by reaſon of the ſaid Tenure by Service of Chivalry ut de Honore, as above.

26. 2 *E.* 6. *cap.* 8. Enacts, That *where an Office is found by theſe Words, or the like, Quod de quo vel de quibus tenementa prædicta tenentur, juratores præd' ignorant, or find them holden of the King, but per quæ ſervitia ignorant* &c. *it ſhall not be taken for an immediate Tenure of the King in Chief, but in ſuch Caſes Melius inquirendum to be awarded, as has been accuſtomed of Old Time.*

This Branch has been well expounded, for if the firſt Office find a Tenure of King, per quæ ſervitia &c. yet if, upon the Melius Inquirendum, the Tenure be found of a Subject, the firſt Office has loſt his Force per ſenſum hujus Statuti, and need not be traverſed; and the Melius &c. is in Nature of the Diem Clauſit extremum, or Mandamus &c. And this was but a Declaration of the ancient Common Law, as by the Words of the Statute (as has been accuſtom'd of old) it appears; but if, upon the Melius, it be found again as uncertainly as before is ſaid, then it is in Judgment of Law a Tenure in Capite; and ſo it was before the making of this Act, and ſo are the Books that ſpeak hereof to be intended. But if, upon the Melius, a Tenure be found of the King Ut de manerio per quæ ſervitia &c. it ſhall be taken for Knights Service. Co. Litt. 77. b.

27. Of ancient Time every *Earldom and Barony* were holden of the King in Capite. 2 Inſt. 7.

Co. Litt. 83. b. S. P. ſays, it was ſo at and before the Statute of Magna Charta, cap. 20. and that the King would not ſuffer them to be divided or ſever'd; but that at this Day Earls and Barons are without ſuch Earldoms and Baronies of the King in Chief.

28. The Queen made a *Feoffment of Lands of the Dutchy out of the County Palatine to hold of her in Capite*; the Feoffee ſhall hold of her in Capite as of her Crown of England. Per Egerton Solicitor Gen. Arg. 2 Le. 151. pl. 184. in Caſe of the Lord Howard v. the Town of Waldon. Cites 4 Eliz. Pl. C. 223. at the End of the Dutchy Caſe.

29. A Man *ſeiſed of Land held in Capite* of the King before the Statute of Quia Emptores Terrarum *enfeoffed* one *J. S. of Part of the Demeſnes in Fee, without ſaying any thing more.* The *Feoffee enfeoffed another to hold of the Feoffor and his Heirs by the Rent of* 1 *l.* 6 *s.* 8 *d.* a Year *Pro Omnibus Servitiis & Demandis.* This Land clearly is not held in Capite and the firſt Meſnalty is held of the Feoffor, as of the Manor by Service of Chivalry. D. 299. b. pl. 33 Paſch. 13 Eliz. Anon.

4 Le. pl. 80. pl. 169 S. C. in almoſt the ſame Words.

30. If before the Statute of Weſtminſter 3. the King's Tenant in Capite had made a Feoffment to hold of him, ſo as now there is *Lord Meſne and Tenant*, and afterwards the *Meſnalty came to the Crown by Attainder* &c. If by the coming of the Meſnalty to the Crown, the Seigniory Paramount be extinct, Then the Tenancy is not holden in Capite; But if the Meſnalty be drown'd in the Seigniory it is otherwiſe. Some held that there was a *Difference where the Meſnalty comes to the Seigniory, and where the Seigniory comes to the Meſnalty*; By Manwood Ch. Baron. 4 Le. 214. pl. 347. Mich. 29 Eliz. in the Exchequer. The Biſhop of London's Caſe. — But there is added a Quære.

31. Certain *Lands* called S. *were holden of the Manor of P. by Rent and Suit of Court*; *P. was holden of the Manor of G. by Rent and Suit of Court*; The Manor of *G. came to the Crown by the Statute of Diſſolutions*; The King *H.* 8. *granted* the Manor of *G. to J. S. and his Heirs, to hold by Knight Service in Capite: B. purchaſed the Manor of* G. and afterwards he purchaſed the Moiety of the Manor of P. and the Lands called S. Afterwards B. died, and the Lands purchaſed by him deſcended to his Son, who purchaſed the other Moiety of P. and afterwards enfeoffed C. of the Lands called S. It was reſolved in this Caſe, that the Lands called S. were held in Capite by one intire Knights Fee. Mo. 729. pl. 1015. Paſch. 38 Eliz. Reſolved by Popham and Anderſon, Ch. J. Creſwell's Caſe.

32. It was *found* upon a Diem clauſit &c. *that J. S. held Bl. Acre of A. and* alſo *Wh. Acre of Q. Eliz. as of her Manor of V. by Fealty and* 3 *s. Rent, but Per quæ alia Servitia ignorant. Upon a Melius Inquirendum, it was found, that J. S. held Wh. Acre of the late Queen by Knight Service.* Hobart Ch. J. and Tanfield Ch. B. reſolved, that Wh. Acre upon both the Inquiſitions ſhould not be conſtrued to be held of the late Queen by Knight Service in Capite, but only by *Knight Service, as of a Meſne Tenure, as of her Manor of V.* and decreed accordingly. Ley. 50, 51. Trin. 13 Jac. French's Caſe.

Jenk. 298. pl. 57. a Tenure of the King *Per Servitium Militare* in Groſs is a Tenure in Groſs. — An Office found, Quod tenet de Domina Regina per Servitium Militare, generally, and Brooke, Saunders, Griffin Attorney, Stamford and Dyer, thought it ought to be traverſed, in as much as it ſhall be intended the beſt for the Queen viz. a Tenure in Chief. D. 161. b. 162. pl. 47. Anon.

33. It was found by Inquiſition, that J. S. died ſeiſed of certain Land, Et quod *tenentur de Domino Rege ut de uno Groſſo, per vigeſimam partem unius Feodi Militis.* This was ruled by Hobart Ch. J. and the Ch. Baron, Abſente the Ch. Juſtice, to be a Tenure by Knight Service in Chief. *All Tenures in Chief are in Groſs*, and the Words (ut De uno Groſſo) are ſcarce of any Senſe, but of no certain Senſe at all in Law, and ſo ſtand as void. Hob. 90. pl. 123. Hill. 13 Jac. Spathurſt's Caſe.

(M) In what Caſes the *Law will create* a Tenure in Capite *without Reſervation.* Of whom.

1. IF the King grants Land without expreſſing any Service, this is in Capite. 29 H. 8. S. 113.

2. If the King grants Land to hold of his Perſon, this is in Capite.

3. So if he grants to hold of him, this is of his Perſon, and ſo in Capite. 29 H. 8. 113. Da. 1. 66. b. Fol. 505.

Br. Livery, pl. 57. cites S. C.—S.C.cited Arg Dav. Rep. 66. b. in the Caſe of the County Palatine of Wexford —— If the King infeoff others to hold of him, they ſhall hold as of his Crown in Chief, per Finched. Br. Tenures, pl. 9. cites 47 E. 3. 21.

4. If a Count Palatine (who has Power to create Tenures in Capite of himſelf, by Grant of Jura Regalia) grants Land to hold of his Perſon, this is not a Tenure in Capite; For tho' he has ſuch Power, yet his Perſon is not changed. Contra Davies 1. County Palatine, 66. the principal Matter. See (L) pl. 1.

5. If the King purchaſes Land which is held of another, all the Seigniories by this are extinct, and if the King grants it to another to hold of him he ſhall hold as of his Crown in Chief. 47 E. 3 21. b.

6. When an Honour is ſeiſed into the Hands of the King, if a Manor held of the Honour falls to him by Eſcheat, as of a Common Eſcheat, if he aliens to hold of him, he [the Alienee] ſhall hold by the ſame Services as it was held before of the Honour. 47 E. 3. 21. b. Br. Tenures, pl. 9. cites S. C.

7. But when an Honour is ſeiſed into the Hands of the King, and a Manor comes to the King by Forfeiture of War as his Eſcheat of Normandy and others, which is by Reaſon of his own Perſon, and he is ſeiſed and enfeoffs another, he ſhall hold of him in Chief. 47 E. 3. 21. b. Br. Tenures, pl. 9. cites S. C. per Finched. Quod nullus dedixit.

(N) Tenure by Knights Service. *What Eſtate may be held* by *Knight Service.* See (O)

1. A Man may leaſe Land for Life to hold by Knight Service. 25 E. 3. 47. admitted, (and it ſeems that the Leſſee ſhall do the Service of a Knight) but his Heir ſhall not be in Ward.

2. Lands in *Gavelkind* are held in Socage and not in Chivalry. Br. Tenures, pl. 72. cites 9 H. 3. and Fitzh. Preſcription, 63.

3. If, before the Statute of Quia Emptores terrarum, a Man being *ſeiſed of one Acre* of Land, *leaſes the ſame to a Stranger for Life*; and afterwards *grants the Reverſion in Fee unto another Stranger, to hold of him and his Heirs by Knights-Service*, this is a good Tenure; but the Grantor ſhall not diſtrain for the Services, during the Life of the Leſſee &c. Perk. S. 658.

4. If before the Statute of Quia Emptores terrarum, a Man ſeiſed of one Acre of Land *leaſes for Life*, and afterwards *releaſes all his Right* therein *to the Leſſee*, to have and to hold unto him, and his Heirs &c. *or confirms* the Eſtate of the Leſſee, to have and hold the ſame to him and his Heirs,

Heirs, *to hold of him by Knights-Service*; the Releaſor may diſtrain for ſuch Services, or any of them in the Land whereof the Leaſe, Releaſe, or Confirmation was made, as often as the ſame ſhall be behind &c. Perk. S. 659.

(O) Knights-Service, * *Caſtle-Guard. How* it is to be *done.*

* Caſtle-guard is a *Service due to the King only.* Which is originally true, becauſe no Man can erect a Caſtle or Fort in the Kingdom without the King's Licence. But in Caſe the King grants a Caſtle, with all the Liberties belonging to it, unto a Subject, he grants Caſtle-guard alſo, if there be any ſuch Service due unto it; and for this Reaſon this Service may as well belong to a Subject as the Right of a Foreſt. It is a Service conſiſting in Fortifying and Defending any Caſtle of the King's, or another Lord's, as often as the Feodary ſhall require. And this *is properly Knights-Service*, when it requires the Perſon of the Tenant; *but when it is converted into a certain pecuniary Mulct*, payable every Year for the Fortifying and Guarding of a Caſtle, *it is alter'd* from the Nature of Knights-Service. Cowell's Inſtitutes, 2 Lib. Tit. 3. S. 4.

1. **Magna Charta, cap.** 20. Nullus † Conſtabularius diſtringat aliquem Militem ad dandum Denarium pro Cuſtodia Caſtri ſi ipſe eam facere voluerit in propria Perſona ſua, vel per alium probum hominem faciat, ſi ipſe eam facere non poſſit propter racionabilem Cauſam. Et [ſi] nos adduxerimus vel miſerimus eum in Exercitum, ſit Quietus de Cuſtodia Caſtri ſecundum Quantitatem temporis quo per nos fuerit in Exercitu de Feodo pro quo fecit ſervitium militare in Exercitu.

† Conſtabularius is taken here for Caſtellanus. See 2 Inſt. 33. cap. 19. 34. cap. 20.——This Act (conſiſting upon 2 Branches) is declaratory of the Common Law. The 1ſt, That he, that held by Caſtle-guard, viz. to keep a Tower, or a Gate, or ſuch like, of a Caſtle in Time of War, *might do it* either by himſelf, or *by any other ſufficient Perſon* for him, and in his Place. And *ſome hold* by ſuch Service, *as cannot do it in Perſon, as Mayor and Commonalty, Dean and Chapter, Biſhops*, Abbots &c. *Infants* being Purchaſers, *Women*, and the like, and therefore they might make a Deputy by Order of the Common Law. If 2 *Jointenants* hold by ſuch Service, if one of them perform, it is ſufficient.

2dly, If *ſuch a Tenant* be by the King led, or ſent to his Hoſt, in Time of War, the Tenant *is excuſed* and quit of his Service for keeping of the Caſtle, either by himſelf, or by another, *during the Time that he ſo ſerves the King in his Hoſt*; for that when the King commands his Service in his Hoſt, he diſpences with his Service, by reaſon of his Tenure, for that one Man cannot ſerve in Perſon in 2 Places; and when he ſerves the King in Perſon in one Place, he is not bound to find a Deputy in the other; for he is not bound to make a Deputy, but at his Pleaſure; and this is alſo declaratory of the ancient Common Law. 2 Inſt. 34. cites Co. Litt. 111. 121.

* Tho' Littleton ſpeaks of Enemies, yet it ſeems that to keep a Caſtle, in Time of Inſurrection and Rebellion, (tho', in Propriety of Speech, Rebels are no Enemies) is a Tenure by Knight-Service Co. Litt 83. a.——If the *Caſtle* be *wholly ruinated*, yet the *Tenure remains* by Knights-Service; and it goes in Benefit of the Tenant, as to the Guarding of the Caſtle, until it be rebuilt. Co. Litt. 83. a.

2. They which hold by Caſtle-guard, viz. *to guard a Tower* of their Lord's Caſtle, *or a Door*, *or* a *Bridge*, *or* a *Sconce*, or ſome other certain Part of the Caſtle, upon reaſonable Warning given by the Lord, or ſome other for him, that * Enemies will or are come into England, *hold by Knight-Service*, *and* yet they hold *not by Eſcuage*, nor ſhall pay Eſcuage. Litt. S. 111. & Co. Litt. 82. b. 83.

3. By the ancient Cuſtom *none but a Knight might be charged with the Guard of a Caſtle* belonging to the King; for the Letter of this Law mentions only ſuch; and therefore to hold by Caſtle-guard *is a Tenure in Knights-Service*. And it ſeems, that Rent for Caſtle-guard originally was conſiſtent with Knights-Service, and that it was not annual, but promiſcuouſly Knights might either perform the Service, or pay Rent in lieu thereof; and upon Occaſion did neither, if the King ſent them into the Field. And laſtly, that a Knight might either do the Service in

in his own Perſon, or by his Eſquire, or another appointed by him thereto. Bacon of Government, 267.

(P) Tenure by * Knights-Service, What. [*And what Writ lay of it.*]

See (F. a) pl. 17.

* It is commonly call'd in our Books Servitium Militare &c. or Servitium Militis. And this Service

1. † DRengagium eſt certum Servitium, but not Knight-Service. P. 6. E. 1. B. R. Rot. 7. adjudged againſt Robert de Inſula, per 8 Juſticiarios præcipuos & plurimos alios de conſilio Regis.

was *created* and provided *for the Defence of the Realm*, to perform which Service the Heirs are not accounted in Law able, till the Age of 21 Years. Therefore, during their Minority, the Lord ſhall have Cuſtody of them; not for Benefit only, but that the Lord might ſee, that they be in their young Years taught the Deeds of Chivalry, and other virtuous and worthy Sciences. Co. Litt. 75. b.

There was *no certain Sort of Profit aroſe* by Lands held by Knight's Service; for they were not for the King's Proviſion, but his Defence. Theſe were to attend the King in Arms, according to the Array that was made on every Expedition; and whoſoever fail'd in coming, or rendering his Quota of Men according to his Tenure, his Lands were originally liable to be ſeiſed into the King's Hands for not doing his Duty. Gilb. Hiſt. View of the Exch. 21. cap. 2.

† See Spelm. Gloſſ. Verbo Drenches, Drengus, Drengagium, which Words he ſays gave him great Perplexity a long time.

2. A Foreign Service is Knight-Service. 7 H. 4. 19. b.

S. P. Br. Tenure, pl. 12. cites S. C. But Brooke ſays, he wonders that Foreign Service is Service of Chivalry, unleſs the next Lord holds by Servitium Militare of his next Lord.

It is call'd Servitium Forinſecum, *quia pertinet ad Dominum Regem & non ad Capitalem Dominum niſi cum in propria Perſona profectus fuerit in ſervitio*, & niſi cum pro ſervitio ſuo ſatisfecerit Domino Regi, &c. ideo forinſecum dici poteſt, *quia fit & capitur foris ſive extra ſervitium, quod fit Domino capitali.* Co. Litt. 69. b. cites Bract. Lib. 2. 36.——S. P. And it is alſo call'd *Regale Servitium*, quia ſpecialiter pertinet ad Dominum Regem. Ut ſi dicatur in Carta, faciendo inde forinſecum ſervitium, vel Regale ſervitium, vel ſervitium Domini Regis, quod idem eſt, &c. And another ſays; Et ſunt quædam ſervitia forinſeca quæ dici poterunt Regalia quæ ad ſcutum præſtantur, & inde habemus ſcutagium, & ratione ſcuti pro feodo militari reputatur &c. So as in reſpect of him that does it, it is call'd Servitium Militis; but in reſpect of him for and to whom it is done, viz. to the King, and for the Realm, it is call'd Servitium Regale, or Servitium Domini Regis, &c. Co. Litt. 74. b. 75. a.

3. A Fine was levied of a Knight's Fee. 5 E. 3. 213. 16 E. 3. Brief 655.

4. 11 H. 3. among the Rolls in the Tower of London Rot. 13. Willielmus de Gerdelleg petit verſus G. Man extraneum, feodum unius militis cum pertinentiis in S. The Defendant pleaded Recovery of the Advowſon, which once appertain'd to the ſaid Land, &c. which the Demandant acknowledged. And therefore, becauſe Demandant petit * dimidium feodum cum pertinentiis, nulla facta Exceptione de advocatione illa, Conſideratum eſt quod Defendens non reſpondeat ad hoc Breve, & ipſe ſine die &c. and the Plaintiffs in Miſericordia.

* Fol. 506.

5. Vide Dower, 161. 196. 165. adjudged that Writ of Dower lies of a Knight's Fee.

6. P. 12. E. 2. Brief 184. by Berr. In ancient Times, at the ancient Law, a Man ſhould have Præcipe quod reddat of a Knight's Fee.

7. 3 E. 1. B. Rot. 10. A. queritur de B. quod cum ipſe teneat de ipſo 2 Carucatas terræ in Conington, per Homagium, & per Servitium militare unde 12 Carucatæ terræ faciunt unum feodum militis pro omni ſervitio. And H. 5. E. 1. B. Rot. 2. unde 22 Virgatæ terræ faciunt feodum militis. Vide my Manuſcript Regiſter bound with Magna

Charta, fol. 2. There is a Writ Quod clamat tenere de ſe per ſervitium unde tot Carucatæ terræ, vel tot Hidæ terræ, vel tot Bovatæ terræ, vel tot Virgatæ, terræ faciunt feodum unius militis. And ſee the printed Regiſter, fol. 2. quæ ſolebat eſſe ſuch Writ

Ld. Coke ſays there is great Diverſity of Opinions concerning the Contents of a Knight's Fee, viz. How much Land goes to the Livelyhood of a Knight. See Co. Litt. 69. a. where he treats largely of this Matter.

8. Tr. 1 E. 2. B. R. Rot. 59. Lincoln, It is ſaid in Pleading, Quod 48. Carucatæ terræ faciunt feodum unius militis.

9. A Knight's Fee is not accounted according to the Quantity or Value of the Land, but according to the ancient Feoffment and Reſervation; for of the ſame Land in Quantity or Value may be reſerved one or two, or more or leſs, Knight's Fees. Vide 14 E. 2. Liber Parliamentorum, fol. 91. Contra Co. 9. Lowe 124.

Brady's Hiſt. of England, 620. in the Reign of H. 3. ſays, that all the Sheriffs of England were amerced each 5 Marks, becauſe they did not diſtrain every one that had 10 l. a Year in their ſeveral Counties, to come to the King and be knighted; but they obtain'd Reſpite of the King, according to his Writs to them directed.

10. See the Summons to be made of Knights is always Quod omnes qui habent 20 libratas Terræ, vel feodum unius Militis integrum valens 20 l. per Annum &c. by which it appears that there may be a Knight's Fee, which is not of the Value of 20 l. a Year.

11. In the Treaſury with Maſter Bradſhaw in the Bag of Tenures there is a Roll, whereof the Title is De feodis Militum & partibus Feodorum, unde Johanna de Bohun Comitiſſa Hereford dotata fuit 5 Junii 48 E. 3. In which Roll every Fee, and the Value thereof, is ſet down whereof ſhe was endow'd, where it appears that a Man holds ſometimes by 2 Fees Land of the Value of 10 l. and ſometimes of the Value of 15 l. and ſometimes more and ſometimes leſs, and oftentimes by a Fee Land of the Value of 5 l. and this is for the moſt Part, and according to this Rate, and rarely by more, but no Certainty according to the Value.

12. Talis tenet dimidium Feodum Militis vocatum Bacons in London de hæreditate Mountfichit qui tenet ulterius de Rege, this ſhall be intended the Service of a Moiety of a Knight's Fee, if no other Tenure be expreſsly made and found. D. 16 El. 329. S. 15.

Bract. Lib. 2. cap. 16. S. 7. pag. 36. a.——* Forinſecum Servitium *is* ſuch Service by which the Donor held the ſame Land which he gave &c. Perk. S. 650.——Servitia dici poſſunt forinſeca, *quia pertinent ad Do-*

Fol. 507.

minum Regem, & non ad Dominum capitalem, niſi cum in propria Perſona profectus fuerit in Servitio, vel niſi cum pro Servitio ſuo ſatisfecerit Domino Regi quocunque modo & fiunt in certis temporibus, cum caſus & neceſſitas evenerit, & *varia habent Nomina*, & diverſa. Quandoque enim nominantur forinſeca, large ſumpto vocabulo quoad Servitium Domini Regis, quandoque Scutagium, quandoque Servitium Domini Regis, & ideo forinſecum dici poteſt, quia fit & capitur foris, ſive extra Servitium, quia fit Domino capitali: Item Scutagium, quia talis præſtatio pertinet ad ſcutum quod aſſumitur ad Servitium Militare. Bract. 36. Lib. 2. cap. 16. S. 7.

13. Si dicatur in Charta faciendo inde *forinſecum Servitium, vel Regale Servitium ſive Servitium Domini Regis, quod idem eſt ſecundum modum Feoffationis, ſcilicet, quantum pertinet ad Feodum unius Militis, vel duorum in eadem villa, vel de eodem Feodo, vel ad Scutagium 100 s. 2 Marcas, vel 3. &c. Sed ſi dicatur Reddendo inde per Annum tantum, & faciendo tales Sectas pro omni Servitio, excepto regali Servitio, vel ſalvo forinſeco, tunc videndum erit imprimis ſi Feodum illud in ipſa Donatione forinſecum debuit ab initio vel non, ſi autem nullum debuit ab initio, nec ſit certum forinſecum in Charta expreſſum, numquam præſtabitur nec peti poterit propter incertitudinem. Bracton lib. fol. 36. Co. Litt. 75.

14. A Man may give Land to hold by leſs Service than he himſelf holds, ut ſi ipſe teneatur ad forinſecum Domino & Feoffatori ſuo tenens ipſe poterit alium inde ulterius Feoffare ſine forinſeco. Bracton, lib. 2. fol. 21. b. [cap. 7. S. 3]

15. Bracton, lib. [2] fol. 77. b. Servitium forinſecum, quod dicitur Regale, & quod pertinet ad ſcutum & Militiam ad Patriæ defenſionem. [cap. 35. S. 1.]

16. Hill.

16. Hill. 8 E. 1. Rot. 64. b. Diſtringas pro Homago & Relevio, & pro Servitio forinſeco quantum pertinet ad unum feodum Militis. If there be Lord and Tenant by Knights Service, and the Tenant gives the Tenancy in Tail Faciendo forinſecum Servicium quantum ad eandem Terram pertinet, by the Words the Donee ſhall hold of the Donor by Knights Service &c. Jenk. S. 634.

17. Time of E. 2. 88. b. there is pleaded a Gift in Fee of Land, Tenendum libere pro Homagio & Servitio, & per forinſecum Servitium, ſcilicet, ad Scutagium 20 s. quando venit duos ſolidos & unum quadrantem & ad plus &c.

18. 31 E. 1. Rot. Finium, M. 9. Per forinſecum Servitium Cornagii, he was in Ward. He that holds by Cornage holds by Knight Service. Co. Litt. 69. b. ——— Litt S. 156. is, that it is ſaid that in the Marches of Scotland ſome held of the King by Cornage, that is to ſay, to wind a Horn, to give Men of the Country Warning when they hear that the Scots, or other Enemies, are come, or will enter into England, which Service is Grand Serjeanty. But if any Tenant hold of any other Lord than of the King by ſuch Service of Cornage, this is not Grand Serjeanty, but it is Knights Service.

19. The Statute 1 E. 2. [S. 3.] is, That he who holds Lands in Socage of other Manors than of the Manors of the King doing no foreign Service, the Rolls of the Chancery ſhall be ſearch'd, and it ſhall be done as before. By which the Statute implies that he is not compellable to be a Knight. (And by * Foreign Service is intended, as it ſeems, Knight Service. * See Co. Litt. 68. 74. b. 75. a.

20. Capitula Eſcaetriæ in Magna Charta, fol. 163. Item ſi Religioſi vel Eccleſiaſticæ perſonæ a Conqueſtu Angliæ aliquas Terras ſeu aliqua Tenementa de Servitio militari, vel aliquo alio Servitio in defenſionem Regni onerata acquiſierunt, quis remanet oneratus de illis Servitiis forinſecis & de cujuscunque Feodo ſunt &c. (Q) pl. 14.

21. If a Man gives Land in Tail, rendring Rent & faciendo forinſecum Servitium, in this Caſe he ſhall have both, becauſe all is one Service. Kelloway incerti Temporis 123. by Keble. See (G) pl. 3

22. In the Book of the ancient Charters of the County of Cornwall, there is in 31 Charter a Feoffment of Land rendring 12 d. Rent for all Exactions, Salvo Servitio Domini Regis forinſeco quantum pertinet ad quinque acras liberæ Terræ de Feodo ſuo. And there in the 46th Charter, the Prior of Bodmin gave to Richard Earl of Cornwall 3 Acres, Faciendo de eiſdem tribus acris Ingeramo de Bray, & hæredibus ſuis Regale Servitium quantum pertinet ad prædictas tres Acras. And there in the 169th Charter, John de Gateſden gave the Manor of Lerky to the Earl of Cornwall, Reddendo Annuatim 2 Calcaria deaurata, * Salvo etiam ſibi & hæredibus ſuis Servitio forinſeco debito & conſueto pro omni Servitio. * If there be Lord and Tenant by Knight Service, and the Tenant does give the Tenancy in Tail to hold of him by J. D. for all Services Salvo forinſeco ſervicio, in this Caſe this Salvo ſhall make the Donee to hold of the Donor by Knights Service, and yet the ſame was not in the Donor before, but the Donor was chargeable with Knights Service for the ſame Land unto him of whom he held it. Perk. S 650.

23. Some held by Cuſtom to pay but the Moiety, or the 4th Part of the Sum at which Eſcuage was aſſeſs'd by Parliament; and becauſe the *Eſcuage* which they ſhould pay was *uncertain*, they held by Knights Service. Hawk. Co. Litt. 116. Litt. S. 98.

24. Tenure *by Cornage*, if it be of any other Lord than the King, is Knight Service. 2 Inſt. 9. cites Litt. S. 156.

25. *Every Tenure by Eſcuage* is a Tenure by Knights Service; but every Tenant that holds by Knights Service holds not by Eſcuage. Co. Litt. 69 a.

26. Sir Rich. Rokſley Knight did hold Lands at Seaton by Serjeanty to be *Vantrarius Regis*, that is to be the King's Fore-footman *when*

when the King went to Gaſcoigne, Donec peruſus fuit Pari ſolearum Precii 4 d. that is, *until he had worn out a Pair of Shoes of the Price of* 4 *d.* And this Service being admitted to be performed when the King went to Gaſcoigne to make War, is Knight Service. Co. Litt. 69. b.

(Q) Tenure by * *Eſcuage.*

* Eſcuage, in Latin Scutagium, *was a Species of Knight Service.* Some held by the Service of a whole Knight's Fee, ſome by the Service of half a Knight's Fee; And when the King made a Voyage Royal into Scotland to ſubdue the Scots, he that held by a Knight's Fee ought to be with the King 40 Days well array'd for the War; He that held by Half a Knight's Fee ought to be with him 20; and thoſe that held by more or leſs, ought to be with him more Days, or fewer, in the ſame Proportion. And one might hold to ſerve the King in his Wars in other Countries, as well as Scotland. Hawk. Co. Litt. 111, 112.——S. P. Cowel's Inſtitutes, 2 Lib. Tit. 3. S. 5.

When ſuch as held by Knight Service fail'd on any Expedition, in coming or rendring his Quota of Men, according to his Tenure, the Puniſhment originally was to ſeiſe his Lands; but afterwards this Seiſure was chang'd into an Eſcuage, or a Fine, according to the Degree of Failure; but if they ſent inſtead of perſonally appearing, they made a Compoſition with the King for not attending in Perſon, but ſending others; if he did not come at all, then he was aſſeſs'd for all the Lands he held, but had no Eſcuage from his Tenants; but if he came, and there was a Deficiency in any of his Tenants, he had Eſcuage from his Tenants: This was an Inducement for every Perſon to come or ſend, becauſe he had no Eſcuage at all, unleſs he were there, or ſent; ſo that all the Eſcuage fell on him, and he had no Aid over. Gilb. Hiſt. View of the Exch. 21, 22.

1. **Eſcuage was due, if the King had gone a** Voyage Royal into Wales. **Fitzh. Na. 83. c. 5 E. 1. Rot. Scutagii. And 6 E. 1. Rot. Clauſarum Membrana 2.** 20 E. 1. **Liber Parliamentorum, 2 E. 1. Rot. Clauſarum Membrana 4. it appears by an Inſpeximus, that there was an Eſcuage Roll in** 41 H. 3. **upon a** Voyage Royal **to Wales. 7 E. 1. Clauſaurum Membrana 9. a Writ is directed to the Treaſurer and Barons of the Exchequer to cauſe Eſcuage to be levied in all Counties, and there in the End it is** Secundum quod hujuſmodi Scutagium pro aliis Exercitibus Walliæ in caſu conſimili levari conſuevit. 10 E. 1. **Rot. Marefcalli, the Names of thoſe who did their Services and that paid their Fines.** 14 E. 2. **Liber Parliamentorum, the King demanded Eſcuage of the Years of the** 5. 10. 20. 31. 34 E. 1. **and** 4 E. 2. **for the Wars of Wales and Scotland.** 8 E. 2. **Rot. Finium Memb.** 10. **Commiſſion to levy Eſcuage for the Years of the** 28. 34 & 31 E. 1. **Rot. Scutagii de** 1. **Uſque** 12 E. 2. **for the Eſcuage of the** 34 E. 1.

If the Tenure be to go *in Galliam, Hiberniam, Vaſconiam, Pictaviam* &c. it is all one as the going into Scotland. Co. Litt. 69. b.

2. **Eſcuage was due if the King had gone a** Voyage Royal into Scotland. **Ancient Tenures, fol. 1. b. becauſe Scotland is of Right appendant to the Realm of England.**

3. 31 E. 1. **Rot. Scutagii. There is an Eſcuage Grant entered in the Court Rolls of the Heirs of the Earl of Devon, there are** 2 **Rolls of Accounts made** 9 E. 2. **one of the Fees of the** Honour of Ockhampton, and **the other** of Plympton **for the Eſcuages received of the Tenants of the ſaid Honours pro Exercitibus Regis in Scotia de Annis** 28 & 31 E. 1.

So 9 R. 2. The King at the Petition of the

4. **K. Edward** 3. **made one or more Royal Voyages** into Scotland, **yet no Eſcuage was paid; But it ſeems this was becauſe** Aids were granted **to him for this Purpoſe** by Parliament; **but ſee the Pardon of** 50 E. 3. **where Forfeits, Reliefs and Eſcuages**

cuages made, fallen or chanced within the Realm of England are pardoned. Commons *pardon'd the Payment* of

Eſcuage for his Voyage into Scotland. Prynne's Cot. Rec. Abr. No. 40.——Co. Litt. 72. b.

5. So the Pardon of 14 E. 3. cap. 3. Reliefs and Eſcuages till the King ſhall go into Brabant [were] pardon'd; but ſee the Eſcuage Roll of the County of Lincoln, where an Eſcuage is levied for the Voyage of the King to Scotland, the Year 1 E. 3. which Roll is in the Exchequer with Walter Bradſhaw.

6. He who holds by Eſcuage ought to go with the King in a Voyage Royal upon a Rebellion, not [where it] was to conquer that which the King had not before 5 E. 1. Rot. Clauſo Membrana 8: the Clauſe is ſo expreſs'd, ſcilicet, to ſuppreſs Elwin the Prince of Wales and other Rebels; and ſo 5 E. 1. Rot. Scutagii, Memb. 7.

7. An Eſcuage was levied for the Voyage of the King into Scotland. 4 E. 2. as appears by 13 E. 2. Rot. Finium M. 1. Ibidem 16 E. 2. M. 3.

8. 28 H. 3. Eſcuage was granted to the King, ſcilicet, 3 Marks for every Knight's Fee upon the Return of the King out of Britain, where he was to ſuppreſs the Rebels and the French. Speed 526.

9. No Eſcuage is due for a Voyage to Flanders, 25 E. 1. in the Hiſtory of the Monk of Gisburne; this is contained in a Petition to the King by the Commons.

10. Eſcuage is properly to ſuſtain War between thoſe of Wales and Scotland, and not between other Lands, becauſe thoſe ſhall be of Right appendant to the Realm of England. Ancient Tenures, fol. 1. b.

11. It ſeems that Eſcuage is due upon every Voyage Royal made in the Realm for Defence of the Realm. A Voyage Royal *is not only when the King himſelf goes* to War, as Littleton ſays, but alſo when his Lieutenant, or Deputy of his Lieutenant. *And* what ſhall be ſaid a Voyage Royal *ſhall be adjudged* in this Caſe *by the Judges of the Common Law*, as an Incident to Eſcuage, and not by the Conſtable and Marſhal, or any other; & ſic de Similibus. Co Litt. 69. b.

There *is* alſo *another Kind* of Voyage Royal, viz. *when one* * *goes with the King's Daughter beyond Sea to be married* &c. For ſuch a Voyage is for the Good of the whole Realm; (for more Profit for the Realm cannot be, than to make Alliance with another Nation) but of this Voyage Royal Littleton ſpeaks not here, but only of the Voyage Royal to War; ſo as there is a Voyage Royal of War, and a Voyage Royal of Peace and Amity. Co. Litt. 69. b.

* S. P. Co. Litt. 130. b. and that in ſuch Caſe a Protection Profecturæ may be purchas'd, and caſt Pendente placito.

12. Statutum de Religioſis 7 E. 1. in Magna Charta, fol. 79. b. in fine Statuti, Nos ſtatim per Annum completum a tempore quo hujuſmodi Emptiones &c. Terras & Tenementa hujuſmodi capiemus in Manum noſtram aut alios inde feſabimus per certa Servitia nobis inde ad Defenſionem noſtri facienda, ſalvis Capitalibus Dominis Feodorum illorum Wardis Releviis & Eſcaetis & aliis ad ipſos pertinentibus & Servitiis inde debitis & conſuetis.

13. Mirror of Juſtices, Fol. 2. b. cap. 1. S. 3. of the Remnant of the Land they ſhould enfeoff the Earls, Barons, Knights, Serjeants, and others, to hold of the Kings by the Services provided and ordained for Defence of the Realm.

14. Capitula Eſcaetriæ in Magna Charta, Fol. 163. Item ſi Religioſi vel Eccleſiaſticæ Perſonæ a Conqueſtu Angliæ aliquas Terras ſeu aliqua Tenementa de Servitio Militari, vel aliquo alio Servitio in Defenſionem Regni onerata acquiſierunt, quis remanet oneratus in illis Serviciis Forinſecis & de cujuſcunque Feodo ſint &c. See (P) pl. 20.

15. Tenant for Life may do Eſcuage; For it ſeems that *Eſcuage does not draw to it Homage, but where the Tenant has Eſtate of Inheritance*; For Tenant for Life cannot do Homage. Br. Tenure, pl. 68. cites 19 E. 3. Fitz. Fine, 71.

16. He that holds *by Homage, Fealty, and Eſcuage*, holds by Socage and not by Chivalry. Br. Tenures, pl. 85 cites 13 H. 4. and Fitzh. tit. Avowry, 197.

17. *Homage and Knight Service are incident to Eſcuage*, and by the Grant of Services, Eſcuage paſſes with the reſt. Co. Litt. 69. a.

18. Eſcuage is *directed by Cuſtom.* Co. Litt. 72. b. For Litt. S. 98. ſays, That ſome hold by ſuch Cuſtom, that if Eſcuage be aſſeſſed by Parliament to any Sum, that they ſhall pay only the Moiety of the Sum, and ſome only the 4th Part of that Sum.

Fol. 509.

(R) Eſcuage. * *Of what Service* it is *Due.* Eſcuage is *not* due for any Service *of* † *Grand Serjeanty.*

* He that holds by Caſtle Guard or Cornage holds by Knights Service, and yet he ſhall pay no Eſcuage, becauſe he holds not to go with the King to War. Co. Litt. 69. b.

1. THE Conſtable of England **ought by his Office to go with the King in a Voyage Royal, or otherwiſe he ſhall pay Eſcuage. (And yet this is grand Serjeanty.) 5 E. 1 Rot. Scutagii Memb. 6. admitted. For there it is enter'd that he is acquitted becauſe he goes in Perſon; And 10 E. 1. Rot. Mareſcalli Memb. 5. he ſent another.**

† Tenure of the King by Serjeanty *to find a Man for the War Ubicunque infra quatuor Maria* is Grand Serjeanty; Per Hanke; For it is Service to be done by the Body of a Man, and if he cannot find a Man to do the Service he ſhall do it himſelf; Quod aliqui Juſticiarii conceſſerunt. Br. Tenure, pl. 15. cites 11 H. 4. 72.

2. **So the** Marſhall of England **ought by his Office to go in the Voyage Royal, or otherwiſe he ſhall pay Eſcuage. (And yet this is Grand Serjeanty.) 5 E. 1. Rot. Scutagii Memb. 6. admitted, and 10 E. 1. Rot. Mareſcalli Memb. 6.**

3. **10 E. 1. Rot. Mareſcalli Memb. 4. Dimidium Serjeantiæ & facit per J. S.**

4. **5 E. 1. Rot. Scutagii Memb. 7. All the** Biſhops and Abbots, finem fecerunt, **or** pro quo ſatisfecerunt, **and 10 E. 1. Rot. Mareſcalli Memb. 6. Some Abbots and Biſhops are excuſed for Vacancy at the Time; By which it appears that Eſcuage is due from Biſhops and Abbots, and they hold their Baronies by Grand Serjeanty.**

5. The King ſhall not have Eſcuage of ſuch as hold by Grand Serjeanty, *unleſs they hold* of him *by Eſcuage.* Litt. S. 158.

(S) To be *Aſſeſſed by Parliament.*

Magna Charta, cap. 37. was that Eſcuage ſhould be taken as it was in the Time of H. 2. But Bacon of Government 276, 277. ſays, that the Charter of King John hath ſuperaded hereunto this enſuing Proviſion viz. There ſhall be no Eſcuage ſet in the Kingdom, except for the redeeming of the King's Perſon, making of his eldeſt Son a Knight, and one Marriage of his eldeſt Daughter; And for this there ſhall be only reaſonable Aid: And in like Manner ſhall

1. **KING John in a Charter ordained in this Manner.**

ſhall the Aids of the City of London be ſet. And for the aſſeſſing of Eſcuage we will ſummon the Archbiſhops, Biſhops, Abbots, Earls, and greater Barons of the Kingdom ſpecially by our ſeveral Writs, and will cauſe to be ſummon'd in general by our Sheriffs, and Bailiffs, all other our Tenants in Capite, to be at a certain Day after 40 Days at the leaſt, and at a certain Place; and we will ſet down the Cauſe in all our Writs; And the Matter at the Day appointed ſhall proceed according to the Counſel of thoſe that ſhall be preſent, altho' all that were ſummon'd do not come. And we will not allow any Man to take Aid of his Freemen, unleſs for Redemption of his Body, and making his eldeſt Son a Knight, and one Marriage for his eldeſt Daughter; And this ſhall be a reaſonable Aid only.——This is copied out in Gilb. Hiſt. View of the Exch. 12. with a Note and ſome few Additions by way of Explanation, in Parentheſes, but as it is mention'd as an **Addendum**, it may deſerve the leſs Notice as being an Addition by ſome other Hand, and the Introductory Note perhaps not eaſily to be ſupported.

2. 13 E. 2. **Rot. Finium M. 1. Two Marks de Scuto given for the Eſcuage of 4 E. 2. Ibidem. M. 2. 40 s. de Scuto de tempore E. 1.**

3. Albeit Eſcuage uncertain be due by Tenure, yet becauſe the Aſſeſſment thereof *concerned ſo* many, and *ſo great a Number of the Subjects* of the Realm, it could not be aſſeſſed by the King, or any other but by Parliament. And this was by the Common Law. *No Eſcuage* was *aſſeſſed by Parliament ſince* the Reign of *Ed.* 2. and in the 8th Year of his Reign Eſcuage was aſſeſſed. Co. Litt. 72. a. b.

(T) Eſcuage. *By whom* the Service is *to be done.*

1. FEmes and Abeſſes **do the Services always by others. 10 E. 1 Rot. Mareſcalli Memb. 5.** Litt. S. 96. S P. and ſo of other

Perſons of Religion. —— And Ld. Coke in his Comment, pag. 70 b. ſays, That the Word (Religion) is taked largely, viz. not only for regular or dead Perſons, Abbots, Monks &c. but for ſecular Perſons alſo, as Biſhops, Parſons, Vicars &c. for neither are bound to go in proper Perſon.

2. **It ſeems by all the Eſcuage and Marſhalſea Rolls, that** all Lay Perſons for the moſt part in good Health, ought to do the Service in proper Perſon, and not by another. Co. Litt. 70. b. thinks an Ideot, Madman, Leper,

a Man maim'd, blind, Deaf, of decrepit Age &c. are not bound to go in proper Perſon.

3. 10 E. 1. **Rot. Mareſcalli Memb. 5.** Infirmus facit per alium Memb. Umphrevil abſente de Licentia Regis recognovit, & facit per J. S. &c.

4. **Generally of right, they who hold by Eſcuage ought to be in the Army in Perſon; and it is not ſufficient to find another to be there. Contra, Co. Litt. 70.**

5. **In the Exchequer, with Mr. Bradſhaw, there is a Roll which is intitled, Negotia Adjurnata de Scaccario ad Parliamentum Regis apud Karliolum in Octabis Sancti Hillarii, Anno 35 E. Regis. In which there is thus, That** Rogerus le Ware, who, upon Summons, came to Parliament, and ſaid, That whereas he was ſummon'd to be at Carliſle, 34 E. 1. Perſonaliter cum ſervitio ſuo, **He acknowledg'd, that he held by Knight-Service, and that he was there according to the Summons.**

6. 7 E. 2. **Rot. Finium Memb. 5.** Pro Rege de Finibus capiendis ab Archiepiſcopis, Epiſcopis, Abbatibus, Prioribus, & omnibus Eccleſiaſticis Perſonis ac Mulieribus & aliis debilibus & ad laborandum impotentibus &c. et Servitia nobis facere debent.

7. If there be *Lord*, *Meſne*, *and Tenant*, and *each holds of the other by Eſcuage*, and the *Tenant goes a Voyage into Scotland*, the Lord ſhall not have Eſcuage of the Meſne. The Reaſon ſeems to be, inaſmuch as there *ſhall* The Lord ſhall not have Eſcuage of his

Tenant, unleſs where he himſelf goes into the War in Perſon.

ſhall be only one Service done for one and the ſame Land; quære inde. Br. Tenures, pl. 89. cites 6 H. 3. & Fitzh. Tit. Avowry, 242. & concordat Nov. Nat. Brev.

Br. Tenures, pl. 103. cites F. N. B. 83, 84.

Hawk. Co. Litt. 113. becauſe the Service originally reſerved on the Tenure, was perform'd.

8. If 2 *Jointenants* be of Land holden by Knights-Service, *and one goes* with the King, it ſuffices for both, and both of them cannot be compell'd to go; for by their Tenure one Man is only to go. Co. Litt. 70. b.

9. If the *Tenant paravail goes*, it *diſcharges the Meſne*; for one Tenancy ſhall pay but one Eſcuage. Co. Litt. 70. b.

——If there be Lord and many ſeveral Meſnes and Tenants, and each holds by ſeveral Knights Service, if the Tenant paravail of the Land does the Services, and goes with the King in War, &c. the ſame ſhall excuſe all the other Meſnes; For, for one Land but one Service can be demanded, viz. to go, or to find a Man to go &c. And ſo the Meſne Paramount here is excuſed, becauſe the Service is done by the Tenant &c. F. N. B. 84. (D)——S. P. Br. Tenures, pl. 103. cites F. N. B. 83, 84.

10. An *Abbot*, or Prior &c. that holds Lands by Knights Service, albeit he ought not, in reſpect of his Profeſſion, to ſerve in War in proper Perſon; yet *muſt* he *find a ſufficient Man*, conveniently array'd for the War, to ſupply his Place. And if he can find none, then muſt he pay Eſcuage, &c. for his Profeſſion does not privilege him, but that the King's Service in his War muſt be done, that belongs to his Tenure. Co. Litt. 99. a.

Fol. 510.

(U) Eſcuage. *Who ſhall have it.*

S. P. And ſo if he has Ward, by reaſon of the Vacation of Biſhoprick; and *ſo* ſhall a *common Perſon*, if he has Eſtate for Life or Years of a Seigniory. Co. Litt. 73. b.

1. THE King ſhall have Eſcuage of thoſe who ought to pay Eſcuage to his Ward. 31 E. 1. Rot. Scutagii Memb. 2. 7 E. 1 Rot. Finium Memb. 17.

2. If the King grants over to another the Cuſtody of his Ward, and after there is a Voyage Royal, the Grantee ſhall not have Eſcuage of the Tenants of the Ward, but the King.

3. 10 E. 1. Rot. pro Scutagio levando Memb. 2. But there the Eſcuage was granted to the Grantee ex Gratia Speciali. And ſo Memb. 3.

4. So the Grantee of the King of his Ward cum Feodis Militum & Advocationibus ſhall not have Eſcuage of the Tenants of the Ward, but the King himſelf. 31 E. 1. Rotulo Scutagii Memb. 1. De Jure; But the King granted this to him De Speciali Gratia.

S. P. For he ſhould have no Benefit by the Default of others, who was guilty of the like himſelf.

5. He who was not with the King in the Voyage, nor ſent any one for him, nor had any lawful Excuſe for his Abſence, nor had made Agreement with the King for his Eſcuage due to the King, he ſhall not have any Eſcuage of his Tenants. This appears by all the Rolls of Eſcuage. Fitz. Na. 83. q.

Hawk. Co. Litt. 113.——But if the Tenant *goes* with the King, *and dies in Exercitu*, in the Hoſt or Army, he is excuſed by Law, and no Eſcuage ſhall be demanded. Co. Litt. 72. b.

6. He

6. He, who was with the King in another Place at the Time of the Voyage by Command of the King, shall have Escuage of his Tenants. 10 E. 1. Rot. pro Scutagio Levando. M. 1 & 4. 31 E. 1. Rot. Scutagii Memb. 2.

7. Bishops, Abbots, and Women, who had Servitium cum Rege, shall have Escuage. 31 E. 1. Rot. Scutagii Memb. 2.

8. He who was not in the Voyage, nor sent any one for him, if he made a Fine with the King for the Escuage, shall have Escuage of his Tenants. 10 E. 1. Rot. pro Scutagio levando Memb. 3. & Memb. 2. for him qui Regi satisfecit pro Servicio suo. 31 E. 1. Rot. Scutagii Memb. 2. 8 E. 1. Rot. Finium Memb. 8. Fitz. Na. Bre. 83. (J) Contra Co. Litt. 72. b.

If he that holds of the King by Escuage, *goes, or finds another* to go for him with the King,

&c. then he shall have Escuage of his Tenants that hold of him by such Service, which must be assessed by Parliament. But if the King's Tenant goes not with the King, then he shall pay for his Default, Escuage, and shall have no Escuage of his Tenants. Co. Litt. 72. b.

9. If the Tenant of the King in Socage has diverse Tenants by Knight Service, he shall not have upon a Voyage Royal Escuage of his Tenants, if he does not go in the Voyage, or agree with the King for it; but he shall have it if he goes with the King, or agrees with him. Fitz. Nat. 83. (J)

10. 31 E. 1. Rot. Scutagii Memb. 1. Vicecomiti Oxonii, Licet Servicium dilecti & Fidelis nostri Roberti de Veer, Comitis Oxonii, nobis debitum in Exercitu nostro Scotiæ 31, in Rotulis Marescalciæ nostræ de eodem Exercitu non irrotuletur, nec fuerit Recognitum ut est Moris; Volentes tamen ei hac vice Gratiam facere Specialem, concessimus ei Scutagium &c. Ideo habere facias de Dono nostro & hoc Nullatenus omittas. The like in iisdem Verbis, except de Dono nostro.

11. He who was with the King, tho' he holds of the King but in one County, yet he shall have Escuage of his Tenant in every other County of England. 10 E. 1. Rot. pro Scutagio levando, Memb. 3.

12. The Executors of him who was the King, shall have Escuage. 10 E. 1. Rot. de Scutagio levando, Memb. 3.

13. So the Executors of him who paid a Fine for the Service. Ibidem 31 E. 1. Rot. Scutagii Memb. 1.

14. So the Executors of a Bishop, qui habuit Servitium cum Rege. Ibidem 31 E. 1. Rot. Scutagii Memb. 1.

15. If Escuage be granted, and after the Mesne grants the Services to another, and then Escuage is levied of the Grantee, he may levy this again of the Tenants. 1 E. 3. 6. b.

16. So if Escuage be granted in the Time of the Ancestor, and levied upon his Heir, the Heir shall have the Escuage of the Tenants. 1 E. 3. 6 b.

17. The King or other who has *Seigniory for Term of Years*, or for *Life*, or has Seigniory *in Ward*, *or by the Temporalties of the Bishop*, or such like, *shall have Escuage*, *and* yet he *shall not have Homage*. Br. Tenures, pl. 103. cites F. N. B. 83, 84.

18. The *Lords of whom Lands were holden* by Escuage, should have it when assess'd; for the Lands at first came from the Lords, and it is not intended that they were given by them to the Tenants, to defend them as well as the King. And the Lords might distrain for it, or have a Writ to the Sheriff to levy it for them; but of such Tenants as held of the King by Escuage, that went not to the War, the King should have it. Hawk. Co. Litt. 116, 117.

(X) Eſcuage. *Summons.*

1. 19 E. 1. ROT. Clauſarum Memb. 7. in Dorſo, Summonitio Servicii, Mandamus Vobis in Fide & Homagio, quibus nobis tenemini, quod cum Equis & Armis & tali Servitio, quod nobis debetis, ſitis ad nos apud Northamptoniam ad faciendum Servitium veſtrum C. & Nomina eorum qui ſummonentur C. Edmundo Fratri Regis, Johanni Ballivo Archiepiſcopi Eborum &c.

2. 5 E. 1. Rot. Scutagii, Memb. 8. Breve de Summonitione, Quod interſitis cum Equis & Armis & cum Servitio veſtro nobis debito apud Wigorn tali Die &c. parati nobis cum ex inde proficiſci in Expeditionem noſtram &c. And ſeveral Summons to each.

3. Rot. Scotiæ 5. 6 E. 2. throughout. 8 E. 2. Memb. 10. Dorſo ſuper Fidelitate.

4. See 11 E. 1. Rot. Walliæ Memb. 2. in Dorſo, and 3 in Dorſo, the Manner of the Summons.

(Y) Eſcuage. *Trial.*

1. IF it be not inroll'd in the Roll of the Marſhal, that J. S. was in the Army, yet it may be teſtified by the King, by a Biſhop, by the Chancellor, by the Chamberlain, or other Men of Credit; and thereupon he ſhall have his Eſcuage of his Tenants. 10 E. 1. Rot. pro Scutagio levando, Memb. 3.

2. 31 E. 1. Rot. Scutagii M. 1. Vicecomiti Dromii. Licet Servitium dilecti & fidelis noſtri Roberti de Veer, Comitis Oxon nobis debitum in Exercitu noſtro Scotiæ 31 in Rotulis Mareſcalciæ noſtræ de eodem exercitu non irrotuletur nec fuerit recognitum ut eſt Moris. Volentes tamen ei hac vice gratiam facere ſpecialem conceſſimus ei Scutagium &c. Ideo habere facias de dono noſtro & hoc nulla tenus omittas. The like in iiſdem Verbis, except de Dono Noſtro.

3. In the Bag of Tenures in the Exchequer there is a Roll, of which the Title is Negotia Adjurnata de Scaccario ad Parliamentum Regis, apud Karliolum, in Octabis Sancti Hillarii, Anno Regni Regis Edwardi 35. Where Theobaldus de Verdon fuit Attachiatus ad Reſpondendum quare non venit apud Karliolum in quindena Sancti Johannis cum Servitio ſuo quod Regi debuit in Exercitu Scotiæ, Anno 34. &c. Et ipſe venit & dicit quod fecit Domino Regi Servitium ſuum quod Regi &c. & inde vocat ad Warrantum Recordum Conſtabulariorum & Mareſcallorum exercitus Regis, & datus eſt ei Dies de habendo Warrantum ſuum ad Parliamentum prædictum. And ſo in the ſame Roll; Rogerus De la Ware attachiatur ad reſpondendum Regi &c. qui venit & dicit quod fecit Domino Regi Servicium ſuum in exercitu prædicto, & petit Diem de habendo Warranto ſuo &c. Et ad hoc Dies datus eſt ad Parliamentum Prædictum.

Litt. S. 102. —At the Muſter of the King's Hoſt, the *Marſhal gave a Certificate under his Hand and Seal to all the Tenants that there attended*, which was an unconteſted Evidence of their attending the King in his Expedition. When Eſcuage was aſſeſs'd upon the Tenants in Parliament, every

4. When the Lord diſtrain'd for Eſcuage aſſeſs'd by Parliament, if the *Tenant* would *aver*, *that he was with the King* all the Days required, *and the Lord averr'd the contrary*, it ſhould be try'd by the Certificate of the Marſhal of the King's Hoſt, under his Seal, ſent to the Juſtices. Hawk. Co. Litt. 117.

every Tenant might have his Certificate into the Court of Exchequer; and upon ſuch Certificate the Barons diſcharged him out of the King's Rent-Roll; for *ſuch Certificate* of the Marſhal, *inroll'd in the Court of Exchequer, was an Authority to the Barons to diſcharge the Pipe-Roll of an Eſcuage upon ſuch Tenant*, that ſo no Diſtringas iſſued upon ſuch Eſcuage. If the King's Tenant had not inroll'd his Certificate, then the Diſtringas regularly iſſued; but the *Tenant might plead ſuch Certificate at the Return of the Diſtringas*, and get the Diſcharge. But however the Diſtringas did originally iſſue, becauſe he had not inroll'd his Certificate; where it was inroll'd, it was never in Diſcharge to the Sheriff; where it was pleaded upon the Return of the Diſtringas, the Sheriff was fin'd till ſuch Certificate produced. *If any inferior Tenant was diſtrain'd* by his Landlord for Eſcuage, *he might replevy*; and if upon ſuch Replevin he could plead, That he was with the King in the Expedition, and ſhew his Certificate from the Marſhal, the Tenant might have a Recordari of ſuch Plaint before the Sheriff, and thereby bring it before the Juſtices in Eyre; *and upon producing ſuch Certificate* before the Juſtices, *the Juſtices granted a* Writ de *Returno habendo* of ſuch Diſtreſs. Gilb. Hiſt. View of the Exch. 24. 25.

(Y. 2) Frankalmoign.

1. PRIOR *held in Frankalmoign and infeoff'd J. S.* in Fee, and the *Lord after the Limitation of Aſſiſe got Services, and brought Ceſſavit* for not doing them; and it was ſaid, That the *Feoffee cannot hold by Frankalmoign*, as the Prior held; therefore he ſhall hold by the Services accroach'd, or by Fealty only, or as the Donor held over, and yet the Demandant was barr'd upon his Count of Services accroach'd. Br. Tenures, pl. 39. cites 31 E. 3. and Fitzh. Ceſſavit 22.

2. In Treſpaſs it was in a manner agreed Arguendo per Cur. That where the Lands of the *Templers*, which were diſſolved, and *held of the King in Frankalmoign*, and *their Lands given by Act of Parliament to the Hoſpital in Fee, to hold by the ſame Services as the Templers* held, theſe Words do not make Frankalmoign; for Frankalmoign is not any Service, and by ſome it cannot be, becauſe *Frankalmoign cannot be but of the Donors*. But Brooke ſays, it ſeems to him that it may; for tho' it cannot be but of the Donors *by the Common Law*, yet *otherwiſe it may be by the Act of Parliament*, which may make a new Law varying from the Common Law. Br. Tenures, pl. 5. cites 35 H. 6. 56.

3. At this Day a Man cannot *give Land* to hold in Frankalmoign *to an Abbot in Fee*; for by the Statute of Tenures, *he ſhall hold of the Lord Paramount*, of whom the Donor held. Contra before this Statute, which is call'd Quia Emptores terrarum. Per Littleton. Br. Tenures, pl. 39. cites 12 E. 4. 3. 4.

(Z) Tenure in * *Socage.*

* Tenure in Socage is where the Tenant *holds* of his Lord *by certain Service, as Fealty and certain Rent, for all Manner of Services.*

1. IF Tenant by Eſcuage had made Feoffment, before the Statute, to hold of him by the Services of 6 d. & ex illis 6 d. ſolvi debet Scutagium tantum &c. quantum pertinet ad tantam terram. This is but ‡ Socage Tenure. 27 Aſſ. 52. Per Curiam.

And at this Day every temporal Tenure of a common Perſon is in Socage; for tho', in a ſtrict Senſe, it only ſignifies that in which the Service of the Plough was originally reſerv'd, yet largely taken it comprehends all others that have the like Effects and Incidents; As if a Roſe, Rent, or the doing the Duties of an Office were originally reſerv'd; and *at Law every temporal Tenure of a Subject that was not Knight's Service, was Socage.* Socagium idem eſt quod ſervitium Socæ, i. e. A Plough; and anciently ſuch Tenants ought to come with their Ploughs for certain Days in the Year, to plough and ſow the Lord's Demeſnes, or do other Works of Husbandry. And afterwards ſuch Services were ‡ chang'd into annual Rent, and yet the Name of Socage remain'd; ſuch Charge muſt be before Time of Memory; for at this Day they cannot be chang'd by Releaſe, Confirmation, or any other Conveyance,

ance, ſo long as the Seigniory remains. And in ſome Places they ſtill do ſuch Services with their Ploughs to their Lords. Hawk. Co. Litt. 132, 133.

† S. P. So that this Tenure which at firſt was ſlightly eſteemed of, is now accounted much the better; for the original Labours are converted into a moderate Sum of Money, only the Value of the yearly Rent is exacted for Relief, and it is obliged neither to Ward or Marriage. Cowell's Inſtitutes, Lib. 2. Tit. 3 S. 21.

‡ S. P. And Brooke ſays, the Reaſon ſeems to be inaſmuch as the 6 d. is certain, and therefore it cannot be but Eſcuage certain, which is Socage, as appears in Littleton's Tenures. Br. Tenures, pl. 29. cites S. C.

Incidents.

Fol. 512.

Br. Tenures, pl. 30. cites S. C. and ſays, that the beſt Opinion was that, becauſe the Relief was

2. If at the Common Law **a Man had given Land in Fee, to hold by Knight-ſervice, and had** granted to the Donee and his Heirs, that they ſhould pay ſo much for Relief, when it is to be paid for Ward, Marriage, and all Exactions, **the Donee ſhould hold by Knight's-Service, and yet he ſhould not be in Ward, tho' it be incident to Knight-Service, but not inſeparable.** 31 Aſſ. 15. **Dubitatur.**

put in certain, [viz.] pro dimidia Marca, that it is Socage, and not Knight-Service; for of Socage, Relief ſhall be paid as well within Age as of full Age, & Adjornatur quære.

3. So **it is in the ſaid Caſe,** tho' it be alſo granted generally, that he ſhall not be in Ward, nor ſhall pay nothing for his Marriage. 19 E. 2. **Avowry** 224. **By Herle ſaid to be adjudged, tho' it be Knight-Service.**

4. **If a Man gives by Deed to a Prior and Covent Land** abſque Homagio & Fidelitate, **Habendum** & Tenendum de ſe, & hæredibus ſuis Reddendo inde annuatim 10 s. tantum pro Homagio & Fidelitate & pro omnibus quæ de dicta terra exigi poterunt, Salvo tamen Scutagio Domini Regis quando currit. **Tho' this be Knight-Service, and tho' Homage and Fealty are incident to Knight-Service, yet he ſhall not avow for them againſt the Deed.** 19 E. 2. **Avowry** 224.

5. **If a Man** holds by Fealty, and 12 d. Rent, **and the** Lord releaſes or confirms the Eſtate **of the Tenant,** to hold by 2 d. for all Services and Demands; **this ſhall barr the Lord of Relief. Kelloway incerti temporis,** 136.

6. **If a Man holds Land** at Will, rendering Rent, **this is not a Rent-Service; for** Fealty **is not incident to it, but it is a Rent diſtrainable of common Right. Co. Litt.** 37. b.

Herein the Difference ſtands thus. If a Rent be paid for Caſtle-guard,

7. If a Man *holds* his Land *to pay a Rent* to his Lord *for Caſtle-guard*, this Tenure is Tenure in Socage; *but where* the *Tenant ought by himſelf, or by another, to do Caſtle-guard*, ſuch Tenure *is* Tenure by *Knights Service*. Litt. S. 121.

it is clear a Socage Tenure, at it is agreed in **Lutterel's Caſe,** according to Littleton's Opinion. *But if a Sum* in Groſs, or other thing, *be voluntarily paid or given* by the Tenant, *and voluntarily received* by the Lord in lieu of Caſtle-guard, yet the Tenure by Knights-Service remains. Co. Litt. 87. a. b.

8. Lands held *of a Manor in Ancient Demeſne*, ſhall be held by no other Service than Socage. F. N. B. 13. (D) and 14. (B)

9. *Every Tenure* which is *not Tenure in Chivalry*, is a Tenure in Socage. Co. Litt. 86. a.

10. If a Man hold *by Homage, Fealty, and Eſcuage, viz. by an Half-penny*, when Eſcuage runs at 40 s. this is a Tenure in Socage, and no Knights Service, for 2 Cauſes; firſt, *it is Socage* Tenure, *becauſe of the Certainty*; for to the Tenure in Socage certa Servitia do ever belong, ſo as the Husbandman may the rather live in quiet. 2dly, *Eſcuage is to be paid at every Time when it is aſſeſs'd*, and here it is not to be paid but when it amounts to 40 s. Co. Litt. 87. a.

11. He

11. He that held by *Eſcuage certain*, i. e. to pay his Lord a certain Sum for it, at what Rate ſoever the Parliament aſſeſs'd it, held in Socage. If one ſpeak generally of Eſcuage, it ſhall be intended of Eſcuage incertain, becauſe that is the worthieſt Senſe. Hawk. Co. Litt. 116.

12. The *Service* which is performed *by Tenants in Fee Farm*, is Socage, in regard Fee Farm cannot be where Ward and Marriage are reſerved to the Lord by Charter. *And* the ſame is to be underſtood of Tenants *in Franck Bank*. Cowell's Inſtitutes, Lib. 2. Tit. 3. S. 26.

(A. a) Alteration. In what Caſes the Tenure ſhall be *chang'd*, and How.

See (L. 2)

1. IF there be Lord Meſne and Tenant, and the Tenant by his Act [as] by Purchaſe, Forejudger, and the like, is Party to the Alteration of the Tenure, there he ſhall hold as the Meſne held before; for he comes in loco Medii; And on the contrary, where the Meſnalty is determined by the Act of God, as by Eſcheat without Heir, and the like; for there the Seigniory will merge in the Meſnalty, and the Meſnalty will remain, and the Tenant ſhall hold as before. Brook Tenures 97.

Br. Tenures, pl. 97. cites 22 E. 3. Fitzh. Dower 131. ——*Lord Meſne and Tenant* by Rent; *Tenancy* by Purchaſe, Deſcent, or other lawful Means *comes to the Lord in Fee-ſimple*; the Tenure and all Things which were incident to the Tenure, are extinct and gone, becauſe the Lord cannot hold the Land of his own Tenant. But tho' the *Seigniory is extinct*, yet the *Rent is not gone*; if no Rent due from the Meſne to the Lord, then all the Rent continues; if any Rent, then it continues for the Surpluſage, as Rent Service diſtrainable of Common Right. But ſo long as the Land continues in the *Hands of the King*, the Diſtreſs is ſuſpended, and the Remedy is by Petition. But when the *King grants it over*, then the Meſne ſhall diſtrain the Patentee. Reſolved. Jo. 234. Paſch. 7 Car. B. R. Faulker v. Bellingham.

2. [So] if there be Lord Meſne and Tenant, and the Tenant holds by more Services than the Meſne, and the Meſne is attainted of Felony, by which the Meſnalty eſcheats to the Lord, the Lord ſhall have the ſame Services of the Tenant as the Meſne had of him before; For he is now become Tenant to the Lord, by reaſon of the Meſnalty to which his Services were annexed. 1 E. 3. 6. by Tond.

3. So ſhall it be in the Caſe aforeſaid, though the Tenant held by leſs Services of the Meſne than the Meſne held over, yet he ſhall pay but the ſame Services which he paid before, for his Tenancy is not altered; But the Meſnalty to which the Services are annexed is come to the Lord Paramount. 1 E. 3. 6.

4. [So] if Lord Meſne and Tenant are, and the Meſnalty is a Manor, and held of the King in Capite, a Tenant Paravail, who holds of the Manor by Socage Tenure, obtains a Releaſe of the Meſne, now his Tenure [is] immediate * of the King in Capite, as the Tenure of the Manor was, becauſe the Meſnalty is extinct by his own Conſent; and Volenti non fit Injuria. D. 19. 20 El. 359. 1. Da. County Palatine 67.

D. 359. b. pl. 1. * Fol. 513.

5. If Lord Meſne and Tenant are, and the Meſne releaſes to the Tenant, the Tenant ſhall hold of the Lord by the ſame Services as the Meſne held for the Cauſe aforeſaid. 7 E. 4. 12. 22 E. 3. Brook Tenures 97. Fitzherbert Dower 131.

S. P. 2 Inſt. 502. ——So if the Tenant infeoffs the Meſne, the Meſne ſhall hold by the ſame Service as he did before. 2 Inſt. 502.

* Br. Tenures, pl. 37, cites S. C. becauſe the Seigniory is extinct in the Meſnalty; Per Danby Ch. J.

6. If Lord, Meſne, and Tenant are, and the Meſnalty eſcheats to the Lord upon the Death of the Meſne without Heir, the Tenant ſhall hold of the Lord by the ſame Services as he held before. 7 E. 4. 12. by Needham. Davies County Palatine 67. Co. Litt. 99. b. D. 30 H. 8. 44. 30. And the Seigniory is extinct. 10 Aſſ. 29. adjudged. * 2 E. 4. 6. by Danby. 1 E. 3. 6. Brook Tenures 91. Fitzh. Avowry 258.

See pl. 16. in the Note upon the Words (By ſuch Service &c.)

7. If Lord, Meſne, and Tenant are, and Tenant holds in Frankalmoigne, and Meſnalty eſcheats to the Lord upon Death of the Meſne without Heir, there the Tenant ſhall hold of the Lord by the ſame Services as the Meſne held; becauſe he cannot hold in Frankalmoigne as he held of the Meſne, the Lord being a Stranger to the Blood. 7 E. 4. 12. (It ſeems he ſhall hold it as near it as may be, that is to ſay) by Fealty only.

Where Lord, *Meſne and Tenant* are, and the *Tenant forejudges the Meſne, and is in Arrear* to the Lord, he *accepts the Services by the Hands of the Tenant*, (as he ought) *yet he may* diſtrain him, and *avow upon him for the Services of the Meſne*; for it is the Folly of the Tenant to forejudge the Meſne. And the beſt Opinion was, that the *Tenant may rebut the Lord by Deed made to the Meſne for an Incroachment of* the Lord, as the Meſne himſelf may. Br. Tenures, pl. 80. cites 7 E. 3. Fitzh. Avowry 143.

8. If the Tenant forejudges the Meſne, he ſhall hold of the Lord by the ſame Services as the Meſne held before of the Lord; for it is his own Act. 22 E. 3. Dower 131. Brook Tenures 97. 10 Aſſ. 29.

S. P. For the ancient Seigniory remains, and the Statute wills this. But where Lord, Meſne and Tenant are, and the Tenant holds of the Meſne by 3 Halfpence, and the Meſne over of the Lord by 4d. and the Meſne dies without Heir, the Lord is ſeiſed of the 3 Halfpence, and may bring thereof Aſſiſe upon Diſſeiſin, and recover upon the Matter; for the Seigniory is extinct in the Meſnalty, ſo that he ſhall have only the Services which the Meſne ſhould have had, and not the Services which the Meſne paid to the Lord; quod nota. Br. Tenures, pl. 27. cites 10 Aſſ. 29.

9. If Lord, Meſne, and Tenant are, and the Meſnalty comes by Purchaſe to the Lord, the Tenant ſhall hold as he held before. Davies County Palatine 67. D. 30 H. 8. 44. 30.

10. So if the Meſnalty deſcends to the Lord, the Tenant ſhall hold as he held before. Davies Reports 67. D. 30. H. 8. 44. 30.

If there be *Lord, Meſne, Meſne, and Tenant*, and the *firſt Meſne dies without Heir*,

11. If Lord, 2 Meſnes and Tenant are, and the laſt Meſnalty deſcends to the firſt Meſne, this firſt Meſnalty is extinct, becauſe he by this comes more near to the Tenancy, and yet the firſt Meſne ſhall hold of the Lord Paramount as he held before. Co. Litt. 99. b.

and the *Meſnalty eſcheats to the 2d Meſne*; *or* if the *Meſne grants the Meſnalty to the Meſne*, the Meſnalty which is neareſt to the Tenancy doth drown the more remote Meſnalty, and the Tenant ſhall hold per eadem Servitia & conſuetudines, as he held before; but the 2d Meſne ſhall hold of the Lord Paramount per eadem Servitia & conſuetudines, as he held before the Extinguiſhment of his Meſnalty for the Cauſe aforeſaid. 2 Inſt. 502.

4 Rep. 86. b. in Lutterel's Caſe Arg. cites 31 E. 1. Tit. Aſſ. 441. and ſaid there that the Alienee cannot build a new Caſtle; for the Tenure was to keep the old Caſtle.

12. If Lord and Tenant are by Caſtle-guard, and the Lord grants over the Seigniory, the Caſtle-guard is gone, becauſe the Grantee has not the Caſtle. Co. Litt. 83. a. and this is not a Tenure by Knight Service, as it was before.

Service of Caſtle-guard and Suit to the Mill, cannot be ſever'd from the Caſtle, nor from the Manor, ſo that Grant thereof is void. Br. Tenures, pl. 11. cites 1 Aſſ. 441.

13. If A. holds of B. as of his Manor of D. by Fealty and Suit of Court, and B. grants over the Seigniory, the Suit is gone, becauſe the Grantee has not the Manor. Co. Litt. 83 b.

14. But if Lord and Tenaut are by Caſtle-Guard, and the Caſtle be utterly ruinated, yet the Tenure remains by Knight Service, and this

this goes in Benefit of the Tenant as to the Guard of the Caſtle, till it be rebuilt. Co. Litt. 83. c.

15. If the King makes Releaſe to his Tenant in Capite to hold by a Penny and not in Capite, this is a void Releaſe and does not alter the Tenure; For it is merely incident to the Perſon and Crown of the King. D. 30 H. 8. 45. 35. [36.]

16. * 18 *E.* 1. *cap.* 1. *Foraſmuch as Purchaſers of Lands and Tenements of the Fees of great Men and other Lords, have many Times heretofore entered into their Fees, to the Prejudice of the Lords to whom the Freeholders of ſuch great Men have ſold their Lands and Tenements to be holden in Fee of their Feoffors and not of the Chief Lords of the Fees, whereby the ſame Chief Lords have many Times loſt their Eſcheats, Marriages, and Wardſhips of Lands, and Tenements belonging to their Fees, which thing ſeemed very hard and extreme unto thoſe Lords, and other great Men; And moreover in this Caſe manifeſt Diſheritance.*

* It is called the Statute of Weſtminſter 3. becauſe two notable Parliaments had been before holden at Weſtminſter, the one called Weſtminſter 1, and the other called Weſtminſter 2; in reſpect whereof, and the Excellency of it, this Parliament being holden at Weſtminſter is called Weſtminſter 3. 2 Inſt. 500.

Before this Statute, if Tenant by Knight Service had made Feoffment, the Feoffee by the Law ſhould hold as the Tenant held over, viz. by Knight Service, and if the Feoffor had after procured a Releaſe to hold in Socage, the Feoffee ſhould hold in Socage likewiſe. Per Doderidge J. quod fuit conceſſum per Coke Ch. J. Roll Rep. 106. in Caſe of Spink v. Tenant cites 49 E. 3.

If a Man before this Statute had made a *Gift* of Land to one in Fee, *to repair a Bridge* or to *keep ſuch a Caſtle*, or to *marry annually a poor Virgin of S.* this had been a Tenure, and the Donor might have diſtrain'd and made Avowry, and is not a Condition; But if a Feme gives Land to a Man to marry her, this is a Codition in Effect, and no Tenure. Per Fitzherbert, quod nemo negavit. Br. Tenures, pl. 53 cites 24 H. 8.

At the Common Law, if A. had made Feoffment in Fee to B. Reddend' inde ſive *Tenend' de ſe & hæredibus ſuis per* 6 *d. pro omnibus ſervitiis, & faciendo capitalibus dominis feodi pro prædict' A. & hæredibus ſuis omnia ſervitia debita* &c. In this Caſe by the firſt Reddend' or Tenend' the Land had been holden of the Feoffor, and all the Services due ſhall be done to him; for *to do Service for a Man, is to do it to him*; Qui pro me aliquid facit, mihi feciſſe videtur. 2 Inſt. 501.

Our Lord the King in his Parliament at Weſtminſter after Eaſter, the 18*th Year of his Reign, that is to wit, in the Quinzime of St. John Baptiſt, at the Inſtance of the great Men of the Realm, granted, provided and ordained, that* * *from henceforth it ſhall be lawful to every* † *Freeman to* ‡ *ſell at his own Pleaſure, his Lands and Tenements, or part of them,*

* By the Common Law, the Tenant might have made a *Feoffment in Fee of the whole Tenancy, to be holden of the Chief Lord*; But notwithſtanding the Lord might, during the Life of the Feoffor, take him for his Tenant, and avow upon him (in reſpect of the former Fealty, Service, and Privity) albeit the Feoffee gave Notice and tendered him all the Arrearages, which this Statute has alter'd. 2 Inſt. 501.

† i. e. Libere tenenti, to every Freeholder. Hereby are *excluded*, not only Nativi, but alſo Native Tenentes, *Copyholders*, or Tenants at Will according to the Cuſtom of the Manor. 2 Inſt. 501.

‡ This is not only taken for a Sale, but for any *Alienation by Gift, Feoffment, Fine*, or otherwiſe; But Sale was the moſt common Aſſurance. 2 Inſt. 501.

* *So that the Feoffee ſhall hold the ſame Land and Tenements of the* † *Chief Lord of the ſame Fee*

* The General Words of this Act *and tender the Arrearages* before the Lord ſhall be compelled to avow upon him; Neither do theſe or the former Words (De cætero liceat) take away the Fine for Licenſe of Alienation &c. of Lands holden of the King in Capite, for that belongs to the King by the ſaid Statute of Magna Charta. See Magna Charta, cap. 32. 2 Inſt. 501.

take not away neceſſary Incidents, as that the Feoffee of all, or of part, ſhall give *Notice*,

Theſe general Words have a tacite Exception, viz. unleſs all the *Lords* mediate and immediate do *aſſent* thereunto; For Quilibet renunciare poteſt beneficio juris pro ſe introduct'. 2 Inſt. 501.

† This is taken for the *next immediate Lord*, and ſo by Degrees upward to every Lord Paramount; albeit the Act ſpeaks in the ſingular number; And it is to be known, that all the Lands and Tenements in England, are holden either mediately or immediately of the King, and therefore he is Summus Dominus ſupra omnes. 2 Inſt. 501.

* *A. holds Lands by* * *By ſuch Services and* || *Cuſtoms as his Feoffor held before.*

Knights Service, and *gives* the ſame *to B. in Tail, to hold of him in Socage*; *B. makes a Feoffment in Fee*, the Feoffee ſhall not hold of the Lord in Socage as the Feoffor held, but by Knights Service, as A. the Donor held; For by the Feoffment the Reverſion in Fee holden by Knights Service, is drawn out of the Donor, and paſſes to the Feoffee, and the Feoffee in this Caſe cannot hold of the Donor; and this Caſe is not againſt the Letter of the Law, but within the Intent and Meaning thereof; for the Meaning of this Law was, That the Feoffee ſhould hold of the Lord, as the Feoffor did when the Feoffee held of the ſame Lord; and this Act was made for the Advantage of the Lords; and therefore in Conſtruction *the Feoffee ſhall hold, not as the Feoffor, but as the Donor held.* 2 Inſt. 502.

Alſo, if the *Tenant that holds by Priority make a Feoffment in Fee*, the Feoffee ſhall not hold by Priority; for this Act ſays, Per eadem Servitia, by the ſame Services, and not according to every *collateral Quality.* 2 Inſt. 502.

If the Tenant in Frankalmoign aliens in Fee, the *Feoffee* ſhall not hold of the Lord Per eadem Servitia, *albeit he be a Man of the Church*; but he *ſhall hold of the Lord by Fealty only*; for by the firſt Words of this Act he ſhall hold of the Lord, but he cannot hold of the Lord Per eadem Servitia, becauſe it is *againſt the Nature* of the Tenure in *Frankalmoign to hold of any but of the Donor or his Heirs*, and general Words of an Act ſhall not be taken to work any thing againſt the Nature of the Thing, or the Rule of Law, but he ſhall hold by Fealty only, which was as free a Tenure, and as near to the Former as can be, and therefore by Conſtruction (*eadem Servitia*) the ſame Services *ſhall be taken As near the ſame Services as may be.* 2 Inſt. 502.

The *Archbiſhop* of C. ſeiſed of Land in Right of his Archbiſhoprick, and *held of the King in Frankalmoign*, after this Statute *made a Feoffment in Fee* to J. S. *and the Dean and Chapter confirmed it.* The Queſtion was, if the Land ſhall be held of the King in Capite by Service of Chivalry or Socage in Capite? It was reſolved upon this Statute, that the Land *ſhall be held of the King in Socage, and not in Capite*, and this by reaſon of this Statute, for before this Statute he ſhould hold of the Biſhop, and not otherwiſe; But now this Statute provides that it ſhall be lawful to alien his Land, but the *Statute is Vendere*, Nota hoc &c. *ſo that the Feoffee ſhall hold the Land of the Chief Lord of that Fee, by the ſame Services as his Feoffor held before*, the which cannot be in this Caſe. For he cannot hold of the King in Frankalmoign, nor by the Services which the Feoffor held by; and therefore he ſhall not hold in Capite by the Meaning of this Statute, which ſhall be taken the moſt reaſonably for all Parties concerned. 2 And. 211. pl. 30. in the Court of Wards, Rotheram v. Wood.

A *Diverſity* was taken, when the *King grants Land, and reſerves no Tenure, or* when a *Clauſe is Aliquo aliquo reddendo*, there the Law creates a Tenure, the Beſt it can for the King; *But when* the *Land paſſes from a Subject, and the Law, of Neceſſity, changes one Tenure into another, it will create One as near the Freedom of the firſt Tenure as may be*; As if a Biſhop or other Man of the Church had held Land of the King in Frankalmoign, and at the Common Law had infeoff'd another and his Heirs of the ſame Land, in ſuch Caſe the Feoffee ſhould hold by Fealty only; for this is as near the Freedom of the Tenure in Frankalmoign as may be, and ſo it was reſolved in Lowe's Caſe. And the reaſon of this Diverſity is, becauſe in the firſt Caſe the Land moves from the King, and therefore ſhall be ſubject to ſuch Tenure as the Law will create; But when Tenant in Frankalmoign infeoffs another, the Feoffee is in by a Subject and not by the King, ſo as the King parts with nothing; Beſides, in the laſt Caſe the Law does not create any Tenure originally as it does in the firſt Caſe, but only changes one Tenure into another, viz. Frankalmoign into Fealty only. 9 Rep. 123. a. b. Trin. 7 Jac in the Court of Wards in Lowe's Caſe. ——Litt S. 139. and Coke's Comment upon it, pag. 98. a. S. P.

* This Act extends to Lands holden by *Fee Farm.* 2 Inſt. 502.

|| Cuſtom is here *taken for Services*, as in the Writ de Conſuetudinibus & ſervitiis, and not for Cuſtoms 2 Inſt. 502.

If the *Tenancy comes to the Meſnalty by Act in Law, as* by *Eſcheat or Deſcent*, the Meſne ſhall hold per eadem Servitia & conſuetudines, as he held before; for albeit the Tenure between the Tenant and the Meſne in theſe Caſes be extinct, yet the Seigniory paramount, which alſo was iſſuing out of the Tenancy, remains ſtill. 2 Inſt. 502.

The *King may licence* a Man to alien, and *to make a Tenure* at this Day, *where he is his Tenant immediate*; *and* the *King and the other meſne Lords* may licence other Tenants to alien and make Tenure at this Day. *But the Lords only cannot*; for the Statute was for the Advantage of the King and Lords, and the † King is not bound thereby; and ſo the King and the Lords may diſpence with this Statute. Br. Tenures, pl. 65. cites F. N. B. fol. 211.

† S. P. That the King is not bound by this Statute, becauſe all Land muſt be held, and therefore if he ſhall not hold of the King, he will hold of no body. Roll Rep. 165. in the Caſe of Smith v. Warren, alias, Magdalen College's Caſe.

17. If a Man had given Land before the Statute to hold of the Chief Lord, the Feoffee ſhould have held of the Chief Lord; And if the *Lord had releaſed and* * *confirmed* to the Tenant to hold in Frankalmoign, he ſhould have held in Frankalmoign thereby. And ſo ſee that Tenure may be *alter'd by Confirmation.* But it ſeems that it is only a diminiſhing; For he does no Services. Br. Tenures, pl. 71. cites 4 E. 3. Fitzh. tit. meſne 41.

* A Man *held 2 Acres* of J. S. *by two ſeveral Tenures and by 5 s. Rent*, and the Lord *confirm'd* the *Eſtate* of the Tenant *to hold by 4 d. for all Services*, it was held that this ſhall not make the Tenant to hold by one entire Tenure where he held by ſeveral Services before. Br. Tenures, pl. 59. cites 2 H. 6. 9, 8.—— [But it ſeems it ſhould be 9 H. 6. 8. b. 9.]

On

On *Confirmation* to the Tenant the Lord can't *reſerve new Services*, as Hawk for Rent, or Rent for Hawk. 9 Rep. 142. Paſch. 10 Jac. in the Court of Wards in Beaumont's Caſe.

18. In Aſſiſe; the *King* Lord, *Meſne and Tenant* are, the *Tenant held* of the Meſne *by Socage*, and the *Meſne over in Chivalry*; the *Tenant gave his Land* to his Daughter with her Baron *in Frankmarriage rendring* 12 *d. per Annum for all Services ſalvo Forinſeco Servitio*; And it was held that the Donor cannot have Service of Chivalry by theſe Words (Forinſeco Servitio;) the Reaſon is, becauſe he himſelf held only in Socage; for it appears there, that the Foreign Service are *ſuch Services by which the Donor holds over.* But per Wilby, They are ſuch Services by which the Land is held, and the Meſne holds over by Chivalry, tho' the Tenant holds only by Socage; and he adjudged accordingly, which was contrary to the Opinion of ſeveral, and therefore Error was thereof brought in B.R. And it was ſaid, that this Word **(Salvo)* is *ſufficient to ſave that which is in Eſſe*, which was only Socage here; *But* it is *not* ſufficient *to reſerve that which is not in Eſſe*, as Service of Chivalry here, *if he does not ſay Reddendo vel faciendo.* And per Wilby and Green, that of which the Donor is charged over may be reſerved by this Word (Salvo.) And per Wilby Eſcuage certain is Socage, and Eſcuage uncertain is Service of Chivalry; And a Man may hold by Homage and yet not in Chivalry, but in Socage, per Wilby. And the beſt Opinion was, that by theſe Words Salvo Forinſeco Servitio, the Donor ſhall have only ſuch Services by which he himſelf is charged over, and not ſuch Services which his Meſne or other Lords Paramount is charged for the ſame Land; quod nota. Br. Tenures, pl. 28. cites 26. Aſſ. 66.

Br. Tenures, pl. 95. cites S. C.——Thorp Ch. J. ſaid, That when a Man gave Land before the Statute, to hold by 2 d. for all Services, Salvo Forinſeco Servitio, yet he ſhall hold by Service of Chivalry if the Feoffor held over by Service of Chivalry, by Reaſon of the Salvo &c. And if a Man infeoffs another, rendring a Roſe per Annum

& faciendo Capitali Domino Servitium debitum pro Feoffatore & Heredibus ſuis, that which he ſhall do for him he ſhall do to him, and therefore he holds in Chivalry. But Mombray Contra for the firſt Words (for all Services) diſcharge him, and the laſt Words are not ſufficient to contradict the firſt. And Brooke ſays, the Law ſeems to be with him; For the Deed ſhall be taken more ſtrong againſt the Feoffor, and there is no Reſervation nor Exception of Eſcuage, Br. Tenures, pl. 31. cites 31 Aſſ. 30.

* S. P. Br. Reſervation, pl. 33. cites 31 Aſſ. 30.

19. Lord and Tenant by *Service of* 6 *Marks, and to find a Chaplain for ever*, the *Lord releaſed by Fine* in Writ of Cuſtoms and Services *to hold by* 6 *Marks, and rendring half a Mark for the Chaplain*, and after deviſed the 6 Marks and died, and in Aſſiſe all was found by Verdict at large, and the Plaintiff recover'd. Brooke ſays, Quod Mirum! that he may change the Services, or reſerve Rent upon Fine of Releaſe. Br. Tenures, pl. 49. cites 26. Aſſ. 37.

20. In Aſſiſe Deed was ſhewn by which *Land was given to A. B. and his Heirs to hold of the Feoffor and his Heirs by* 6 *d. for all Services*, and *ex illis ſex Denariis Scutagium ſolvi debeat quum evenerit quantum pertinet ad tertiam partem unius acræ terræ*; And per Seton he holds in Socage by by theſe Words (6 d. for all Services.) And theſe Words *(Scutagium debet* &c.*)* are not Words of Reſervation, as Reddendum Scutagium, nec Salvo Scutagio, therefore it is only Socage. Br. Tenures, pl. 31. cites 51 Aſſ. 30.

21. If a Man *gives Land in Tail Tenendum libere & quiete*, the *Remainder over Tenendum in forma prædicta, reddend.* 2 *s. per Annum*, the firſt Eſtate is diſcharged of the 2 s. and not the Remainder, otherwiſe it ſeems if Libere & quiete was not expreſſed before. Br. Tenures, pl. 92. cites 34 E. 3. & Fitzh. Avowry 285.

22. If *Manor* be *converted into a Priory*, yet the Tenure remains, and the *Lord may diſtrain*; For Alteration ſhall not prejudice the Lord. Br. Tenures, pl. 55 cites 42 E. 3 7.

23. If a Man *holds* an Acre of Land *of J. S.* by Fealty and Suit *as of his Manor of Dale*, and J. S. is alſo ſeiſed of another Manor called T. and *J. S. grants unto* the Tenant *that he ſhall do his Suit at his Manor of T.* this

S. P. Br. Suit, pl. 44. cites Fitzh. tit. Action ſur le Sta-

ture, pl 24. 3 E. 2. F.N.B. tit. Cont. Form. Feoffamenti.

this Grant ſhall not determine the Suit at the Manor of Dale. Perk. S. 70.

24. *And if J. S.* in the ſame Caſe *had granted* unto his Tenant that he ſhall give unto him 12 *d. yearly for his Suit*; This Grant ſhall not determine nor alter the Tenure. Perk. S. 70.

25. If Lord and Tenant be, and the *Tenant infeoffs the Lord of the Tenancy upon Condition*, the Lord may *grant his Seigniory*, and yet it is not determined nor extinguiſhed; For if the *Condition be broken*, and the Tenant enters, the Seigniory is revived. *But if before the Entry of the Tenant the Lord enfeoffs a Stranger of the Tenancy*, and then the firſt Feoffor, that is to ſay, the Tenant enters, the Seigniory is not revived but is determined, becauſe that the Lord departs with the Tenancy to his Feoffee diſcharged of the Seigniory. And ſo in the ſame Caſe the Lord may depart with his Seigniory by ſuch Means &c. Perk. S. 89.

26. If there be *Lord and Tenant* by Knights Service, viz. *by Homage, Fealty, and Eſcuage, and* 12 *d. Rent*, and the *Lord grants the Rent unto a Stranger ſaving unto him his Seigniory*, it is a good Saving; but notwithſtanding that, the *Lord ſhall have the Eſcuage*, and yet it is not but a Payment of Money if the Tenant will, and the Grantee ſhall have the 12 d. Rent as a Rent Seck &c. Perk. S 648.

27. If before the Statute of Quia emptores Terrarum, there had been *Lord, Meſne, and Feme Tenant*, and the *Meſne and* the Tenant *had intermarried*, the ſame ſhould not have alter'd the Lord's Avowry; *or* if the *Tenant* had *infeoff'd the Meſne* of the Tenancy, it ſhould not have altered the Avowry of the Lord &c. Perk. S. 654.

28. If *Lord*, 2 *Jointenants meſne, and Tenant* had been, and *every of them held of the other by Fealty, and* 12 *d.* and the *Tenant* had *infeoff'd one of the Joint Meſnes* before the Statute of Quia emptores Terrarum *of the whole Tenancy*, it ſeems the Feoffee ſhall hold one Moiety of the Tenancy of him who was his Joint meſne by Fealty, and 6 d. Rent. Perk. S. 655.

See Bendl. 116. pl. 149. S C. ſays, this was before the Statute of Quia Emptores, and the Fine was given in Evidence in an Iſſue to be try'd in the Manner of a Writ de Valore Maritagii in Suſſex, at the Suit of the Executors of the old Duke of Norfolk v. Keeds.

29. See the Form of a *Fine* levied *upon a Writ of Cuſtoms and Services*, where it is recited, that whereas there *was a Diſpute about Caſtle-guard and Murage*, now the *Lord conceſſit quod ipſi* &c. *ſint quieti de prædictis ſervitiis, ſalvis omnibus aliis Servitiis ad prædictum Tenementum pertinentibus.* It ſeems that the Diſcharge of the Murage and Caſtle-guard, which it may be were not of Right due, is no Diſcharge of the Tenure in Chivalry. D. 179. b. pl. 46. Paſch. 2 Eliz. Bruſe v. Bonet.

3 Le. 58. pl. 85. S. C. accordingly. — 4 Le. 40. pl. 109. S. C. and reported in the ſame Words. — Bendl. 237. pl. 264. Mich. 16 & 17 Eliz. S. C. accordingly.

30. If a Man has Lands which were Parcel of the Poſſeſſion of a *Chantry &c.* and came to the King by the Statute of *Diſſolutions*, and before *were held of a common Perſon by Rent and Fealty*, or by Service in Chivalry, now the *Patentee* of the King ſhall hold according to the Patent, and not of the ancient Lord, or of his Heirs by the former Services, but he *ſhall pay the ſame Rent, which before was Rent Service, as Rent-charge diſtrainable of Common Right* only by the former Lord and his Heirs; and ſo the ſaving in the Statute was expounded. And. 45. pl. 115. Mich. 16 & 17 Eliz. Stroud's Caſe.

31. A Writ of Diſceit by the Lord of the Manor in *Ancient Demeſne*, upon a Fine levied of Land there; the Defendants *pleaded that the Lord* of the Manor *in the Time of E.* 2. *releaſed to one who was Tenant of the ſame Land by Fine de omnibus Servitiis & conſuetudinibus, ſalvis Servitiis infraſcriptis, viz. pro una virgata Terræ* 2 *s. Rent, Suit of Court, and Relief.* And the Releaſe was de uno Meſuagio & una virgata Terræ. It was held, That the Cuſtom of the Ancient Demeſne was extinct by the Releaſe, but that

that the Rent, Relief and Suit of Court remained as Parcel of the Seignory by the ſaving. And adjudged accordingly. Mo. 143. pl. 285. Mich. 25 & 26 Eliz. Griffith v. Clarke.

32. *King* Edw. 3. was *Lord*, *Abbot of W. Meſne*, and *C. was Tenant. C. was attainted of Treaſon.* Office was found. The *King granted the Land to M. and his Heirs, Tenendum de Nobis & Succeſſoribus noſtris & aliis Capitalibus Dominis Feodi illius per Servitia inde prius debita*, & de Jure conſueta. It was argued, (among other things) that this was now a Tenure of the King immediately, and not of the Meſne, becauſe the Words were not per Servitia (Ante Proditionem,) or (Ante Attinctu-ram) inde prius debita &c. And diverſe Offices and Licences of Alie-nations and other Records were ſhewn to the Court, by which it ap-peared that the Law had been ſo taken all along, that the ſaid Manor was held of the King in Capite. But as to the ſaid Offices, Licences, and other Records, the Barons ſaid, that *ſince* by Conſtruction of Law upon the ſaid Letters Patents, *it appears that there is no immediate Tenure of the King, notwithſtanding it has been found otherwiſe in Offices, or ad-mitted in Licences* or other Records, *yet this cannot alter the true Tenure which originally appears of Record to them as Judges*; and that tho' Con-ſuetudo ſit magnæ Authoritatis, nunquam tamen præjudicat Veritati. 6 Rep. 5. b. Hill. 40 Eliz. in Scaccario, Sir John Molyns's Caſe.

33. A. ſeiſed in Fee of Land held of Queen Eliz. as of the Fee of Crow-land, whereof ſhe was ſeiſed in Fee by Admittance, procured a Licence from her, and ſuffered a Common Recovery, and made a Join-ture on his Wife. A. and the Wife died, and the Land deſcended to B. as Couſin and Heir of A. B. ſold the Land to C. who died ſeiſed, and the Land deſcended to D. as Son and Heir to C. This was found by Office; and further, that the ſaid Land at C.'s Deceaſe was held of Queen Eliz. and at the Inquiſition was held of the King now by Knight Service in Capite. Reſolved by Coke and Tanfield, that the * *ſuing the Licence of Alienation is no Concluſion to the Party, ſo as to make the Lands to be held of the King in Capite*, becauſe the Words of the Licence are (Quæ de Nobis tenentur in Capite, ut dicitur) but yet that the ſame may be us'd as ſome Part of Evidence for the King to prove ſuch a Tenure. And decreed that the Tenure ſhould be taken as a Meſne Tenure, and not a Tenure in Capite. Ley 16. Mich. 7 Jac. Daviſon & Dymmock's Caſe.

* And Ld. Coke cited a Caſe Mich. 29 & 40 Eliz. in the Exchequer accordingly; becauſe the Plea has Re-lation only to the Li-cence or Pardon; but otherwiſe it is where the Party is di-rectly charg'd with a Te-nure, as by Bene & verum eſt &c. For in ſuch Caſes the Plea is a Concluſion.

34. Two Tenants held of C. by unequal Rents. C. *gives, grants and confirms &c. the ſaid Rents, Services, and Seigniories to them 2 and their Heirs*; this is an Extinguiſhment of a Moiety of every of the Tenures, and for the other Moiety they hold one of another; it was ſaid that if the Acres and *Rent* had been equal, that then it ſhould be *extinguiſh'd* in all; but, as it was, there was a *croſs Tenure between them as to one Moiety*, and that ſhall not move as a Releaſe Reddendo ſingula Singulis. Noy 113. Goldwell v. Navenden, cites D. 319. 11 H. 7. 12, a. 39 H. 6. 2. 49 E. 3. 40.

35. A. *ſeiſed of* the *Manor of W. held in Capite, purchas'd* a Freehold of 7 *Acres held of the ſame Manor in Socage.* Reſolv'd by the Lord Ch. J. Mountague, and Hobart, and Tanfield Ch. B. That the 7 Acres pur-chas'd by A. is held of the King in Capite by Knight Service, as the Manor of W. is held, and of which the ſaid 7 Acres were held in So-cage till ſuch Purchaſe. Ley 63, 65. Paſch. 17 Jac. Mountague's Caſe.

See Heriot (H)

(B. a) *Extinguiſhed.* What Act will extinguiſh it.

Br. Tenures, pl. 9. cites S. C.

1. IF the King purchaſes Land which is held of others, by this all the Services are extinct. 47 E. 3. 21. b. by Finchden.

Fol. 514. Br. Tenures, pl. 56. cites S. C.

2. If my Tenant infeoffs the King, and retakes Eſtate from the King, my Tenure is extinct. Contra 45 E. 3. 6. He ſhall hold of both.

That he is my Tenant in Right, and ſhall hold of the King alſo; Per Finch. Brooke ſays, Quære of his holding of me; for the Tenure was once extinct by the Poſſeſſion of the King.

3. If the King has Land by Forfeiture of Treaſon, by this all Tenures are extinct as well of the King as of others. Co. 6. *Molyns.* 5. b.

D. 154. b. pl. 18. 4 & 5. P. & M. the King and Queen v. the Archbiſhop of Canterbury.

4. If Lord Meſne and Tenant are, and the Tenant gives the Land in Tail, the Remainder in Fee to the King, if he aſſents to the Remainder the Meſnalty is extinct, becauſe the King can hold of none (and the particular Eſtate and Remainder are all one Eſtate in Law, and both hold of the Lord Paramount.) D. 4, 5 Ma. 154. Co. 2. *Bingham* 92. b.

—S. C. cited 2 Rep. 92. b in Bingham's Caſe.——Goldb. 149. pl. 73. Hill. 43 Eliz. S. P. exactly, and ſeems to be S. C. Anon.

5. If there are Lord and Tenant in Frankalmoigne, and the *Lord releaſes to the Tenant all his Right*, the Seigniory by this is extinct; and therefore Quære, How the *Tenant ſhall hold* over after. It ſeems *as the Lord held before the Releaſe made.* Br. Tenures, pl. 74. cites 18 E. 2. and Fitzh. Releaſe 51.

6. If a Man *holds by Homage, Fealty, Rent, and Caſtle-guard*, and [the *Lord*] *grants the Services*, and the Tenant attorns, the *Grantee ſhall not have the Caſtle-guard*; for he has not the Caſtle. But per Berr. & Spigurnel, he ſhall have Money for it, as Contributory. Quære inde; for it ſeems, that that Service is loſt. Br. Tenures, pl. 58. cites 19 E. 2. & Fitzh. Aſſiſe 399.

7. If *Lord Meſne and Tenant* are, and *Meſne is attainted of Felony*, the Lord ſhall have the Services of the Tenant which the Meſne had, and no more; for the Segniory is merg'd in the Meſnalty; per Cand. but Tond. contra. And per Devon. the Lord in Chivalry may relinquiſh the Ward, and diſtrain for the Services, if he will; quod Tond. conceſſit. Br. Tenures, pl. 91. cites 1 E. 3. Fitzh. Avowry 168.

8. The *Lord granted his Rent, ſaving to him his Seigniory*, the Grantee cannot diſtrain; for it is Rent-Seck. Brooke ſays; And ſo ſee, that by expreſs Words Fealty may be ſever'd from Rent-Service. Br. Tenures, pl. 79. cites 7 E. 3. and Fitzh. Avowry 142.

In ſuch Caſe the Lord cannot make Contribution to the Suit, nor take Contribution,

9. In Ceſſavit it was agreed, that Suit is not ſeverable; ſo that if 3 *Tenants hold of the Lord*, and the *Part of the one comes to the Lord*, he ſhall not have any Part of the Suit; and the Reaſon ſeems to be, inaſmuch as he cannot take the Suit, and be Contributory to the Suit which he himſelf takes. Br. Suit, pl. 1. cites 40 E. 3. 40.

and therefore the Suit ſhall not be apportion'd. Br. Suit, pl. 5. cites 34 Aſſ. 15.

So if 3 hold by a Horſe, or other Intire thing, and the *Lord recovers two Parts of the Land by Ceſſavit*, there the entire Rent is extinct by the Recovery; for this is the Act of the Lord. Br. Tenures, pl. 104. cites F. N. B. 209.

10. Confirmation with Warranty therein, that an Abbot ſhall hold *Libere & Quietus de Gildis, Placitis & Querelis, Actionibus & Demandis ab omni*

omni Servitio exactione Seculari &c. *Demandis* does not excuſe him of Corody; and becauſe it is not expreſly reheatſed in Perpetuam Eleemoſinam, therefore they ſhall do other Services; and ſuch Grant ſhall not diſcharge him from making Bridges and Cauſeways. Br. Tenures, pl. 6. cites 44 E. 3. 24.

11. Where two *Parceners make Partition* of the Manor, ſo that the *one has the Demeſnes*, and the *other the Manor*, neither of them ſhall have the Suit; but if the *one dies without Iſſue*, the *Suit is revived*. Br. Suit, pl. 3. cites 12 H. 4. 25.

Br. Extinguiſhment, pl. 13. cites S. C. for the Suit was not extinct, but only ſuſpended; quod nota. Brooke ſays, Quære; for the Manor was once defeated.

12. It was held, that by the *Unity of Poſſeſſion of the Land in the Lord*, all *Cuſtoms and Services annex'd to the Seigniory*, or to the Lord, are extinct for ever, *as Heriot-Cuſtom*, *Ancient Demeſne*, *Fine for Alienation*, or *Cuſtom to be Bedel* to the Lord, or to collect his Rents &c. are extinct. *But contra of Cuſtom*, *which runs with the Land as Gavel-kind*, *Burgh-Engliſh*, *Dowment of the entire Lands* &c. for this runs with the Land, and there Unity of Poſſeſſion in the Lord, and after Feoffment made to another, ſhall not change the Cuſtom; for it *runs to a Number*, *and throughout the Country or Vill*, *and not to the Lord as a ſingular Perſon*, as in the other Caſes before. Br. Avowry, pl. 46. cites 14 H. 4 2.

13. If *Lord and Tenant* are, and the *Lord confirms the Eſtate of the Tenant Reddend'* vel ſolvend' 1 *d. pro omnibus ſervitiis*, by this the Tenure, which was before the Confirmation, is determin'd. *But if it had been reſervand' vel tenend' by* 1 *d.* there the firſt Tenure remains; Per Brian Ch. J. But Brooke makes a Quære thereof; for none made any Anſwer thereto. Br. Tenures, pl. 40. cites 21 H. 4. 62. 73.

14. If there be *Lord Meſne and Tenant*, and the *Lord releaſes to the Tenant* &c. the Meſnalty is extinct; for he has it only in reſpect of the Charge which he brings to the Lord, and by the Releaſe all this is determin'd. But per Littleton, Tit. Rents in his Book, if there be *a Surplusage of Rent*, *the Lord ſhall have it*; quod nota. Br. Tenures, pl. 48 cites 8 H. 6. 24.

15. If the *King grants Land* to J. S. in Fee, *to hold as freely as the King is in his Crown*, yet he ſhall hold of the King; and *if he aliens without Licence he ſhall make Fine*; for this is veſted in the King by his Prerogative, which cannot be extinct by ſuch general Words. Br. Tenures, pl. 52. cites 14 H. 6. 12.

16. If *Lord and Tenant* be *of* 3 *Acres* of Land, viz. *white Acre*, *and* 2 *other Acres*, and the *Lord grants* unto the Tenant by Deed, *that he will not diſtrain in white Acre for his Rent* and Services; this Grant ſhall not enure to ſuch Intent to determine the Seigniory in any Part, but ſhall *enure by way of Covenant*; ſo that if the Lord diſtrains in white Acre for his Services, the Tenant ſhall have an Action of Covenant. Perk. S. 69.

17. If *Lord and Tenant* are *of* 2 *Acres*, and the Lord *releaſes* unto the Tenant *all the Right* which he hath *in the one Acre* of the ſame Land, it is a Determination of the whole Seigniory. Perk. S. 71. cites 7 E. 4. 25. 20 H. 6. Exting. 2.

And to this Purpoſe there is *a Difference* between a *Releaſe in Fact*, *and* a Releaſe *in Law*; for if they *purchaſe one of the Acres in Fee*, which are holden of him, that is no Determination but *of the Rate of the Services*, which are *annual and ſeverable*, and he ſhall have the whole Corporal Service. *But* if the annual Services be *entire*, *as a Horſe*, a Hawk &c. then all the annual Services are gone by the Purchaſe. *But if one of the Acres deſcend unto the Lord*, then if the annual Services be entire he ſhall have the entire annual Services out of the Remnant of the Tenancy. But if it was ſeverable, as Rent &c then it ſhall be apportion'd according to the Rate of the Land. Perk S. 71. cites 4 Aſſ. 5. 40 E. 4. 5. 40. 34 Aſſ. 15.

But if the *Lord diſſeiſeth the Tenant of Part* of the Tenancy, the whole Seigniory is ſuſpended; for a Seigniory *ſhall not be ſuſpended in Part*, *and in Eſſe for other Parcel* to every Intent ſimul & ſemel in one Perſon, if not in Special Caſes; *But* a Seigniory may *be determined in Part*, and in Eſſe for other Part *ſimul & ſemel* &c. Perk. S. 71. cites 19 E. 4. 1.

18. By *Feoffment* made *by the Tenant unto one Jointenant Meſne* there is but a Moiety of the Menalty extinct, viz. the Moiety; which in right does belong unto the Feoffee, and no more &c. ſo as for one Moiety of the Tenancy there are Lord, Meſne, and Tenant; and for the other Moiety of the Tenancy Lord and Tenant. Perk. S. 655.

The Saving to the Donor &c. all ſuch Rents, Services, &c. in the Statute 1 E. 6. cap. 14 is controll'd by the Common Law, which adjudges it void as to the Services, and the Donor ſhall have the Rent as Rent-Seck, diſtrainable of Common Right; for it ſhould be againſt Right and Reaſon, that the King ſhould hold of, or do Service to, any of his Subjects. 8 Rep. 118 b. in Dr. Bonham's Caſe, cites D. 313. 14 Eliz. and ſays, it was ſo adjudged. Mich. 16 & 17. Eliz. C. B. in Strowd's Caſe.

19. Reſolved, that the Seigniory and Tenure of *Obit, or Chantery-Land*, is extinct *by Poſſeſſion of the King*, by the Act of 1 *Ed.* 6. notwithſtanding the Saving in the Act, Propter Abſurditatem. But for the Rent-Parcel of the Tenure, the *Lord may diſtrain the Patentee* of the King, and make Avowry upon the Matter, but not upon the Perſon within his Fee and Seigniory. D. 313. pl. 91. Trin. 14 Eliz. Anon.

20. *Abbot*, before the Diſſolution, *held of J. S. by Fealty and Rent*, and after the Land came *into the King's Hands* by the Statute; the *Seignory is but ſuſpended*; and if the King grants the Land to another, the Patentee ſhall hold of the Lord as before, and the Lord ſhall have his Rent; but whether as Rent-Service as before, ſome doubted. D. 213. Marg. pl. 91. cites Trin. 23 Eliz. C. B.

21. *B. was Lord, and D.* was *Tenant of the Manor of M.* by Knight-Service. *B. held* the Manor of M. *of A. an Abbot, as of his Manor of L. which came to the Crown by the Statute of Diſſolutions.* Afterwards *B. purchaſed* the Manor of *L. of the King*, and being ſo ſeiſed of both Manors of L. and M. died ſeiſed. *C. Son and Heir of B. conveyed both Manors to Truſtees to the Uſe of himſelf and E. his Wife for Life, and to the Heirs of C.* Afterwards *C. purchaſed the Tenancy paravaile, and thereof enfeoffed J. S.* Manwood held, that by B's. Purchaſe of L. being alſo ſeiſed of M. the Seigniory between the Abbot and B. was extinct, and that D. held of the Manor of L. which was held over of the King in Capite by Knight Service; Then when C. enfeoffed the Truſtees, and after purchaſed the Tenancy, now the Tenancy became Parcel of the Manors, and was held, as the Manors were, of the King in Capite; And when C. enfeoffed J. S. he held as C. the Feoffor held it before. Shute held, that before C. purchaſed the Tenancy, D. held of C. and his Wife; and tho' after the Purchaſe of the Tenancy by C. the Tenancy preſently became Part of the Manor held of the King, yet the Seigniory is not merely extinct againſt the Feme: For if C. dies leaving E. then J. S. ſhall hold of E. during Life, there being no Reaſon that the Purchaſe of the Baron ſhould prejudice the Wife. But if the Uſes had been limited before the Marriage, then by the Purchaſe of the Tenancy a Moiety of the Seigniory had been extinct, and the Baron ſhould hold the other Moiety of the Feme, and when the Marriage had taken Effect, then this part is ſuſpended. And to this Manwood and Clench agreed. Sav. 21. pl. 52. Paſch. 24 Eliz. in the Exchequer. Hutton's, Or, Gifford's Caſe.

22. A. held Land of B. in M as of his Manor of N. by Fealty, Rent, and Suit of Court of the ſaid Manor. B. by Deed indented and inrolled bargains, and ſells to C. and his Heirs *all his Tenements, Rents, Services, and Hereditaments in M.* The *Suit of Court* is extinguiſhed. 2. And 5 pl. 3. Mich. 36 & 37 Eliz. Anthony v. Burton.

23. Where *Purchaſe of Parcel* of the Land out of which &c. by the Lord ſhall extinguiſh the Services, and what, See Heriot (H) pl. 2.

(B. a 2) Revived.

1. 7 E. 4. 5. ENacts, That *Lands holden of a Common Perſon by Fealty, Rent, or other Service, coming to the King's Hands by Attainder of Treaſon, and being afterwards granted by the King to another, ſhall be holden as if ſuch Attainder had not been; And that every Perſon not attainted, his Heirs, Aſſigns and Succeſſors in the ſame Lands &c. being in the Hands of any other than the King, may diſtrain for the Rent, as they might have done if the ſaid Attainders had not been.* See (I) pl. 9. & 20.

2. If Lord and Tenant are, and the *Tenant is attainted of Treaſon by* Act of *Parliament, and to forfeit all his Lands, and* after is pardon'd and *reſtored by another Parliament*, Habendum to him and his Heirs, as if *no ſuch Attainder* nor former Act *had been*, now he ſhall hold of the common Perſon as before, and yet at one Time the Tenure is extinct by the Forfeiture of the Land to the King. Br. Tenures. pl. 70. cites 31 H. 8.

3. If *Lands held of the King are given to the King in Tail*, the *Remainder over*, the Tenure ſo long as it is in the Hands of the King, is ſuſpended; but *after his Death without Iſſue*, it ſhall revive. D. 102. a. pl. 82. Trin. 1 Mar. The Queen v. Ld Barkley.

(C. a) Services. In what Caſes the Services ſhall be *multiplied.*

1. IF a Copyholder in Fee holds by Fealty, Rent, Suit of Court, and to pay a Heriot, that is to ſay, Optimum Animal upon every Surrender, and after he ſurrenders Parcel of the Land he ſhall pay a Heriot; for it cannot be divided, it being entire and a Heriot Service, and therefore ſhall be multiplied; For if he ſhall expect till all be ſurrender'd, peradventure no Heriot ſhall be paid, for then he may ſurrender all but a little Parcel, and ſo no Heriot ſhall be paid. Hill. 20 Ja. B. R. between *Snagg and Fox* by Dodd. and Chamb. But Houghton dubitavit. Palm. 342. S. C. adjudg'd.

2. If a Man holds by Homage and dies having Iſſue diverſe Daughters, in this Caſe the eldeſt Daughter ſhall do Homage for her and all her other Siſters. Co. Litt. 67. b.

3. But in the ſaid Caſe if the Coparceners make Partition, then every one of them ſhall do Homage, becauſe it is not Una ſed diverſa Hæreditas. Co. Litt. 67. b.

4. So where there are 2 Coparceners who hold by Homage, and the one enfeoffs J. S. of his Part; Now J. S. ſhall do Homage for his Part; for it is a Partition in Law of this Part. Co. Litt. 67. b.

5. [So] where there are diverſe Coparceners, who hold by Homage, and the eldeſt does Homage for her and her other Siſters, and after the youngeſt enfeoffs J. S. of her Part, J. S. ſhall do Homage for it; For by this the Coparcenary is deſtroyed. Co. Litt. 67. b.

6. If there are ſeveral Jointenants of Land held by Homage, they all ſhall do their Homage jointly. Co. Litt. 67. b.

7. If there are ſeveral Tenants in common of Land held by Homage, every of them ſhall do Homage. Co. Litt. 67. b.

8. If Tenant by Homage makes Feoffment of Part of the Land, the Feoffee ſhall hold by Homage. Co. Litt. 67. b.

9. In

And if *several Feoffees* were of *Land, whereof one Suit is due*, the Lord ſhall have only one Suit, but this is where they are jointly infeoffed Quære, *if they are ſeverally infeoffed*, then it ſeems as Skipwith ſaid, that the *Lord may diſtrain whom he pleaſes*, and *if the one makes the Suit, the others ſhall have thereof Advantage*, and ſo the Lord ſhall have but one Suit; quod nota. And Tit. Tenure, 64. and Bar in Fitzh. 211. every one ſhall make Suit by himſelf. Br. Suit, pl. 4. cites 24 E. 3. 73.

9. In Replevin the Defendant ſhewed that certain *Land* was *held by Suit* of Court and other Services &c. and alleged Seiſin &c. and this *deſcended to 2 Coparceners who made Partition*, and the *one of his Part infeoffed the Plaintiff*, and the *other of his Part infeoffed J. N.* and for Suit Arrear by 7 Years he avowed upon the Plaintiff, and the Avowry good per Cur. quod nota, Now there ſhall be ſeveral Avowries. And per Seton a Man cannot make joint Avowry upon ſeveral Tenants, but by him after ſuch Partition and Alienations if the one makes the Suit, this ſhall diſcharge all the Tenancy, and if any of the Tenants make the Suit, the other may plead it, but he may avow upon whom he pleaſes; Quod non negatur. Nevertheleſs, Quære in this Caſe, if he ſhall not have Suit of every of them? But per Skip. and Seton he ſhall have it only of the one. Quod non negatur, quod nota bene. And the *Statute of Marlebridge, cap.* 9. wills, that where *Coparceners* hold by Suit, he who has Enitiam Partem ſhall make the Suit, and the others ſhall make Contribution to him; and this is *after Partition*. Quære before Partition. Br. Suit. pl. 4. cites 24 E. 3. 73.

10. If a Man grants *Parcel of his Rent Service*, and the Tenant attorns, this is good, and he ſhall do two Fealties if the Service be Fealty only. Br. Grants, pl. 4. cites 9 H. 6. 12.

Br. Avowry, pl. 110. cites S. C.——Br. Tenures, pl. 64. S. P. cites 29 H. 6.——Br. N. C. 29 H. 8. pl. 124. S. P.

11. If a Man *holds* 3 *Acres by a Hawk*, and *makes* 3 *ſeveral Feoffments* of the 3 Acres, every Feoffee ſhall hold by a Hawk; for it is not ſeverable. *Contra of* 3 *d. Rent*, or 3 s. which is ſeverable. Br. Tenures, pl. 42. cites 22 E. 4. 36.

12. If a Man makes *Feoffment of a Moiety of his Land*, the Feoffee ſhall hold of the Lord by the entire Services by which the entire Land was held before; for the Statute *Tenendo pro Particula does not hold Place here* for *Moiety nor Part*. Contra of one Acre or two Acres in certain. *Contra of a third Part* &c. which goes throughout the whole. Br. Tenures, pl. 64. cites 29 H. 8.

13. If there be *Lord and Tenant of* 3 *Acres* of Land *by Homage, Fealty, Suit of Court, Eſcuage, and the Rent of a Horſe* payable at the Feaſt of Eaſter, *or* by the Rent of a *Hawk or* of a *Roſe* &c. And the *Tenant* after the Statute *enfeoffs one* Man *of one Acre* Parcel of the Tenancy, *and another of another Acre Parcel* of the Tenancy, in this Caſe every of them ſhall hold of the Lord by Homage, Fealty, and Suit; but the Eſcuage ſhall be apportioned, and the Relief, when it falls, as a Rent ſeverable, ſhall be apportioned, and the Lord ſhall have but one Horſe, or one Roſe; or one Hawk of them all, not apportionable. Perk. S. 684.

14. All *intire* Services, whether Things of *Profit or Pleaſure*, as Ox &c. or Faulcon, Dog &c. ſhall be *multiplied by Alienation* of Part of the Tenancy; but if the *Lord purchaſe Parcel* before any Part alien'd, all is extinct; but if after Alienation no more is *extinct* than remain'd on the Parcel purchaſed. 8 Rep. 105. b. 106. Hill. 7 Jac. in Talbot's Caſe.

10 Rep. 108. b. in Lofield's Caſe.

15. *Some perſonal Services* ſhall be multiplied, and ſome not, as Homage and Fealty is multiplied, and is not extinct by Purchaſe of Part by the Lord, and ſo of Knights Service, and ſuch Services as are *pro Bono Publico* & pro Defenſione Regni; but Perſonal Private Services, as to be the Lord's Butler, Carver &c. or where the Tenure is ad Convivandum Dominum &c. ſemel in Anno &c. there ſhall be no Apportionment or Multiplication, and Purchaſe of Parcel by the Lord ſhall extinguiſh ſuch *private* perſonal Services; But where ſuch Private Perſonal Services ſhall

ſhall not be multiplied, the Lord may *diſtrain every one* for not doing them, tho' they ſhall be done only by one of them. And manual Labour, as to cut the Lord's Corn or Graſs &c. which is to be done upon a certain Thing, ſhall not multiply. 8 Rep. 105. b. Talbot's Caſe.

16. There is a *Difference* between *very Lord and very Tenant*, and between *Donor and Donee*, or the *Leſſor and Leſſee*; for in Caſe of very Lord and very Tenant, as well the annual as the caſual intire Services ſhall be multiplied, as appears in **Bruerton's** Caſe, 6 Rep. 1. b. 2. a. and in the 8 Rep. 105. in **Talbot's** Caſe. But in the Caſe of Donor and Donee, or Leſſor or Leſſee, the entire Rent reſerved ſhall not by any Diviſion either of the Reverſion or of the Poſſeſſion, by Act in Law be multiplied. 10 Rep. 107. b. Per Coke in Lofield's Caſe.

17. If a Man makes a *Gift in Tail of 2 Acres* (one of the Acres being *Borough Engliſh* Land, *and* the other at *Common Law*) reſerving a Horſe, he ſhall not multiply the Horſes, but ſhall pay one Horſe for which of them he will, but not 2 Horſes; Per Coke Ch. J. 3 Bulſt. 154. Mich. 13 Jac. in Caſe of Moody v. Garnance.

(C a. 2) Services abridged.

1. IF a Man had given Land before the Statute *rendring* 3 *d. pro omnibus Servitiis ſalvo Scutagio quum currit & abſque Homagio & Fidelitate*, he ſhould not have Homage, tho' it be incident to the Eſcuage; Per Herle, Wilby, Bows, and Mutf. but ſeveral e contra. And if Lord grants for him and his Heirs to the Tenant and his Heirs, that they ſhall never have Ward nor Marriage, the Heir ſhall rebutt the Lord in Aſſiſe by this Deed to claim Ward; quod adjudicatur for Law, per Herle. Br. Tenures, pl. 87. cites 19 E. 1. and Fitzh. Avowry 224.

2. If there be Lord and Tenant, albeit the *Lord confirms the Eſtate, which* the *Tenant has* in the Tenements, yet the Seigniory remains entire to the Lord as before. Litt. S. 535.

3. If there be *Lord and Tenant*, which *Tenant holds by Fealty and* 20 *s. Rent*, if the *Lord* by his Deed *confirms* the Eſtate of the Tenant *to hold by* 12 *d. or* by a *Penny*, or by a Halipenny, in this Caſe the Tenant is diſcharged of all the other Services, and ſhall render nothing to the Lord but that which is comprized in the ſame Confirmation. Litt. S. 538.

Becauſe there is Privity between the Lord and his Tenant; but if there be *Lord, Meſne, and Tenant*, the Lord cannot confirm the Eſtate of the Tenant to hold of him by leſs Services; but it is void, becauſe there is no Privity between them, and a Confirmation cannot make ſuch an Alteration of Tenures. Co. Litt. 305. b.—*But* where there is Lord, Meſne, and Tenant, and the *Lord confirms the Eſtate of the Meſne* to hold by leſs Services, this is good; for he is Tenant in Poſſeſſion of the Meſnalty, and there is no other Poſſeſſion. Br. Confirmation, pl. 8. cites 14 H. 4. 37.——And as there is required a Privity when the Lord abridges the Services of his Tenant by Confirmation, ſo muſt there be alſo when he abridges them by Releaſe. And therefore the Lord Paramount cannot releaſe to the Tenant Paravail, ſaving to him Part of his Services; but the Saving in that Caſe is void. Co. Litt. 305. b.

4. If there be *Lord, Meſne, and Tenant*, and the *Tenant is an Abbot that holds* of the Meſne *by certain Services yearly*, the which has no Cauſe to have Acquittance againſt his Meſne for to bring a Writ of Meſne &c. if the Meſne *confirms the Eſtate* of the Abbot in the Land, *to hold to him and his Succeſſors in Frankalmoigne* &c. this Confirmation is good, and the Abbot holds of the Meſne in Frankalmoigne, becauſe *no* * *new Service is reſerv'd*; for all the Services ſpecially ſpecified be extinct, and no Rent is reſerved to the Meſne, but the Abbot ſhall hold the Land of him as before the Confirmation; for he that holds in Frankalmoigne

* As long as the State of the Land continues, it cannot by the Lord's Confirmation be charged with any new Service. Co. Litt. 305. a.

ought to do no bodily Service; ſo that *by ſuch Confirmation the Meſne ſhall not reſerve any new Service*, but that the Land ſhall be holden of him as it was before; and in this Caſe the Abbot ſhall have a Writ of Meſne, if he be diſtrained in his Default, by Force of the ſaid Confirmation, where percaſe he might not have ſuch a Writ before. Litt. S. 540.

And regularly where a Confirmation does abridge Services, there ought to be Privity. Co. Litt. 305. b.

5. A Man cannot abridge a * *Rent-charge* or *Common of Paſture* by a Confirmation; but a *Rent Service*, *in* Reſpect of the Privity between the Lord and the Tenant, may be abridged by a Confirmation. Co. Litt. 305. a.

* *But* a Man may releaſe *Part of his Rent-charge* or *Common* &c. Co. Litt. 305.

6. A *Tenure* may be abridged by a Confirmation. Co. Litt. 305. a.

(D. a) * *Relief.*

* Relevium is *derived from* the Latin Word *Relevare*; for ſo ancient Authors ſay, and give this Reaſon, *Quia hæreditas quæ jacens fuit per Anteceſſoris deceſſum, relevatur in manus hæredum, & propter factam relevationem facienda erit ab hærede quædam præſtatio, quæ dicitur Relevium.* And in Domeſday it is call'd Relevamentum & Relevatio. Co. Litt. 76. a. ——See Ld Coke's Copyholder 36. S. 25.

1. BEfore the Time of H. 1. **the King and other Lords** us'd to make the Heirs **of their Dead Tenants** to redeem their Land. **Janus Anglorum** 79.

2 But H. 1. abrogated this **evil Cuſtom,** and ordain'd [that] **the Heirs of the dead Tenants of the King, and of other Lords,** relevarent terras de Dominis ſuis, non redimerent. **Janus Anglorum.** 79. & 116. 70.

See (E. a) pl. 3.

What.

3. **Relief** is a Profit **of the Seigniory.** 17 E. 3. 64. **Co.** 3. **Pennant.** 66.

Fol. 515.

4. **Relief is** not a Service, but incident to the Service. 4 E. 2. **Avowry** 200. **by Scrope. Co.** 3. **Pennant.** 66.

2 Inſt. 95. S. P.——It is not any Service, but *a Flower of the Service*, and ſhall go to the Executors. Cro. J. 28. in the Caſe of Mackworth v. Shipward.——It is only an Improvement of, or an Incident to the Service. Co. Litt. 83. a.

5. It was ſaid, that Relief is *only a thing perſonal.* Br. Reliefe, pl. 11. cites 39 H. 6. 33.

6. The paying a Relief is a putting the Lord in Seiſin, and an acknowledging him for his Lord; ſo as of ancient Time, and in ancient Books, Relief is call'd *Simplex Seiſina.* 2 Inſt. 134.

7. Relief *on Alienation* is not properly a Relief, tho' call'd ſo in divers Books; but is properly a Fine for Alienation. And this may be by Tenure, by ſpecial Reſervation, by Cuſtom. Agreed per tot. Cur. Jo. 133. Trin. 2 Car. B. R. Hungerford v. Haviland.

(E. a) Re-

(E. a) Relief. *Of what* Tenure or Service it is *to be paid.* [*And what it is*, pl. 3. *How much to be paid*, pl. 2, 3, 4.]

1. HE, who holds by Petit Serjeanty, shall not pay any Relief. 28 E. 1. Statute of Wards and Reliefs.

2. He, who holds in Socage, shall not pay any Relief, according to the proper Signification of Relief. 28 E. 1. Statute of Wards and Reliefs. Ancient Tenures, fol. 3. b. But only shall double his Rent; for anciently always it was put as a Badge of Knight Service, Ward, Marriage, and Relief. Bracton, Lib. 2. fol. 85. b. S. 8.

Relief is an Incident as well to Chivalry as to Socage; quod nota bene. Br. Tenures, pl 76. cites 13. R. 2. and Fitzh. Avowry 89.

3. But of late Time the Doubling of the Rent by Tenant in Socage, that is to say, the paying of so much as his Rent is by one Year over the Rent, is call'd Relief. Litt. 28 S. 126. Doctor Student, 14. b. 31 Ass. 15. Bract. Lib. 2. fol. 85. b. S. 8. it is call'd Quædam præstatio ab Hærede propter Dominium & Dominii Recognitionem. Ancient Tenures, 3. b. says, that he shall double the Rent. 13 E. 2. Avowry 89. 20 E. 3. Avowry 131. Britton. fol. 178. shall give this in Acknowledgment of the Seigniory. Kelloway. incerti temporis 136.

The Heir in Socage shall double the Rent, after the Death of his Father, in Name of Relief. Br. Relief, pl. 13. cites Vet. N. B. Tit. Ravishment de Gard; and this appears Tit. Socage in the old Tenures, That the Heir in Socage shall not pay Relief, but shall double his Rent in Name of Relief.

4. If Tenant holds of the Lord by Fealty, and to pay 10 s. Rent every 2 or 3 Years, tho' it be not any annual Rent, yet he shall pay 10 s. for Relief. Co. Litt. 91.

If a Man had *been infeoffed* before the Statute of Quia Emptores terrarum, *to hold by 12 d. and Fealty for all Services, Actions, and Demands*; yet he should pay Relief; for this is incident to the Tenure; Per Skrene, ad quod non fuit responsum. Br. Reliefe, pl. 10. cites 14 H. 4. 8.——Br. Incidents, pl. 22. cites S. C. per Skrene; but Hank contra, therefore Quære inde.

Where the *Tenure* is *by Fealty only*, there is no Relief due; for all other Services except Fealty are severable. Co. Litt. 93. a.

5. A Fee Farmer shall not pay any Relief; for the Rent is intended the very Value of the Land, or the 4th Part of it at least. 45 E. 3. 15. Ancient Tenures, fo. 4. b. because he ought not to do other thing, but so as is contain'd in the Feoffment. Britt. fo. 61. Dubitatur Bracton, Lib. 2. fol. 86. S. 9.

Br. Relief, pl. 5. cites Vet. Ten. S. C.—— Ibid. pl. 8. cites 45 E. 3. 15. S. C. per Finch.—*But if* the *annual Value be abridg'd by express Reddendo*, there the Grantee of the Fee-Farm shall pay Relief. Mo. 168. pl. 301. in the Case of Saffron Walden.

6. He who holds in Frankalmoigne shall not pay any Relief. Britt. fo. 61.

[7] 10. Of Corporal Service, or Labour, or Work of the Tenant, no Relief is due. Co. Litt. 91. b.

[8] 11. As if the Tenant in Socage holds by Service of attending upon his Lord at Christmas, he shall not double this Corporal Service for Relief. Co. Litt. 91. b. It seems because it is impossible to do this Service double, being to be done by his own Person at one and the same time.

But if the *Tenure* be *to attend on his Lord at* the Feast of *Christmass*, *or* to *pay* 10 *s.* there the Relief must be 10 s. because the other cannot be doubled, & sic de similibus. Co. Litt. 91. a.

[9] 12.

[9.] 12 But if a Man holds in Socage by Service to do certain Work-days at the Lord's Harveſt, he ſhall double this Corporal Service for his Relief, becauſe the particular Time of doing it is not preſcrib'd, but only to be done in the Harveſt; the which may be done by his own Perſon, or may be done by the Labour of any other Man. Autumn Vacation 11 Car. So held by Maſter Herbert, Reader of the Inner-Temple. Contra Co. Litt. 91. b.

[10.] 13 So it is when it is to plow the Lord's Land by certain Days, or to work about a Hedge by certain Days, or ſuch like.

[11.] *Abbot* nor *Prior* ſhall not render Relief; for they *do not come in by Deſcent*. *But* becauſe the Prior and the Covent *granted by their Deed to the Lord to hold in Chivalry, and to render* 100 *s. for Relief* at every Avoidance of the Prior, *the Lord diſtrain'd, and avow'd for Relief, as upon his very Tenant*, and the Avowry awarded good. Brooke ſays, Quod miror! Br. Tenures, pl. 77. cites 20 E. 3. and Fitzh. Avowry 124.

[12.] Relief and *Heriot Service* are all in one, and the *ſame, Condition*, and the ſame Law holds Place in all Caſes. Per Frowike Ch. J. Kelw. 84. pl. 7. Paſch. 21 H. 7. Anon.

(F. a) Relief. *How much* ſhall be paid.

1. THE Relief of Knights, and all Superiors, is the 4th Part of their Revenues. Co. 9. *Lowe* 124. b. Co. Litt. 69. a. b. Co. 7. Nevill. 33. b.

2. An intire Earldom ſhall pay 100 l. for Relief. Doct. Student. 14. Co. Litt. 69. a. b. 83. b. Magna Charta, cap. 2. Bracton, Lib. 2. fo. 84. b. S. 2. Co. 7. *Nevil.* 33. b. Selden Tit. Honor. 232.

3. An intire Barony ſhall pay 100 Marks for Relief. Doctor Student 14. Co. Litt. 69. a. b. 83. b. Co. 7. *Nevil.* 33. b. Selden Tit. Honor. 232.

4. A Marquiſdom, which conſiſts of the Revenue of 2 Baronies, which amounts to 800 Marks, ſhall pay for Relief 200 Marks. Co. 9. *Lowe* 124. * b. Co. Litt. 69. a. b. 83. Co. 7. *Nevil.* 33. b. Selden Tit. Honor. 232.

* Fol. 516.

5. A Dukedom, which conſiſts of the Revenue of 2 Earldoms, that is to ſay 800 l. a Year, ſhall pay 200 l. for Relief. Co. 9. *Lowe* 124. b. Co. Litt. 69. a. b. 83. b. Co. 7. *Nevil.* 33. b. Selden Tit. Honor. 232.

6 Quære, what Relief the King of the Iſle of Man, or Waight, ſhall pay. Co. Litt. 83. b. This is not limited by the Statute of Magna Charta.

Co. Litt. 76. a. 83. b.

7. An intire Knight's Fee ought to pay 100 s. Doctor Student. 14. Litt. 24. b. Co. 9. *Lowe* 124. b. Gervaſius de Tilbury, fol. 63. b. cap. de Relevio. Co. Litt. 69.

Co. Litt. 76 a. And this Relief was, as ſome hold, certain by the Common Law; but the Relief of Earls and Barons were incertain, and therefore were call'd Relevia Rationabilia; but the Statute of Magna Charta, cap. 2. limits them in certain, and mentions alſo a Knight's Fee.

8. And, pro Rata, according to this Value, if it be leſs. Litt. 24. b.

A Man may hold his Land of his Lord by the *Service of* 2 *Knights Fees*, and then the Heir, being of full Age at the Time of the Death of his Anceſtor, ſhall pay to his Lord 10 l. for Relief. Co. Litt. 84. a.

S. C. at pl. 22.

9. Tenant by Knight Service, by a Cuſtom, may pay for an entire Fee but 2 Marks for Relief. 40 E. 3. 9.

10. Upon

10. Upon the Creation of a Tenure any Sum may be reſerved, **if more or leſs than the Law appoints.** 31 Aſſ. 15.

11. **If a Man be** created **an** Earl of a County, and that he ſhall have the 3d Penny of the Profits of the County, **this is clearly ſuch Earl as ſhall pay** 100 l. **for Relief, within the Statute of Magna Charta; for this was the ancient Uſe of Creation of Earls.** See Selden's **Titles of Honor,** 131.

12. [So] **If a Man be created an Earl of a County, and that** he ſhall have Pro tertio Denario ejuſdem Comitatus, vel pro Nomine ejuſdem Comitatus 20 l. or ſuch Sum, **this is ſuch Earl as ſhall pay** 100 l. **for Relief, tho' he has but** 20 l. **Value, which was the Body of his County; and the Relief is according to the Value of** 400 l. **for the Relief is** not paid according to the true Value, but according to the Dignity of an Earl. **See Selden Tit. Honor,** 131.

13. [So] **if a Man be created an Earl of a County by Letters Patents,** Et ulterius Rex concedit to him 20 l. Annuity, ut Honorem & Dignitatem prædictos honorificentius ſupportare valeat, **tho' this is not any Part of the Body of the Earldom, but only an Annuity for the Supportation of his Honour, yet he ſhall pay** 100 l. **for his Relief as an Earl; for of late Times the Creations of Earls have been made in this Manner. Contra Litt.** 83. b.

14. [So] **if the King creates J. S. Earl of a County, and** does not grant to him any Land or Annuity **for the Supportation of it, yet he ſhall pay** 100 l. **for Relief, becauſe the Relief is not to be paid according to the Value of the County, but as Earl. Contra Co. Litt.** 83. b.

15. **If the King creates J. S.** Earl of a Vill, or of a Place within the County, **yet he is ſuch an Earl as ſhall pay** 100 l. **for Relief.**

16. **If A. be a** Feodal Earl, **that is to ſay, holds his Land as an Earl, and he** aliens Part of the Land which is the Body of the Earldom, **he ſhall not pay** 100 l. **for a Relief for his Earldom which remains; but his Relief ſhall be abated according to the Value of the Land which is alien'd.** 10 H. 5. **in the Exchequer, Ex parte Rememoratoris, the which Intratur** 9 H. 5. **Ibidem, this is admitted upon the Pleading, where the Earl of Devon pleaded ſuch Plea; and it was adjudged no Plea, becauſe he does not ſhew what Perſons had the Lands ſo alien'd, by which the King might have Remedy againſt them for their Reliefs.**

17. **If the** King gives Land in Fee abſque aliquo inde Reddendo, **this is a Knight Service in Capite, becauſe it is the beſt Service general, that is to ſay, Eſcuage for Defence of the Realm; but becauſe it is not expreſs'd in the Reſervation by what Part of a Fee he ſhall hold, and the Law cannot make it an entire Fee, or other Part of a Fee, according to the Value, it ſeems that he ſhall pay the Value of the Land by a Year, according to a** Grand Serjeanty. **Autumnal Reading** 1635. **held ſo by Maſter Herbert Reader of the Inner Temple.**

18. So **it is, if the King gives Land,** and does not expreſs any Tenure, **it ſhall be a Tenure by Knight Service in Capite; and becauſe it cannot be made certain any Way by what Part of a Knight's Fee he ſhall hold it, it ſeems he ſhall pay for Relief the Value of the Land by a Year, having Reſemblance to a Grand Serjeanty; for Relief is out of the Statute of Magna Charta, c.** there being no certain Knight's Fee, and then ought to be reſorted to as was before the ſaid Statute. Fol. 517.

19. De Serjeantiis **vero nihil certum exprimitur, quid vel quantum dare debeant hæredes & ideo,** juxta Voluntatem Dominorum Dominis ſatisfaciant pro Relevio, dum tamen ipſi Domini rationem, vel menſuram non excedant. **Bracton, lib.** 2. **fol.** 84. b. **S.** 7. Ger-

* Br. Relief, pl. 2. cites S. C. Per Cokain Ch. B. ad quod non fuit reſponſum.—Br. Tenure, pl. 13. cites S. C. accordingly.

vaſe of Tilbury, fol. 63. b. cap. de Relevio de Baronie. For Grand Serjeanty the Value of the Land for a Year ſhall be paid for Relief. * 11 H. 4. 72. b. by Cockain, Litt. 35. The Value (over the Charges and Reprizes.)

20. In divers Provinces by the Feudal Law there uſed, the Rent of a Year of the Feud ſhall be given to the Lord for Relief; and in other Provinces in other Manner Relief is given. Contii Methodus 47.

21. By the Law of England the Tenant (in Socage) ought to double the Rent for Relief, that is, he ought to pay for Relief ſo much as the Rent is by the Year, and ought to pay his Rent alſo. 16 H. 7. 4. b. Doctor and Student. 14. b. 28 E. 3. Statute of Wards and Relief. Bracton, lib. 2. fol. 85. b. S. 8. Litt. fo. 28. S. 126. Tho' the Rent be payable at 4 or 5 Terms of the Year. Kell. incerti Temporis 136. 4 E. 2. Avowry 200.

S. C. at pl. 9.

22. Tenant by Knight Service by a Cuſtom, may pay for an entire Fee but 2 Marks for Relief. 40 E. 3. 9.

23. It was agreed, and not denied, that where a Lord avows for 100 s. Relief, where by Cuſtom of the Country, or otherwiſe, he ought to have but 13 s. 4 d. there, if the Lord has Judgment to have Return for 100 s. the Tenancy ſhall be charged with 100 s. for Relief for ever. Br. Eſtoppel, pl. 25. cites 40 E. 3. 9.

(G. a) Relief. *Who ſhall pay.*

If the King's Tanant in Chivalry dies, his Heir of full Age, the Heir ſhall ſue Primer Seiſin, and ſhall pay his Relief. Contra of Heir within Age, and in Ward of the King, and ſues Livery, he ſhall not pay Relief. And the Heir in Socage, Tenant of the King in Chivalry, ſhall pay Relief, and thoſe ſhall find Surety for their Relief upon the ſuing out of the Primer Seiſin. Br. Relief, pl. 12. cites F. N. B. 254. And ſays, See Ibidem 262. That where the Tenant of the King in Chivalry has Iſſue two Daughters, and dies, the one of full Age, the other within Age, the eldeſt ſhall ſue Livery for her Moiety, and ſhall pay Relief for her Moiety, and the other ſhall be in Ward quouſque &c.

1. HE that ought to be in Ward, if he had been within Age at the Death of his Anceſtor, ſhall pay Relief, if he be of full Age at his Death. 17 E. 3. 64.

See (I. a) pl. 7.

2. If the Tenant be diſſeiſed, and dies, his Heir of full Age, he ſhall pay Relief; for he ought to be in Ward if he had been within Age. 17 E. 3. 64.

3. *Two Coparceners; one dies*, her Heir of full Age; ſhe ſhall not pay a Relief; for if ſhe ſhould pay any at all, ſhe ſhall pay but the Moiety, and that ſhe can't do; for a Relief cannot be apportioned, for Coparceners are but one Tenant to the Lord. 3 Le. 13. pl. 30. Mich. 8 Eliz. C. B. Anon.

(H. a) Who. *In Reſpect of Eſtate.*

1. A Purchaſor **ſhall not pay Relief, but only he who comes in by Deſcent.** * 40 E. 3. 9. 11 H. 4. 74. b. 17 E. 3. 63. b. * Br. Relief, pl. 2. cites S. C.

2. **If the** Tenant at Common Law **had** alien'd in Fee to his eldeſt Son and died, the Son being of full Age, **he ſhall not pay Relief; becauſe he was in by Purchaſe. Bracton lib. 2. fol. 85.** 17 E. 3. 64. If the *Tenant infeoffs his Heir apparent by Colluſion and dies, his Heir of full Age*, it is a Queſtion in our Books, whether he ſhall have

3. **If the** Tenant infeoffs his eldeſt Son and dies, the Son being of full Age, **he ſhall pay Relief tho' he be in by Purchaſe, becauſe he ought to be in Ward, if he had been within Age, by the Statute of Marlborough; (And it ſeems Relief is within the Equity of it, or otherwiſe it cannot be Law.)** 17 E. 3. 63. b. 64. 7 E. 3. **Relief.** 11. **Nevertheleſs Fitzherbert ſays, Credo quod non eſt Lex.**

Relief either by the Common Law, or by the Statute of Marlbridge, cap. 6. But now the Statute of 13 Eliz. cap. 5 has cleared that Queſtion, and that the Lord ſhall have Relief where the Conveyance is made to any Perſon by Colluſion &c. Co. Litt. 84. a.

4. **If the** Tenant aliens in Fee, and dies before Notice **of the Feoffment** to the Lord, his Heir of full Age, **no Relief ſhall be paid, becauſe the Heir is not his Tenant; For the** Privity of the Avowry **is determined by the Death of the Alienor, for the Heir ſhall not be in Ward. Dubitatur.** 17 E. 3. 64.

5. **If a** Feme pays Relief, and after takes Baron, and has Iſſue by him and then * dies, **the Baron ſhall not pay new Relief, becauſe he does not ſucceed as Heir. Bracton. lib. 2. fol. 84 b. S. 7.** * Fol. 518.

6. **A Man ſhall** not **pay Relief being of full Age,** but where, if he had been within Age, he ſhould be in Ward, and e converſo. 26 H. 8. 6. **by Knightley ſaid to be a Ground.** See (G. a) pl. 1. — See (I. a) pl. 7.

7. A Purchaſor **ſhall not pay the Relief.** 26 E. 3. 71 b. **Bracton,** lib. 2. **fol.** 84. **b. S.** 3. But only he who comes in by Deſcent. **Britton,** fol. 177. **b.**

8. But, by the Cuſtom **in Cornwall, the Purchaſor ſhall pay it.** 14 H. 4. 5. **b.**

9. A Corporation aggregate **ſhall not any Relief, for it is a perpetual Corporation. Co Litt.** 70. **b.** S. P. But if the Corporation *conveys over* the Lands *to any natural Man and his Heirs*, now Relief &c. and other Incidents thereunto is due. And yet this Poſſibility was Remota Potentia, but the Reaſon is, Ceſſante Ratione Legis ceſſat ipſa Lex, and the Reaſon of the Immunity was in Reſpect of the Body Politick, which by the Conveyance ever ceaſes. Co. Litt. 70. b. ——— and ſays, it is the ſame of an *Abbot and his Succeſſors.* Ibid.

10. An Abbot or Prior **who is** in by Succeſſion **ſhall not pay Relief.** 20 E. 3. **Relief** 8. **and Avowry** 124. 30 E. 3. **Relief** 9. * 3 H. 4. 2. **Becauſe the Corporation never dies.** 3 E. 3. **Relief** 9. **Co. Litt.** 99. * Br. Relief, pl. 9. cites S. C. — Every *Biſhop* in England hath a Barony, and that barony is holden of the King in

11. But by † Preſcription **they may pay.** 3 H. 4. 2. 8 R. 2. **Itinere Cancii title Relief** 14. **Admitted by Iſſue.** 17 E. 3. 5. **b. Co. Litt.** 99.

Capite, and yet the King can have neither Wardſhip or Relief. Co Litt. 70. b. —— 2 Inſt. 7. S. P. — And yet the Succeſſor of a Biſhop or Abbot may pay Relief *by Preſcription or Grant.* Co. Litt. 84. a.

No Relief if due *upon Succeſſion* unleſs it be by ſpecial Reſervation in Point of Tenure, or by Cuſtom alſo; agreed per tot. Cur. Jo. 133. Trin. 2 Car. B. R. Hungerford v. Haviland.

† S P. per Thirn. Ch. J. But not by the Common Law by the Tenure. Br. Relief, pl. 9. cites 3 H. 4. 2. ——— See the Note on pl. 9.

12. If

12. If a Tenant gives the Land to his Son and his Feme in Tail, and dies, by which the Reverſion deſcends upon the Son, tho' he has the Eſtate Tail by Purchaſe, yet he ſhall pay Relief for the Reverſion deſcended. 26 E. 3. 71. b. ſaid to be adjudged by all the Counſel.

But where *Land was given to the Father for Life*, the *Remainder to the eldeſt Son in Tail*, the *Remainder to the right Heirs of the Father*, and the *Father died*, and after the *Son died without Iſſue*, and the *youngeſt Son enter'd*; He was adjudged to pay Relief as Heir of his elder Brother, and not to be Purchaſor by the Name of the right Heir of the Father. Br. Eſtoppel. pl. 25. cites 43 E. 3. 9.

13. But if the Tenant aliens in Fee upon Condition to leaſe to himſelf for Life, the Remainder to his Son in Tail, the Remainder to his own Right Heirs, and it is performed, and after he dies, his Son ſhall not pay Relief for the Remainder deſcended, becauſe he has the Tail by Purchaſe. 26 E. 3. 71. b. Dubitatur.

14. An Heir Female ſhall pay Relief as well as the Heir Male. Doctor and Student. 14. b.

15. If Land deſcends to an Infant it being held in Socage, he ſhall pay Relief. Doctor and Student. 14. b.

16. *Grandfather*, *Father*, *and Son*, the *Grandfather held by Relief* and *died*, the *Father enter'd and enfeoffed his Son* and *dies*; there the *Lord may diſtrain the Son for the Relief of his Grandfather* before he accepts him for his Tenant, and ſhall make Avowry for the ſame Relief; *Contra if he firſt accepts the Feoffee for his Tenant*; For upon an Alienation the Lord is not bound to change his Avowry before he be ſatisfied of the Arrears due before; And here the Son is Purchaſor, but if he was in as Heir and not as Purchaſor it had been otherwiſe. Br. Relief, pl. 7. cites 4 E. 3. 22.

17. If a Man be *ſeiſed of* certain *Lands* which is holden *in Socage*, and *makes a Feoffment in Fee to his own Uſe, and dies* ſeiſed of the Uſe, (*his Heir of* the Age of 14 *Years* or more) *and no Will by him declared*, the Lord ſhall have Relief of the Heir; and this by the Statute of 19 H. 7. cap. 15. Litt. S. 126.

18. Relief is not due to the Lord, but only from his very Tenant in Fee Simple. Per Frowike Ch. J. Kelw. 82. pl. 2. Paſch. 21 H. 7. Anon.

(I. a) Relief. *To whom* it ſhall be paid.

S. P. Co. Litt. 83. b. becauſe the *King had the Wardſhip of Body and Lands by his Prerogative*, and the Lord upon every Deſcent ought to have either Wardſhip or Relief.

1. If the King has the Wardſhip of Land held by others, by Reaſon of his Prerogative, yet the Heir at full Age ſhall pay Relief to every of the Common Lords. * 24 E. 3. 24. b. 26 H. 8. 6. Bracton, Lib. 2. fol. 85. S. 7. 39 E. 3. Tit. Relief, 1. 13 H. 7. 15. Co. Litt. 83. b.

* S. P. And per Hilliar, the other Lords ſhall ſue to the King by Petition, and ſhall have their Rents alſo. Brooke ſays, Quære inde; for it ſeems that their Seigniories are extinct. But ſee now the Statute thereof, 2 E. 6. 8. Br. Relief, pl. 4. cites S. C.

S. P. But the King, or this Lord who had the Ward ſhall not have Relief alſo. But where a Man *holds of ſeveral common Perſons ſeveral Lands in Chivalry*, and the *one has the Ward within Age by Priority*, and the *others have the Ward of the Land held of them*, there none ſhall have Relief; for every Lord has the Ward of Land held of him. Br. Relief, pl. 13. cites Vet. N. B. Tit. Raviſhment de Gard.

See the Note on pl. 7.

2. If an Infant be in Ward to J. S. his Guardian in Chivalry, he ſhall not pay Relief to him at his full Age.

3. With

3. With this accords the Law of Scotland. Skene Regiam Majestatem. 68.

4. If there be Lord Mesne and Tenant, and the Tenant aliens, the Mesne shall not have the Relief. 14 H. 4. 5. b.

5. But by the Custom in Glouceſter, the Lord shall have the Relief upon Alienation of the Tenant. 14 H. 4. 5. b. Mo. 160. in the Case of Saffron Walden.

6. If the Tenant dies, his Heir within Age, and the Lord waives the Ward, and takes him to his Seigniory, in this Case the Lord shall not have Relief at his full Age, because he might have had the Ward of the Body and Land. Co. Litt. 83. b.

7. If the Tenant be disseised, and Disseisor dies seised, and after the Tenant dies, his Heir within Age, and after at full Age he recovers the Land of the Heir of the Disseisor, he shall pay Relief; because he could not be in Ward † till the Recovery, because of the Descent to the Heir of the Disseisor. Co. Litt. 83. b. See (G. a) pl. 2. † Fol. 519.

And tho' in this Case the Tenant held 2 Manors, and died seised of one, and the Lord seised the Body and Lands of that Manor, yet after Recovery of the other Manor by the Heir at full Age, the Heir should pay Relief for that Manor; and so the same Lord of the Heir of the same Tenant shall have both Wardship during his Minority, and Relief at his full Age. Co. Litt. 83. b.

8. *Tenant for Life* should have Relief, &c. 2 Inst. 234.

9. Relief is not any Service, but *a Flower of the Service*, and shall go to the *Executor*. Arg. Cro. J. 28. pl. 4. Pasch. 2 Jac. B. R. in Case of Mackworth v. Shipward.

(K. a) Relief. What thing shall be paid. [*Disjunctive.*]

1. If Tenant in Socage holds to pay a Pair of Gilt Spurs, or 5s. in Money, at the Feast of Easter, it is in the Election of the Tenant to pay which of them he will for Relief; But if he does not pay when he ought, the Lord may distrain for which of them he please. Co. Litt. 90. Upon S. 126.

2. [But] If the Tenant in Socage be to attend upon his Lord at Christmas, or to pay 10s. there the Relief ought to be 10s. because the other cannot be doubled. Co. Litt. 91. upon S. 126.

(L. a) Relief. *At what Time it* shall be paid.

1. If Tenant in Socage dies, his Heir within Age, he shall pay Relief immediately, as well as if he had been of full Age. 31 Ass. 15. by Tank. Br. Tenures, pl. 30. cites S. C.

2. But if Tenant by Knight Service dies, his Heirs within Age, he shall not pay Relief before full Age. 31 Ass. 15. Admitted.

3. After the Death of the Tenant in Socage, Relief is due immediately of what Age soever the Heir be, tho' he be not past the Age of 14, because such Lord cannot have the Ward of the Body, nor of the Land of the Heir. Litt. S. 127. Co. Litt. 91. where it is said that the said Words in Litt. (So that he be past the Age of 14 Years) are not any Part of Littleton, but added after thereto.

4. If the Tenant in Socage dies before the Rent-day, yet the Heir ought to pay the Relief presently before the Rent-day comes. 16 H. 7. 4. b. Littleton. S. 127.

See (M. a) pl. 1. 5. Properly this ought to be paid before the Homage or any other Service shall be received. 17 E. 3. 64.

See (M. a) pl. 1. 6. After Receipt of Homage, a Man shall not avow for Relief. 15 E. 3. Relief 5. 16 E. 3. Relief 10.

7. If the Tenant in Socage holds by Fealty and 10 s. or a Pair of gilt Spurs, if the Heir be not so soon as conveniently he may, all Circumstances considered, after the Death of his Ancestor ready upon the Land to pay his Relief, the Lord may distrain for which of them he will; for upon Default of the Tenant, the Election is given to the Lord. Co. Litt. 91.

8. If the Tenant in Socage holds by a Bushel of Wheat, he ought to pay it for Relief presently after the Death of his Ancestor, and the Lord is not bound to tarry till Harvest; for this is to be had at all Times of the Year. Co. Litt. 91. b. 92.

9. But if the Tenant holds by a Rose, or a Bushel of Roses to be paid at Midsummer, he is not bound to pay it for Relief after the Death of his Ancestor till the Time of the Year comes for the Growth of them; for the Law does not compel him to do impossible Things, nor to preserve them by Art to other Time than Nature has ordained them. Co. Litt. 92.

Fol. 520. 10. But if Tenant holds to pay certain Saffron, he ought to pay it for Relief presently after the Death of his Ancestor, before the Time of Growth, because it may naturally be preserved as well as Corn, and it is to be had at all Times of the Year. Co. Litt. 92.

11. It was held by Frowike and Kingsmil for clear Law, That if I make a *Lease for Life*, the *Remainder over in Fee*, and after the *Tenant* for Life *dies*, yet *the Lord* after his Death *shall not have Relief*, notwithstanding that his Tenant be chang'd; *but if* he *in Remainder dies living the Tenant for Life*, now by his Death the Right of a *Relief accrues* to the Lord, *but* it is *not leviable during the Life of Tenant* for Life, because he is always Tenant to his Avowry, but immediately after the Death of the Tenant for Life the Lord may distrain for Relief due by the Death of him in the Remainder. Keilw. 83. b. pl. 7. Pasch. 21 H. 7. Anon.

12. If *Lord and Tenant* are, and the *Tenant gives* the Land in Tail, *the Remainder over in Fee*, and he in the *Remainder dies*, and after the *Tenant in Tail dies without Heir of his Body*, quære if the Lord shall have Relief by Reason of the Death of him in the Remainder, as well as if this Remainder had been dependent upon a Lease for Term of Life? It seems he shall not. Keilw. 84. a. pl. 7. Anon. And says, See like Matter 11 H. 4. pl. 154. Scire facias.

(M. a) Relief. *What* shall be *a Bar* of Relief.

See (L. a) pl. 5. 6. 1. If the Lord accepts Homage of his Tenant, he shall not have Relief of himself after. 3 E. 2. Avowry 190.

2. A Man *gave in Tail pro Homagio & Servitio the Donee reddend. 6 d. pro omnibus Servitiis.* Et per Judicium Cur. By this the Donee shall be discharged of Homage and of Relief; but the Reporter says it is not Law. Br. Tenures, pl. 76. cites 13 R. 2. and Fitzh. Tit. Avowry 89. ——But Brook says, See Ibidem 99. Anno 19 E. 3. A Man gave Land *Tenendum by* 10 *s. pro omnibus Servitiis, Exactionibus, Consuetud' & Demand'* and

and yet the Tenant was compell'd to pay *Relief*; for this *is incident as well to Chivalry as to Socage*; Quod nota bene. Br. Tenures, pl. 76.

3. It was ſaid, That Anno 18 E. 3. a Man avow'd for Relief upon the *Heir in Socage* for double the Rent, the Heir *pleaded Feoffment to hold by Fealty and* 10 *s. pro omnibus Servitiis & Demandis*, and yet Judgment was againſt the Heir, and that this ſhould not diſcharge the Relief; for it is not due nor in Eſſe till the Anceſtor dies, and therefore was not in Eſſe to be releaſed. Br. Relief, pl. 6. cites 5 E. 4. 42.

4. *Alienation* of the Land by the Heir, and *Acceptance of the Rent due after*, is no Bar to the Lord of his Relief due on Death of the Anceſtor. 2 And. 178. Mich. 43 & 44 Eliz. Parkham v. Norton. Mo. 643. S. C.—Cro. E. 885. S. C.

(N. a) Relief. *Remedy* for Recovery thereof. Actions &c. and *Pleadings*.

1. IT was ſaid, That Relief is only a Thing perſonal, and yet where there are Lord, Meſne, and Tenant, and the *Tenant is diſtrain'd* by the Lord *for the Relief of the Meſne*, he ſhall have Writ of Meſne againſt the Meſne to diſcharge him thereof. Br. Relief, pl. 11. cites 39 H. 6. 31.

2. *And*, per Rolf, 7 H. 6. 13. if the Relief be due to the Lord, he *ſhall* * [not] *have Action of Debt* thereof; but if he dies, his || *Executors* ſhall have thereof Action of Debt againſt the Tenant; quod non negatur. Br. Reliefe, pl. 11.

* All the Editions of Brooke are miſ-printed, by leaving out the Word (not.)

For the Year-Book is expreſs, that the Lord ſhall not have Writ of Debt thereof, becauſe it is Parcel of his Seigniory, which is a Franktenement in him. 7 H. 6. 13. pl. 84.

The Lord may † diſtrain, but he cannot have Debt for it; but his Executor or Adminiſtrator may have Debt, but ‡ cannot diſtrain for it. Co. Litt. 83. a. b.——Co. Litt. 162. b. S. P. becauſe it is no Rent, but a caſual Improvement.

† 4 Rep. 49. b. cites 7 H. 6. 13. 22 Aſſ. pl. 52.

‡ Arg. D. 140. pl. 37.

2 Le. 19. Trin. 30 Eliz. B. R. in **Lord North's Caſe**, ſome were of Opinion, that Debt lies for Relief; for there is a Contract by Fealty.——And 2 Roll Rep. 371. Doderidge J. held clearly, that Debt lies for Relief by the Lord himſelf; and that ſo are all the Books in the Time of E. 1. throughout the Law almoſt, and cites Fitzh. Tit. Diſtreſs, in Time of E. 1. And the Reaſon is, becauſe it is not a Service, but a caſual Profit and Duty, by reaſon of the Service, tho' it be in the Realty.

|| S. P. per Holt Ch. J. Show. 36. Trin. 1 W. & M. in Caſe of **Shuttleworth v. Garret**, becauſe they have no other Remedy.——They may have Debt for it by the Common Law. Co. Litt. 162. b.

3. *And* Brooke ſays, ſee 32 H. 8. Ro. 528. in C. B. Debt was brought by Executors of the Lord, of Relief due to the Teſtator. And the Defendant pleaded in Bar, and traverſed the Tenure, and ſo to Iſſue; and therefore it ſeems clearly, that Debt lies for the Executors. Br. Reliefe, pl. 11.

4. The Statute of 32 *H.* 8. *of Avowries*, extends only to Rent Suit, or Service, ſo as Relief is not within the Purvieu of the Law, becauſe it is no Service, but a Duty, by reaſon of the Tenure or Service. 2 Inſt. 95.

5. A. the Grandfather died ſeiſed, leaving B. his Son (the Father of C. the Defendant) at Age. B. made C. his Executor, and died. O. S. as Executor of an Executor, brought Debt againſt C. for Relief. It was agreed by the Court, 1ſt. That an Executor may have an Action of Debt for Relief by the Common Law, without Fealty 32 H. 8. *and* that *Seiſin of the Services need not be alleged*, when the Executor brings Debt Cro E. 883. pl. 17. Paſch. 44 Eliz. B. R. Lord St. John v. Brandring. S C. adjudged for the Plaintiff.

Debt for Relief; *otherwiſe when the Party himſelf avows.* 2. That *Debt may be brought* for it *in a Foreign County*, and the Defendant cannot plead Nihil Debet; for Relief is made certain by the Statute of Magna Charta cap. 2. 3dly, That *Debt* well *lies againſt an Executor* for Relief; the *Teſtator could not wage his Law* for that, becauſe it is certain, and a real Duty. Alſo in the Caſe of Relief, there was a *real Contract in the Creation of the Tenure.* Poph. ſaid, That in Debt, for Relief, the *Plaintiff ought to ſhew the Tenure in Special*, and by what Part of a Knight's Fee the Tenure is, that the Court may judge what is due for Relief. And Judgment was given for the Lord St. John, and after Error was brought; but the Judgment was affirm'd. Noy 43. Oliver St. John v. Bawdrip.

Per Whitlock J. Lat. 95. S. C.— Lat. 130 per Whitlock J. S. P.

6. If Relief be due *by Tenure*, then *Diſtreſs* is incident; but if *by Cuſtom*, no Diſtreſs lies, unleſs eſpecial Cuſtom warrants it. Jo. 133. Trin. 2 Car. B. R. Hungerford and Haviland——cites 11 Rep. 44. Bullen v. Godfrey.

(O. a) Tenures taken away.

Mr. Madox in his Hiſtory of the Exchequer, p. 432, 433. makes the following Obſervations on this Statute.

1. 12 *Car.* 2. *cap.* 24 S. 1. ENacts, That *all Tenures by Knights Service of the King, or of any other Perſon, and by Knights Service in Capite, and by Socage in Capite of the King, and the Fruits thereof, ſhall be taken away. And all Tenures of any Honours, Manors, Lands, Tenements, or Hereditaments, held either of the King or of any other Perſon, ſhall be turned in Free and Common Socage.*

He ſays, It is wonderful to ſee how much the Notion of Tenancy in Capite, which is in itſelf plain and ſimple, has been obſcur'd and perplex'd by Writers within the Memory of Man. There have been eager Diſputes about the Tenants in Capite. By what I have read of the Controverſy, I cannot perceive, that it was ever agreed amongſt the Diſputants, what Tenancy in Capite was; or that they had a diſtinct Notion of it. There is one thing here to be remember'd, which may juſtly ſeem ſtrange. I muſt ſpeak of it with great Submiſſion. It was intended, by the above Statute, to take away and aboliſh Tenure by Knight-Service, whether of a King or of a Subject, with the Fruits and Appendages thereof, viz. Wardſhip, Marriage, Relief, Eſcuage, &c. and to take away Wardſhip, Marriage, Relief, Eſcuage, and other Feodal Profits or Services incident either to Tenure by Barony, or by Serjeanty. But there are ſome Clauſes in that Statute relating to Tenures, which, if I do not miſtake, are worded in Terms ſo complex and indiſtinct, that, like a two-edged Sword, they cut both ways. In general, as to the *Nature of Tenancy in Capite*, one may preſume to ſay, it *has not been ſufficiently clear'd by the common Lawyers, or even the Antiquaries of our Nation.* Sir Edward Coke has no Luck in the Explication he gives of it in his firſt Inſt. p. 108. a. Nor is his Opinion in the Caſe needful to be recited here. Mr. *Selden ſpeaks as if he thought a Baron and a Tenant in Capite was all one.* (Not. & Specil. & Eadm. p. * 868. & Tit. Hon. p. 575) And Sir Henry Spelman *ſays, That in the Time of King Hen.* 2. *every Tenure in Capite was accounted a Tenure by Barony* (Gloſſar. ad vocem Baro. p. 73. Col. 2.) In this Caſe, both Mr. Selden and Sir H. Spelman, altho' in Part they are not far from the Truth, have fallen ſhort of giving a clear and juſt Explication. I think it may be rightly ſaid, that in the ancient Times (ſuppoſe *about the Time of King Hen. the* 2d) *moſt of the Tenants* holding of the King *in Capite, were real or reputed Barons*; not barely becauſe they held of the King in Capite, but partly for that Reaſon, and chiefly *becauſe they held* of him *large Seigniories.* And there was, as I take it, ſo great a Likeneſs between a Baron and one of the King's Tenants in Capite, who held a large Seigniory, that in the Reign of King H. 2 *they made little or no Difference between them.* There was alſo another Thing which made Tenancy by Barony, and Tenancy of the King in Capite, by Knight-Service, ſo like the one to the other; and that was the *indetermined Quantity* or Number of *Knights Fees neceſſary to compoſe a Barony.* For whereas *ſome* Baronies or Honours *were exceſſive large*, conſiſting of a very great Number of Fees; *others* again were *ſo ſmall, that by the Quantity of them*, or the Number of *the Fees* whereof they conſiſted, *they could not be known to be Baronies.* In ſome, every Baron, properly ſo call'd, was a Tenant in Capite; but every Tenant in Capite was not, by reaſon of his Tenure in Capite, a Baron, or reputed Baron. *From the Reign of King Henry* 3. downwards to the ſucceeding Times, the *Tenants in Capite became very numerous*; ſo that it ſometimes happen'd that a Man was the King's Tenant in Capite of a Half, or a Quarter, or a 10th Part of a Knight's Fee, which ſmall Tenancies in Capite were far different from Baronies. Again, if a *Man held* of the King *in Capite by ſome other Tenure than Barony or Chivalry*, ſuch Perſon, altho' he was a Tenant in Capite, was by no means a Baron. Men ſeem to have been lead into their confuſed Way of Speaking upon this Subject, by ſuppoſing Tenure in Capite to have been a diſtinct Kind of Tenure, in like manner as Tenure by Knight's Service, Socage, and others

others were, which Suppoſition is fallacious and untrue. For *Tenure in Capite was ſo far from being a diſtinct Sort of Tenure by itſelf, that it might be predicated of the ſeveral other Tenures*, that is to ſay, a Man might hold of the King in Capite, either by Barony or by Knight Service, or by Serjeanty, or by Socage, or by Fee Farm. And if it be ſaid that a Man held of the King *in Capite, without mentioning expreſsly by what Service*, it *is to be underſtood*, that he *held of the King immediately, in Oppoſition to his holding immediately of another*; and that Phraſe was uſed in ſuch Caſe, when the Service was not in Queſtion, but the Tenure only, to wit, whether it was *Mediate or Immediate*. But the fallacious Suppoſition above-mention'd, had enter'd into the Minds of Men long before the Reign of King Charles 2d. For Example: Queen Elizabeth by her Letters Patent, dated at Weſtminſter the 19th of November, in the 42d Year of her Reign, granted to **Richard Ryves and John Burges**, Gentlemen, the Manor or Lordſhip of Borſcombe in Wiltſhire, and divers other Lands in Fee-ſimple; The Tenure was reſerved in theſe Words *Tenendum de nobis, Hæredibus & Succeſſoribus noſtris, ut de manerio noſtro de Eaſt-Greenwich*, in Comitatu noſtro Kancia *per fidelitatem tantum in libero & communi Socagio, & non in Capite, nec per Servitium Militare, pro omnibus aliis Redditibus, Servitiis*, &c. (To be held of Us, our Heirs and Succeſſors, as of our Manor of Eaſt-Greenwich, in the County of Kent, by Fealty only, in Free and Common Socage, and not in Capite, nor by Military Service, for all other Rents and Services.) Ex. 8. Parte Orig. 42 Eliz. Rot 1. The ſame Queen, by Letters Patent, dated the 14th Day of March, in the ſame 42d Year, granted to Sir John Spencer, in Fee-ſimple, the Site of the Priory of Tortington in Suſſex &c. Tenendum de nobis, &c. in the ſame Words as above in the Grant to Ryves. Ib. Rot. 10. And many other Letters Patent, made in the Reign of that Queen, and afterwards, are of the ſame Tenour; whereas the latter Words (*& non in Capite*) are (with great Submiſſion) repugnant to the former, Tenendum de nobis. And therefore the Tenure (if any) reſerved to the Crown by thoſe Patents, was, in Truth, *Tenure in Capite by Socage*.——Dr. Brady, in his Gloſſary Verbo, Tenentes in Capite de Rege, ſays, that beſides the Tenants in Capite by Military Service, and ſuch as were bound to Military Service in and by their Tenure in Serjeanty, there were ſmall Tenants in Capite by Petit Serjeanty.

* Miſprinted for 168.

For more of Tenure in General, ſee **Avowry, Diſtreſs, Guardian, Meſne, Prerogative,** and other Proper Titles.

(A) Term-Time.

1. *Aſſumpſit* &c. and declared of a Promiſe made *5 June, to pay* Money *in Trinity-Term next* enſuing, and *averr'd, that* the next *Trinity-Term after* the ſaid Promiſe *began the 7 June*, 30 *Eliz.* and ended on the 26 Day of the ſame Month, and that the Defendant had not paid. Defendant pleaded Non-Aſſumpſit. The Plaintiff had a Verdict. It was moved in Arreſt of Judgment, that *the Eſſoign-Day of the ſaid Trinity-Term was the 3 of June*, 30 *Eliz.* and ſo the Term in which the Promiſe is to be perform'd muſt be Trinity-Term in 31 Eliz. and ſo the Action is brought too ſoon. But ſome of the Court held, that the Plaintiff ought to have Judgment; for, according to common Intent, it is not Term until full Term; and therefore, when *the Promiſe was made between the Eſſoign-Day and the common Day of Appearance in Court*, the common People look upon the Term to be when the Judges ſit in Court; but others e contra. But however they gave Judgment for the Plaintiff; for 3 Judges held, That when the Defendant pleaded Non-Aſſumpſit, he had agreed, that there was ſuch a Term as the Plaintiff had alleged, though, in Truth, it commenced before the Promiſe; for the *Defendant ſhould have ſet it forth* in his Plea, *or have given Evidence of the Truth of this Matter to the Jury*, which not having done, the Court is not bound to enquire the Truth thereof, any farther than any other Matter

Le. 210. pl. 295. S. C. ſays, that Anderſon was of Opinion that the Plaintiff muſt wait the Performance of the Promiſe a Year longer, but that the other 3 J. held ſtrongly the contrary, by Reaſon of the Common Intendment, and that ſo it is uſually ſet down in the Alma-

nack; And ſays, that afterwards Judgment was given for the Plaintiff, but does not mention the particular Reaſon of ſuch Judgment. Matter in Fact not appearing to them. And. 240. pl. 256. Paſch. 32 Eliz. Biſhop v. Harecourt.

——— Cro. E. 210 pl. 6. S. C. and that the other 3 Juſtices held contra to Anderſon, becauſe the Plaintiff had expreſsly alledg'd, that the Term began 7 June, and the Defendant had not denied it, and the Court Ex officio are not to ſearch the Rolls of the Court &c. but admitting they ought ſo to do, and tho' in Law the Eſſoign-Day is the firſt Day of the Term, and Writs may be return'd then, yet in common Speech that is the firſt Day, when the Court ſits; And Anderſon againſt his own Opinion gave Judgment for the Plaintiff. ——— 5 Rep. 37. a. S. C. but S. P. does not appear.

2. The * whole *Term* is but as *one Day*, and all the Judgments in B. R. are enter'd as upon the 1ſt Day of the Term; Per Cur. 3 Bulſt. 114. Mich. 13 Jac. Anon.

* S. P. Godb. 33. in Caſe of Harley v. Reynolds.——

S. P. 5 Rep. 74. in Wymark's Caſe.———Tho' to ſome Purpoſes the Term is but as one Day in Law, yet to other Purpoſes it is not ſo. As, for Inſtance, if there be Continuances, there can be no Judgment before they are enter'd. Arg. and admitted by the Court. 8 Mod. 190. Mich. 10 Geo. in Caſe of Miller v. Bradley.

3. *Midſummer-Day* was on a Wedneſday, and if that had not been, that Wedneſday had been the *laſt Day of Trinity-Term*, but now it was on a Tueſday; for, per Holt Ch. J. Trinity-Term may begin, but can't end on Midſummer-Day, and in ſuch a Year there can be no Return *In Tres Septiman' Trin.* But it muſt be *Die Jovis poſt Tres Septiman. Trin.* And this, he ſaid, had not happen'd in 100 Years before. Farr. 17. Paſch. 1 Annæ, B. R. Anon.

4. Tho' the *next Day after the laſt Day of the Term* be not, in Strictneſs, Part of the Term, and therefore (as Mr. Vernon inſiſted) could not be a Day to make any Motion on the Petty Bag Side, yet as to other Purpoſes it is Part; and therefore a Motion then made, to *diſmiſs a Bill for want of Proſecution*, on a Certificate from the Six Clerk, that no Proſecution had been within 3 Terms, of which the laſt Term was one, was denied by the Maſter of the Rolls. Wms.'s Rep. 522. Mich. 1718. Anon.

5. *So* where *the laſt Seal continued* 3 *Mornings*, and computing the 3d Morning according to the Day of the Month, it would be a proper Time to move to make a Report abſolute, viz. it would then be above 8 Days after Service, It was held by the Maſter of the Rolls, that the *Report cannot as yet be made abſolute*; for tho' this Seal laſts 3 Days, yet *it is all a Continuance only of the firſt Day*, and ſo the Time not yet out. Wms.'s Rep. 522. pl. 147. Mich. 1718. Anon. cites Hill. Vacation 1721.

And in a Note added by the Editor at the End of Page 523. it is ſaid that the like Determination was made by Ld. C. King in 1730.

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For more of Term-Time in General, ſee **Executions, Judgments, Teſte,** and other Proper Titles.

Teſtatum.

(A) Good.

1. IF I *recover Goods* by Action brought in Middleſex, I may, upon a Teſtatum, have a *Capias* into any foreign County; Per Williams. 2 Le. 67. pl. 90. in Noon's Caſe.

2. Teſtatum *is grounded upon* a former Return filed, that the Party has nothing in the County where the Action is brought. Yelv. 179. Trin. 8 Jac. in Caſe of Goodier v. Junce, cites 18 H. 6. 27. and 2 H. 6. 9.

3. A *Ca. Sa.* was awarded with a Teſtatum, where *no Capias had been awarded before*, and for that Reaſon it was reverſed. Cro. J. 246. in Caſe of Goodyere v. Ince, ſays a Precedent was cited between Jones and .....

4. An *Action* was brought *by Original*, and *Judgment* was had the *laſt Paper Day of Trinity-Term*. It was objected, that this Judgment could not be ſign'd till after the Quarto Die poſt &c. of the preſent Michaelmas Term, and therefore a *Teſtatum Ca. Sa.* being *brought in* this *Michaelmas-Term* muſt be irregular; becauſe there could be no Ca. Sa. on a Judgment not ſign'd, and conſequently nothing to ground a Teſtatum Ca. Sa. upon, eſpecially this Action being brought by Original. But it was anſwer'd, that when the Judgment was ſign'd, tho' in the latter End of Trinity-Term, this, by Relation, is a ſufficient Foundation to ſue out a Capias the firſt Day of Michaelmas-Term, which will be a Warrant to found a Teſtatum returnable Tres Trin. and ſo good. Per Cur. This, *by Relation, is a Judgment of the firſt Day of the Term, in which it was obtain'd*, which is ſufficient to ground a Ca. Sa. and conſequently a Teſtatum Ca. Sa. And if there is no Difference between an Action by Bill and by Original, it is regular: *But if Continuances had been enter'd*, no Execution could be prior to ſuch Entry. 8 Mod. 189, 190. Mich. 10 Geo. B. R. in Error on a Judgment in C. B. Miller v. Bradley.

5. In an Action of *Covenant* ariſing *in London*, a *Teſtatum* Capias *iſſued to* the County Palatine of *Durham, and a Copy* thereof having been *ſerv'd* on the Defendant, the Court was moved to ſtay Proceedings; and Counſel being heard on both Sides, the Court gave their Opinions ſeriatim, that the Teſtatum Capias to the Biſhop was not the Proceſs that the Defendant ſhould be ſerv'd with, purſuant to the *Stat.* 12 *Geo.* 1. *cap.* 29. but that *the Capias which the Biſhop iſſues, is the proper Proceſs wherewith he ſhould have been ſerv'd*, and upon which he would have been arreſted, if this Act had not been made, and the Act has not altered the Law in that Particular; and thereupon the Court ſtayed the Proceedings which had been had on the Service of the Teſtatum Capias. Rep. of Pract. in C. B. 38. Mich. 1 Geo. 2. Beake & al. v. Smith Ar.

6. A *Capias in Middleſex, and a Teſtatum* Capias may be *ſued out* both *together*. Arg. Barnard. Rep. in B. R. 392. Mich. 3 Geo. 2. in the Caſe of **Porter v. Jones**, it was ſaid to have been ſettled about 3 Years ago in the Caſe of Stone v. Stone.

7. A Motion was made in Eaſter-Term 1735. to ſtay Proceedings on a Teſtatum Capias, a *Copy* of which had been *ſerv'd* on the Defendant *in the*

the County Palatine of Lancaſter, without taking out of a Mandate thereon *from the Chancellor of the County Palatine*; and a Rule to ſhew Cauſe being granted, the Court upon hearing Counſel held, that the Proceſs was well ſerved, and purſuant to the Statute of 5 Geo. 2. cap. 27. and therefore the Rule to ſhew Cauſe was diſcharged. Rep. of Pract. in C. B. 119, 120. Trin. 8 & 9 Geo. 2, Byer v. Whitaker and others.

(B) Neceſſary. In what Caſes.

1. AN *Elegit* iſſued into the County of Lancaſter, which *mentioned another* Elegit *iſſued before* into London, and *returned Nihil*, and upon the Teſtatum it was commanded to extend all the Goods and Land &c. But in Truth, *no Writ was awarded before* into London. This was held to be a manifeſt Error by Reaſon of the Teſtatum, whereas without a Teſtatum the Plaintiff that recovered might have had an Elegit into as many Counties as he had pleaſed. Cro. J. 246. pl. 4. Trin. 8 Jac. in the Exchequer. Goodyere v. Ince.

Brownl. 107. S. C. but it is not there ſaid that no ſuch Writ iſſued, but that the Sheriffs of London made no ſuch Return.——

Yelv. 179. Goodyer v. Junce, S. C. accordingly.——2 Brownl. 208. S. C. that no Writ iſſued to the Sheriff of London.

2. A man is *outlawed* in Middleſex a Capias utlegatum may be ſued out againſt him into any other County without a Teſtatum. Vent. 33. Trin. 21 Car. 2. B. R. in a Nota there.

3. A. brought *Debt in London* and had Judgment and ſued out a *Fieri Facias* directed *to the Sheriff without a Teſtatum* Fieri Facias *into London*, by Virtue whereof the Defendant's *Goods were taken in Execution in Middleſex*, and for this Reaſon the Judgment was ſet aſide as irregular. 8 Mod. 282. Trin. 10 Geo. 1725. Goddard v. Gilman.

4. *So* where an Action was brought *in the County of S.* and upon Judgment for the Plaintiff he took out a *Fieri Facias directed to the Sheriff of W.* without a Teſtatum; Execution was ſet aſide. 8 Mod. 282. cites Mich. 1725. White v. Cornwall.

5. A *Scire Facias* was ſued out *into Middleſex againſt the* Defendant as *Bail*, and a *Fieri Facias iſſued* to the *Sheriff* of that County who *return'd Nulla bona*, then *a common Fieri Facias was executed in London, without mentioning it to be a Teſtatum.* And the Court held it good, and ſaid, there was *no Occaſion to inſert the Form of a Teſtatum* in the Writ, in Order that the Writ itſelf might ſhew it was a Teſtatum; And that if it had been neceſſary, they would have given Leave to amend. Rep. of Pract. in C. B. 79. Mich. 6 Geo. 2. Oades v. Forreſt.

(C) Return thereof.

1. ON a *Judgment in Staffordſhire*, the *Plaintiff ſued* out *a Fi. Fa.* with a *Teſtatum into Worceſterſhire*. It was moved that this ought to be ſet aſide, becauſe *no Fi. Fa. had ever gone into Staffordſhire*, and the Sheriff of Staffordſhire made Affidavit that he never return'd any Fi. Fa. in the Cauſe. Sed non Allocatur for *the Fi. Fa. upon which the Teſtatum is founded, is returned of Courſe by the Attornies themſelves*, as Originals are; if you ſearch the File you may find one, and that is ſufficient. 2 Salk. 589. pl. 2. Mich. 7 W. 3. B. R. Palmet v. Price.

2. Ex-

2. Executors brought 2 *Scire facias's* of the *ſame Teſte, but different Returns*, the one teſted October 22. returnable November 14. the 2d returnable November 23. So by Rule of Court Defendant had 4 Days from the Return of the 2d Scire facias to plead, which indeed was all that remain'd of the Term. Defendant did not plead. Plaintiff takes out a *Fi. Fa. returnable the ſame laſt Day*, to warrant a Teſtatum. And per Cur. it was well; for tho' Defendant has 4 *Days to plead* after the Return of the 2d Scire facias, yet that is in Favour to him when he *does not plead*; the Judgment is of the Day of Return of the 2d Sci. fa. and he may take out a Fi. fa. after to warrant the Teſtatum; and the Secondary remember'd a Caſe where a *Fi. fa. was returnable before Judgment affirm'd* was held good in Favour of Execution, to warrant a Teſtatum. Far. 138. Hill. 1 Ann. B. R. Auſtin v. Crisby.

For more of Teſtatum in general ſee **Bail, Devaſtavit, Executions, Teſte,** and other Proper Titles.

Teſtatum Exiſtit.

(A) *Pleadings* by Teſtatum Exiſtit. Good or not.

1. IN Covenant the Plaintiff declared, Quod cum per Indenturam Teſtatum exiſtit, *that the Defendant infeoff'd the Plaintiff* of ſuch Lands, *and therein covenanted to ſave him harmleſs from all Dowers* and Incumbrances, which he had not done &c. Upon a Demurrer to this Declaration the Plaintiff had Judgment. Upon Error brought it was aſſign'd, that the Declaration was ill, becauſe it did not expreſsly allege that the Defendant made a Feoffment to him, but only by a Quod cum Teſtatum exiſtit, which is only a Recital; but all the Court reſolved the contrary, and that the Difference is where it is by Way of Declaration, and where by Way of Bar or Replication; for in the Declaration Teſtatum exiſtit is ſufficient to induce the Action, and to aſſign the Breach; and the Judgment was affirm'd. Cro. J. 537. pl. 2. Trin. 17 Jac. B. R. Bultivant v. Holman.

2 Roll. Rep. 110. **Buttifant v. Holman,** S. C. And it was ſaid Arg. that it was reſolved Mich. 31 & 32 Eliz. that ſuch Pleading as here is good, becauſe the Feoffment is pleaded only by Way of Inducement of the Action, becauſe this Action is only to recover Damages; and that in the New Book of Entries are 3 Precedents, where Quod Teſtatum eſt was pleaded, as in our Caſe, and held a good Plea. 1ſt. Upon a Bargain and Sale, Teſtatum eſt *quod barganizavit.* 2dly, Upon Demiſe of a Leaſe for Years, viz. Teſtatum eſt *quod Dimiſit*, the Caſe of which Record is reported in 9 Rep. 8, **Bradſhaw's** Caſe. 3dly, Of a Grant of an Annuity, viz. Teſtatum eſt per Indenturam *quod conceſſit.* And Doderidge J. ſaid, if there was any Difference between thoſe Caſes and the Caſe at Bar, it is, that in thoſe Caſes the Grant took Effect by the Deed only, whereas in the Principal Caſe, a further Act is to be executed viz. Livery of Seiſin, but it ſeems that there is no Diverſity; For tho' nothing paſſed by the Feoffment by Reaſon of its Inſufficiency, yet the Feoffee has good Cauſe to have Action of Covenant, and ſince the Covenant is in the ſame Deed by which the Land was conveyed, he may as well have it as he may plead the other, Quod Crooke and Haughton J. conceſſerunt; And the Judgment was affirm'd, Abſente Mountague Ch. J. —— Jenk. 331. pl. 63. S. C. and takes Notice of the Difference where the Pleading is by way of Barr or Replication, accord- ing to Cro. J. as above.

2. In *Replevin* &c. the *Defendant avowed for that the Place* where &c. *was Parcel of the Manor of* F. &c. *and that* Time out of Mind *the Mayor* &c. 2 Lev. 11. **Holbech v.**

Bennet, S. C. and the ſame Exception taken by Hale Ch. J. but adjornatur.—2 Keb. 825. pl 45 S C. ſays, that the Avowry being ill, Judgment was affirm'd in the Exchequer Chamber.

&c. of Coventry, and one Millon and *others were ſeiſed in Fee thereof; and* being ſo ſeiſed *by Indenture* made *between them* of one Part, *and one Baſſnet* of the other Part *Teſtatum exiſtit, that the ſaid Corporation and the natural Perſons had demiſed the ſaid Manor to* the ſaid *Baſſnet* &c. Hale Ch. J. ſaid, And the ſame was agreed to per Cur. that this Plea was ill, becauſe the Avowant had not laid the Leaſe in Baſſnet by an expreſs Averment in Fact, but only by a Teſtatum exiſtit, which is not good Pleading. 2 Saund. 317, 319. Paſch. 23 Car. 2. Bennet and Holbech's Caſe.

3 Keb. 94. pl. 40. 115. pl. 23. Cooker v. Child, S. C. And per Cur. It is well enough here in Debt, as on Articles, tho' Teſtatum exiſtit in Debt on Demiſe is ill. And afterwards Judgment was given for the Plaintiff. ——S. C. cited Lutw. 535. Trin. 5 W. & M. in the Caſe of Boſwal v. Rawſterne; and the Difference was there taken, that where Action of *Debt* is brought *on Covenant to* pay Money, it is good by Way of Teſtatum exiſtit; but where it is *upon a Demiſe* reſerving Rent, it is not good; and thereupon an Exception that ſuch Declaration by Teſtatum &c. was not good in Debt, was over-ruled.

3. *Debt* was brought *upon* an Indenture of *Charter-party not made between Parties, in which there was a Covenant with the Plaintiff,* who was *a Stranger to the Indenture,* and no Party thereto; and the Plaintiff declared by Teſtatum exiſtit. And the Court were all of Opinion, that the Declaration by Teſtatum exiſtit is good, tho' it be in Debt, and not in Covenant, and brought by him alone to whom the Debt is due; and gave Judgment for the Plaintiff. 2 Lev. 74. Hill. 24 & 25 Car. 2. B. R. Cooker v. Child.

4. In *Covenant* the Plaintiff *declared,* that *he was ſeiſed in Fee, and* that *by Indenture* made *between the Plaintiff and Eliz. his Wife of the one Part, and the Defendant of the other Part, Teſtatum exiſtit that the Plaintiff and his Wife demiſed.* It was objected, That it being ſhewn that the Husband was ſole ſeiſed, the Husband and Wife could not demiſe; Sed non allocatur; for it is not affirm'd, but only that by the Indenture it is witneſſed; for the Teſtatum is a Rehearſal of that. 2 Salk. 515. pl. 2. Paſch. 2 W. & M. B. R. Woodward v. Cliffe.

For more of Teſtatum Exiſtit in general, ſee **Covenant,** and other Proper Titles.

* Teſte.

* The Teſte *is* the Warrant of the Writ. Cro. E. 592. pl. 31. Mich. 39 & 40 Eliz. C. B. Grondy v. Iſcharn.

(A) What *Time* there ought to be *between* the *Teſte and Return* of Writs.

1. IN Aſſiſe, the Juſtices ſaw by the Teſte of the Patent that it was *brought within the 15 Days* before the Aſſiſe; and therefore they would not take the Aſſiſe. Br. Aſſiſe, pl. 316. cites 30 Aſſ. 44.

2. 13 *Car.* 2. *Stat.* 2. *cap:* 2. *In all* Perſonal Actions *and Actions of* Ejectione Firmæ *by Original Writ in B. R. or C. B. after Iſſue joined and Judgment had, there ſhall not need to be* 15 *Days betwixt the Teſte and Return of any Venire Facias, Habeas Corpus Jur. or Diſtr. Jur. Fieri Facias, or Ca. Sa. other than Cap. ad Sat. whereon a Writ of Exigent after Judgment is to be awarded and Cap. ad Sat. againſt the Defendant, in order to make a Bail liable.*

This Act ſhall not extend to Popular Actions, Except *Debt upon* 2 *E.* 6. *of Tithes.*

3. In Writ of *Appeal of Murder* there ought to be 15 Days between the Teſte and Return, but the want thereof is cured by Appearance and pleading in Chief. 1 Salk. 63 pl. 4. Paſch. 13 W. 3. B. R. Wilmot v. Tiler. 12 Mod. 451 S. C. accordingly. —Ld Raym. Rep. 671.

4. It was reſolved, it was not neceſſary to have 15 *Days* Return of Proceſs *in a Franchiſe*; For the Reaſon of them in the Court of *Weſtminſter* is, becauſe that Time is judged neceſſary for People to *come from the remote Parts* to which the Proceſs of thoſe Courts does extend, which does not hold in Franchiſes. 12 Mod. 524. Trin. 13 W. 3. B. R. Bidolph v. Veal. S. C. accordingly.

5. One was outlaw'd for Murder and brought Error, and the Outlawry was reverſed, and the Defendant committed to Newgate to undergo his Trial next Seſſions; And Holt Ch. J. ſaid, that to try the Defendant in B. R. there muſt be a Venire Facias returnable at the Common Day, and 15 *Days* between the Teſte and Return of it. 12 Mod. 544 Trin. 13 W. 3. and 562. Mich. 13 W. 3. the King v. Young.

6. Defendant had obtained a Rule for Plaintiff to ſhew Cauſe why Writ of *Capias ad reſpondendum* ſhould not be quaſhed, there *not being* 15 *Days between the Teſte and Return thereof.* The Rule was diſcharged, this being Matter of Error, and not of Irregularity. Barnes's Notes in C. B. 295. Trin. 10 G. 2. Williams v. Faulkner.

7. *Attachment of Privilege* bore Teſte 23d, returnable Jan. 31. Defendant moved to quaſh the Writ for want of 15 Days between the Teſte and Return, and a Rule was made to ſhew Cauſe, which was afterwards made abſolute, the Court conſidering the Attachment of Privilege *in the Nature of an Original Writ.* Barnes's Notes in C. B. 297, 298. Trin. 11 & 12 G. 2. Haward, Attorney v. Diniſon. The Reporter makes a Quære Whether this might not have been taken Advantage of by Plea in Abatement, or by Writ of Error. Ibid.

Rep. of Pract. in C. B. 149. S. C. and the Prothonotaries ſaid they did not know that the Practice required 15 Days, but uſually there were 8, and ſometimes 4. The Court obſerved, that then nothing ſeems ſettled by the Practice, and ſaid, that the Common Law requires 15 Days between the Teſte and Return of all Writs; And if the Practice has not ſettled it otherwiſe, the Law ought to prevail in this as well as in other Caſes; And ſo the Rule was made abſolute.

(B) Good or not. And where it ſhall be ſaid to be Prior to the Cauſe of Action.

1. IF the *Tenant in Aſſiſe or Præcipe* quod reddat *aliens the Day of the Teſte of the Writ*, yet the Writ is good, and ſhall not abate; For this Day is all the Day of the Plaint in Law; quod nota. Br. Jours. pl. 44. cites 17 Aſſ. 21. Br. Briefs, pl. 279. cites S. C.

2. *In Formedon* the *Tenant may appear at the firſt Day*, and may abate this Writ; And *new Writ may be brought bearing Date Meſne between the 1ſt Day and the 4th* Day, and therefore it ſhall not abate. Br. Jours. pl. 33. cites 24 E. 3. 24. Br. Journes Accounts, pl. 17. cites S. C.

3. Scire

Br. Jours, pl. 12. cites S. C.

3 In Scire Facias the Prayee in Aid caſt *Protection* bearing *Date the 7th Day of January, to continue for a Year*, and after the Plaintiff brought *Re-garniſhment*, bearing *Date the 8th Day of Jan. then next after*, Scilicet, *the laſt Day of the Year*, and well, Per Finch; For a Man *may bring a new Writ the ſame Day that his Writ abates*, quære, For by 4 H. 6, 7. A Man may bring Writ *the ſame Day that the Diſſeiſin was made*. Br. Brief, pl. 40. cites 40 E. 3. 18.

4. *And yet* the *Teſte* of the Writ *to ſome Reſpects ſhall ſerve for all the Day*, for *Alienation ſuch a Day* or Jointenancy this Day *ſhall not abate* the Writ, for the Writ *ſhall have Relation to all this Day* that it bore Teſte; And therefore it is pending the Writ. Br. Brief, pl. 40. cites 40 E. 3. 18.

5. Note per Catesby J. That if the *Recordare bears Date before the Plaint affirmed*, or if *Mittimus bears Date before the Fine came into the Chancery*, or if *Writ of Error bears Date before Judgment*, or if *Indictment* be *taken after the Teſte of the Certiorari which comes to remove it*; Yet if thoſe are removed *the Courts to which they are removed ſhall hold Plea*. And ſo it is put in Uſe at this Day of Writ of Error, for all are the Courts of the King; And yet the Writ of Error is Si Judicium inde redditum ſit. And therefore ſee that the firſt Court, to which it comes, needs not to ſend the Record till the Judgment be given; but if they ſend it, then the Higher Court may proceed upon it. Contra often in Court Baron. Br. Cauſe de remover &c pl. 32. cites 1 R. 2. 4.

Br. Brief. pl. 446. cites S. C. —— And per Weſton if a *Joint Feoffment* be made the ſame Day that the Writ of Aſſiſe bears Teſte, and the Tenant pleads Jointenancy by Deed bearing Date the ſame Day, the Jointenancy is void; For this ſhall be taken to be done pending the Writ; For all the Day is the Day of the Writ; But Strange and Martin e contra, and otherwiſe it ſhall be Miſchief. For the Diſſeiſſor may make ſeveral Alienations the ſame Day &c. and therefore Judgment was for the Plaintiff; Quære if the *Cauſe* was not *in as much as the Day in their Verdict of the Diſſeiſin is not material*. Br. Jours. pl 34. cites 4 H. 6, 7.

6. In *Aſſiſe the Seiſin and Diſeiſin was found for the Plaintiff, and that it was done the 15th Day of May*, and the *Writ of the Aſſiſe bore Teſte the ſame Day*, and yet the Plaintiff recovered by Award, after long Debate; and yet per Ellerker and Fulth. all this Day is the Day of the Writ; And ſo the Writ bore Teſte before the Diſſeiſin. Br. Jours. pl. 34. cites 4 H. 6, 7.

7. Upon *Treſpaſs or Robbery*, the Party may have Action bearing Date the ſame Day; quod inſtanti die fecit tranſgr. &c. Br. Jours. pl. 34. cites 4 H. 6, 7. per Rolf.

8 Mod. 344. Perry v. Kirk, Hill. 11 Geo. 1. The Plaintiff in Aſſumpſit counted of a Promiſſory Note, upon producing whereof it appeared the Defendant was to have 6 Weeks from the Date thereof to pay the Money, but within the ſix Weeks he was arreſted on a Latitat, whereupon it was inſiſted that the Action was not maintainable. But it was anſwered, That the Declaration was above 6 Weeks after Date of the Note, and that is all that the Court ought to take Notice of. For the Original Proceſs was only to bring the Defendant in Cuſtodia Mareſchalli, which may well be before the Cauſe of Action. The Court held that to be the conſtant Difference, for the Plaintiff may ſue out a Latitat before the Cauſe of Action, but he cannot declare till after the Cauſe of Action does ariſe.

8. Bond was made 29 Aug. 13 Jac. and the *Latitat bore Teſte before the Bond* Scilicet the 29 June, 13 Jac. yet being Returnable in Mich. Term 'tis good; And the Proceſs always bears Teſte the laſt Day of the Term before. Cro. J. 561. Hill. 17 Jac. B. R. Pigot v. Rogers.

2 Jo. 149, 150. S. C. and that there is Veritas Legis and Veritas Facti, and that the De-

9. In *Caſe*, the Plaintiff *declared*, *that* the *Defendant took out a Latitat 21 Januarii*, 32 Car. 2. ac etiam Billæ &c. whereas he owed him nothing. Upon Not guilty a Special Verdict was *found*, *that the Latitat was Teſte 28 Novembris*, 32 Car. 2. *but* was *really taken out 21 Januarii* 32 Car. 2. Pemberton Ch. J. ſaid, The Courſe of the Court is to teſte Latitats taken out in the Vacation, as of the Term preceding; and the

Courſe

Courſe of the Court is the Law of a Court; he might have declared, that the Defendant ſued out a Latitat the 21ſt Jan. Teſte the 28 Nov. preceding, and if he be not eſtopp'd to declare ſo, ſurely the Jury may find the whole Matter; and ſo Judgment was given pro Quer'. 1 Vent. 362, 363. Hill. 33 & 34 Car. 2. in B. R. Walburgh v. Saltonſtall.

claration is according to the Truth of the Fact, and the Teſte of the Writ muſt

neceſſarily be in the Term, tho' the Writ be proſecuted after.——Skin. 32. S. C. adjudged, and that it was ſaid that if he had pleaded it as taken out 21 Jan. Teſte 28 Nov. it would have been unqueſtionably good, and that ſo it ſhould be now, the Courſe being known.

Original Proceſs may bear Date out of Term, becauſe it iſſues out of Chancery, which is always open; but *judicial Proceſs* iſſues out of thoſe other Courts which are open only in Term-time, and therefore muſt bear Date in Term; Per Doderidge J. Lat. 11. in Caſe of Ramſey v. Mitchell ——118. S.C.

10. In *Debt for Rent*, the Defendant *pleaded an Eviction by Elegit, Teſte 15 July*; and adjudged 5 Will. & Mar. that the Elegit was void; for the *Court will take Notice that it was teſted out of Term.* Ex relatione M'ri Place. Ld. Raym. Rep. 4. Paſch. 6 W. & M. C. B. Ball v. Rowe.

In *Debt on a Bail-Bond*, it *appear'd* by the Declaration, *that the Writ was*

ſued out in the Long Vacation, out of Term-Time, and Exception was taken; for that the Court muſt judicially take notice of the Beginning and End of the Terms, as well moveable as immoveable; and that the 18*th of July* was after Trinity-Term was ended, and therefore that the Writ was a void Writ, for it was not poſſible to be ſued *out of the Court of B. R. then ſitting at Weſtminſter*, the 18th of July, when it was Vacation-Time, no ſuch Court being then ſitting at Weſtminſter. And the Writ being void, the Arreſt was illegal, and the Bail-Bond thereupon given void alſo; the Court being unanimous of Opinion, that it was ill, and that it was not according to the Truth of the Fact, for it could not on the 18th of July be ſued out of the Court of B. R. then ſitting at Weſtminſter, when the Court did not, nor could not, ſit out of Term. The Plaintiff deſired Leave to diſcontinue, which was granted him May 13, 1729. 2 Lord Raym. Rep. 1557, 1558. Eaſt. 2 Geo. 2. B. R. Uſher Eſtwick v. Edward Cooke.

11. It was moved to refer the Regularity of a Judgment in Debt; the *Declaration* was *of Hillary Term*, and *Judgment by Confeſſion*, which was *ſigned after the Term*; and after the Signing, viz. the 10*th of April*, *the Defendant died*, and the *Execution before Teſte the 23d of January*; and it was inſiſted that it appeared that the Execution was before the Judgment. Sed non allocatur; for Execution may be ſued out after the Death of the Defendant, except againſt a Purchaſor, and the Writ of Execution *may bear Teſte of the precedent Term*, even of *the firſt Day* of that Term. Comyns's Rep. 117. pl. 82. Paſch. 13 W. 3. Parſons v. Gill.

1 Salk. 50. pl. 13. Mich 2 Ann. B. R. S. C. but S. P. does not appear.—— Ld. Raym. Rep. 695. S. C. ſays the Motion was denied;

For per Cur. The Practice is always ſo, and well enough.

12. An Action being limited to be brought within a Year, the *Plaintiff gave Inſtructions for an Original to the Curſitor ſome Days before the End of the Year, but the Writ was not ſealed till after the Year, tho' antedated as of the Day of the Inſtructions given*; and upon Debate whether this was good or not, Ld. C. Parker referr'd it to the Principals and Aſſiſtants of the Society of Curſitors, who certified that it was the *conſtant Practice* of the Office *to teſte original Writs againſt Hundreds, Corporations, Heirs, and* in ſeveral *other Caſes, the ſame Day the Writs are beſpoke*; and that they never knew it otherwiſe, or that the Practice was ever conteſted before the preſent Caſe; and his Lordſhip decreed accordingly. Wms's Rep. 437, 438. Trin. 1718. Price v. Chewton Hundred in Somerſetſhire.

13. The *Capias* ad Reſpondendum was *directed to the Sheriff* (ſingular) *of London, teſted the 13th of February*, which was the Day after the End of laſt Hillary Term. It was moved to quaſh it, alledging Defendant has no other Remedy to take Advantage thereof, becauſe he *cannot have Oyer of the Writ*; *nor will it appear upon the Record in caſe of a Writ of Error.* A Rule was to ſhew Cauſe, which was afterwards made abſolute. This Writ bearing Teſte in Vacation is void. Barnes's Notes in C. B. 291, 292. Eaſt. 7 G. 2. Bennet v. Sampſon.

Rep. of Pract. in C. B. 99. S. C. accordingly.

(C) In whoſe Name.

1. IF the *King dies in the Morning, all Proceſs* and Patents *ſhall be in his Name* all this Day, and not in the Name of the new King; Per Ellerker & Fulth. Br. Jours, pl. 34. cites 4 H. 6. 7.

2. The *Lord Chief Juſtice* of the King's Bench *died about* 11 *in the Morning*, and all the *Writs* which were *ſealed that Day, bore Teſte in his Name*, and all *thoſe* which were *ſealed the next Day*, bore Teſte *in the Name of the ſecond Juſtice of the King's Bench.* Cro. C. 393. pl. 3. Hill. 10 Car. a Memorandum.

For more of Teſte in general, ſee **Executions, Teſtatum,** and other Proper Titles.

Time.

(A) Time. *Day.* In what Caſes the Day ſhall be taken *Excluſive.*

1. IF a Man leaſes for Years, Habendum from the Sealing and Delivery of the Deed, the Day is not excluded, but it ſhall commence preſently after the Delivery. H. 32 El. B. R. between *Higham and Cole.* Dubitatur. Co. 5. * *Clayton* 1. Co. Litt. 46. b.

* S.C. cited Arg. 3 Lev. 438. in Caſe of Hatter v. Aſh.

Hob. 140. pl. 190. in Caſe of Norris v. the Hundred of Gawtry. ——— 5 Rep. 1. Mich. 27 & 28 Eliz. B. R. Clayton's Caſe. ——— Mo. 879. ſaid by Hobart to have been ſo adjudged.

2. So if it had been Extunc, or from the making, it ſhall commence preſently. Co. Litt. 46. b. Hobart's Reports 188.

3. But if a Leaſe be made, Habendum from the Day of the Date, or from the Day of the making, the Day ſhall be taken excluſive. Co. Litt. 46. b.

Roll. Rep. 387, 388. S. C. Doderidge ſaid nothing, but all the others agreed that the Day ſhall be excluſive. ——— 3 Bulſt. 204. S. C.

4. [But] if a Man leaſes for Years, Habendum from the Date, the Day of the Date ſhall be taken excluſive. Tr. 14 Ja. B. R. between *Bacon and Waller* adjudged per Curiam. Co. Litt. 46. b.

But Trin. 8 W. 3. C. B. it was adjudged by 3 Judges againſt Treby Ch. J. that ſuch Habendum includes the Day of the Date. 2 Salk. 413. pl. 1. Haths v. Aſh. ——3 Lev. 438. S. C. by the Name of **Hatter v. Aſh**, and was of a Leaſe made by a Prebendary for Life Habendum a Datu; and adjudged accordingly by Nevil, Powel ſenior & junior, Treby Ch J. being now e contra, tho' himſelf at firſt was of the ſame Opinion, but chang'd it, and was not preſent when the Judgment was given, but, as it was ſuppoſed, abſented himſelf purpoſely; and note alſo, that Powel junior was at firſt of Opinion for the Plaintiff, but afterwards chang'd it, and was of Opinion for the Defendant, ſuch Variety and Change had there been in this Caſe. ——Ld. Raym. Rep. 84. S. C. And there it was urg'd, that tho' Co. Litt. 46. is objected to the contrary, yet that Book is founded upon 5 Rep. 1. b. Clayton's Caſe, where

where this Point is not reſolved by the Court, but inferr'd by the Reporter of the Caſe from Popham in Dyer 218. which Book does not warrant any ſuch Opinion. And tho' 3 Bulſt. 203. Bacon v. Waller. Mo. 40. pl. 128. agrees with 5 Rep. 1. yet Cro. J. 135. Osborne v. Rider, and 258. Luellin v. Williams, are contrary. And for theſe and other Reaſons, the ſaid 3 Juſtices held the Leaſe good, and gave Judgment accordingly.

5. If A. makes an Obligation to B. dated 1 May, and B. the Obligee after makes Releaſe to A. dated the ſame Day, of all Actions till the Day of the Releaſe, this ſhall not releaſe the Obligation. Dubitatur. H. 3 Ja. B.

Treſpaſs was done *in the Morning*, and the ſame Day *at Noon a Releaſe was made of all Treſpaſſes; afterwards on the ſame Day another Treſpaſs was done.* In Treſpaſs brought for a Treſpaſs generally done on that Day, the Defendant might plead generally the Releaſe given on that Day, and then the Plaintiff in his Replication muſt divide the Day, to ſhew that the Treſpaſs was done after the Releaſe in that Day Moor 596. pl. 812. Trin. 33 Eliz. in Caſe of Plaine v. Bynd.

6. In caſe of a Protection, the Year ſhall be accounted from the Day of the Date, excluding the Day of the Date. Hobart's Reports 188.

Hob. 139. pl. 190. in Caſe of Norris v the Hundred of Gawtry.——Mo. 879. pl. 1233. in S.C.

7. A Deed of Bargain and Sale may be inroll'd within ſix Months after the Day of the Date, excluding the Day of the Date. Hobart's Reports 188.

Roll. Rep. 387. Arg. in Caſe of Waller v. Bacon, cites D. 5 Eliz. Popham's Caſe; And the Reporter ſays Nota, it has been reſolved alſo, that if it be inroll'd the ſame Day on which it bears Date, it is good.

8. An Action to be brought upon the Statute of Hue and Cry upon a Robbery, ought to be brought within a Year after the Robbery done, including the Day upon which it was done. Hobart's Reports 188. *Norris and Hundred of Gautris*; for it is an Act, not a Date.

Hob. 139, 140 pl. 190. Hill 14 Jac. S. C.——Mo. 878. pl. 1233. S. C.——Brownl. 156. S.C. accordingly.

9. If a Man leaſes for Years, rendering Rent for one whole Year, viz. a Feſto Sancti Michaelis * uſque ad Finem Termini prædicti; in this Caſe the Rent ſhall be due on the Feaſt-Day itſelf; for the Premiſſes of the Reſervation are † generally, rendering Rent, for one entire Year, which is from the Time of the Reſervation, and therefore the Feaſt is not excluded. And when he goes further, and ſays, viz. a Feſto Sancti Michaelis, thoſe Words are void, inaſmuch as they are repugnant to the Premiſſes. Paſch. 43 El. B. R. per Curiam, between *Umble and Fiſher.*

Cro. E. 702. S. C. but there the † Fol. 521. Declaration was held to be ill, and Judgment for the Defendant.——

* Tho' in *Pleadings Uſque* tale Feſtum will exclude that Day; yet, in caſe of a *Reſervation*, it is to be govern'd by the Intent. Vent. 292. Hill. 27 & 28 Car. 2. B. R. Pigot v. Bridges.

10. If a Man in Debt for Rent declares, that 25th March, 15 Jac. he leaſed certain Land to the Defendant, Habendum abinde, for a Year, rendering ſo much Rent half-yearly at the Feaſt of St. Michael, and the Annunciation, by equal Portions, during the Term. For the ſaid Rent, due at the ſaid 2 Feaſts, he brings the Action; and moved in Arreſt of Judgment, that the Leaſe commenced the 25th Day of March, and ſo all this Day is taken inclusive; and then the Leaſe ended the Day before the next 25th Day of March, and ſo the Rent reſerved after the Term ended, and therefore no Action lies for it. But reſolved, that by the Word Abinde, the 25th Day of March being before mention'd, the ſaid 25th Day ſhall be taken exclusive, and ſo the Rent reſerved within the Term. Mich. 2 Car. between *Benedict Hall and Dewe.* Adjudged.

11. If

‡ The Day, as for *Payment of Money* determines at Sun-set. But for *making Arbitrement*, &c. continues till 10 and 11 o'Clock at Night. 2 And 38, 39. pl. 25. Arg. in Case of Banester v. Trussel.

11. If the Condition of an Obligation be to stand to the Award of J. S. Ita quod fiat upon or before the first Day of &c. And an Award is made upon the said first Day of between 6 and 7 o'Clock, post occasum Solis. This is a good Award within the Condition; for if it be within the natural Day it is sufficient, and not like to the ‡ Payment of Money to bind Men to attend it. P. 11 Car. B. R. between *Church and Greenwood*. Adjudged per Curiam, upon a Special Verdict. Intratur Mich. 10 Rot. 497. Note, that Master Hodgson, an Attorney of Staple's-Inn, shew'd afterwards to me a Precedent of Mich. 18 & 19 El. B. between *Raven and Lytwin*, adjudged accordingly, upon a Special Verdict, per Curiam, because they said that the Day to this Purpose has Continuance till Midnight.

Cro E. 218. pl. 5. S. C. adjudged for the Plaintiff; but it does not appear that any Exception was taken there to this Point, or that the Court took any Notice of it.

12. *Assumpsit* on the 11 Sept. *to deliver certain Goods* to the Plaintiff, *if* they were *not claim'd by any other before the* 14 *Day of September*; and alledged, that there was no Claim made after the 11 Day unto the 14 Day. After a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Declaration was ill; because the Plaintiff should have *alledged, that no Claim was made after the Promise*, (and not after the 11 Day of September) *unto the* 14 *Day* &c. But adjudged well enough; for the especial Matter on the Division of the Day, ought to come in by the shewing of the other Side; or otherwise it shall not be intended. Mo. 596. pl. 812. Trin. 33 Eliz. Rot. 700. Plaine v. Bynd.

——Le. 220. pl. 303. S. C. but nothing said as to this Point ——But Cro. E. 301. pl. 16. Bynde v. Plaine, S. C. affirm'd in Error, where this very Matter was assign'd for Error.

3 Bulst. 204. in S. C. says, As to this Point the whole Court agreed in Opinion, according to the Judgment given in Luellin's Case, that the same is all one.

13. *Habendum a Datu*, and *a Die Datus*, are all one. Roll. Rep. 387. in Case of Bacon v. Waller. Arg. cites it to have been adjudged, Mich. 8 Jac. in the Case of Luelling v. Morgan. But Serjeant Athow and Moore seem'd e contra. But Crook and Haughton thought them all one: But Coke was not then present; and the Court said, they would see the Record of that Case.

——Bulst. 177. Trin. 9 Jac. Anon. Fleming Ch. J. held a Die Datus to be exclusive, but that a Datu was inclusive of the Day. And he took this Difference, Where it is in a Case and Point of Interest, that is convey'd or pass'd from one to another, As in case of a Lease for Years, or any other Interest that is pass'd; and so is Clapton's Case, Coke 5. pa. fo. 1. But Where it is in Matters of Account, where no Matter of Interest is to be pass'd or convey'd, as if one be to be accountable to another, and that by Deed, be the same to be done, a Die Datus, or a Datu, in this Case no Interest passing by the Deed, be the same a Die Datus, or a Datu, it is all one, and no Difference between them; as was clearly held by Flemming Ch. J. and so agreed by the Court.

S. C. and same Difference cited Arg. Lord Raym. Rep. 85. Trin. 8 W. 3. in Case of Hatter v. Ash. And of this Opinion was Powell, Sen. but the others said nothing.

S. C. cited 2 Lutw. 1593. by the Reporter in a Nota, in the Case of Bellasis v. Hester.

14. If a Submission be *to an Award, so as it be made within* 6 *Days after the Submission*, an *Award made on the same Day* on which the Submission was, is good; because the Day of the Award shall be taken inclusive, and not exclusive; Per Roll Ch. J. Stile 382. Trin. 1653. B. R. Clark's Case.

12 Mod. 256. S. C.—Lord Raym. Rep. 480. S. C.

15. *Insurance* of H.'s Life for a Year. H. *died on the last Day*. The Insurer is liable. 2 Salk. 625. pl. 3. Trin. 11 W. 3. B. R. at the Sittings at Guildhall, Sir Robert Howard's Case.

16. When the *Computation* is to be made *from an Act done*, the Day in which the Act was done must be included; because since there is no Fraction in a Day, that Act relates to the first Moment of the Day in which it was done, and was as if it were then done. But *when* the Computation is to be *from the Day itself*, and not from an Act done, there the Day in which the Act was done must be excluded by expres Words of the Parties. *As* if a *Lease* be made *to commence a Die Datus*, the Day is

is excluded; but if it be a *Confectione*, which is an Act done, the Day of the making ſhall be included. Per Powell & Nevil J. Contra Treby. Ld. Raym. Rep. 281. Mich. 9 Will. 3. in Caſe of Bellaſis v. Heſter, cites Clayton's Caſe. And Treby Ch. J. admitted that Caſe to be good Law.

17. The Law will never account by Minutes or Hours to make *Priorities in a ſingle Day*, unleſs it be *to prevent* a great *Miſchief* or Inconvenience; as if a Bond be made the 1ſt Day of January, and this *Bond* is *releaſed the ſame Day*, the Bond may be averr'd to be made before the Releaſe. So if a *Feme ſole binds herſelf* in a Bond, *and the ſame Day marries*, one may aver, that ſhe married after the Bond deliver'd. In Aſſiſe it appears, that the *Diſſeiſin* was *done the ſame Day on which the Writ was Teſte*; yet this ſhall not abate the Writ, becauſe the Aſſiſe might be purchaſed after the Diſſeiſin; Per Cur. Ld. Raym. Rep. 281. Mich. 9 W. 3. in Caſe of Bellaſis v. Heſter.

18. A. was *born Feb.* 1. at 11 *at Night*; and *January* 31, *at* 1 *in the Morning*, A. makes a Will of Lands, and dies. 'Tis a good Will, for he was then of Age; ſaid, per Holt Ch. J. to have been ſo adjudged. 1 Salk. 44. Mich. 3 Annæ, B. R. Anon.

S. C. cited by Holt Ch. J. 2 Salk. 625. pl. 3. Trin. 11 W. Lord Raym.

3. at the Sittings at Guildhall, in Sir Robert Howard's Caſe.——S. C. cited by Holt. Rep. 480. in S. C.——And in 2 Ld. Raym. Rep. 1096. Mich. 3 Annæ, in Caſe of Fitzhugh v. Dennington.

(A. 2.) Day. *How* to be *computed.*

1. WHere the *King dies one Day, and another* King is *made the ſame Day*, this Day ſhall be the Day of the old King; Quod quære; for otherwiſe it was computed in 1 E. 6. and if he miſtakes his Day, this ſhall be at his Peril in Mortmain. But it is ſaid that it was not greatly argued by the Court, nor adjudged. Br. Jours, pl. 49. cites 7 H. 7. 5.

2. *Citra Feſtum Sancti Johannis*; Per Frowike Ch. J. The Feaſt in our Law commences in the Morning, and ends at Night, and the *Natural Day* begins ad Ortum Solis, and ends ad Occaſum Solis, and ſo is taken and adjudged in our Law; but the Feaſt, by the Law of the Church, commences at Noon in the Vigil, and continues till the next Day at Midnight; and the *Night as to Burglary* commences ad Occaſum Solis, and continues ad Ortum ſolis. Keilw. 75. Mich. 21 H. 7.

3. There is no *Fraction* of a Day but in ſpecial Caſes, and then the Day of Payment, (viz. of a *Bill of Exchange* payable one Day after Sight) ſhall *commence after Midnight*, and from this Time he ſhall have an intire compleat Day, conſiſting of 24 Hours, to pay the Bill; for a Day to this Purpoſe commences always at Midnight, and always conſiſts of 24 Hours; Per Treby Ch. J. 2 Lutw. 1593. in Caſe of Bellaſis v. Heſter.

(A. 3.) Where there ſhall be a *Priority* and *Poſteriority*, as to Things done on the ſame Day.

1. IF a Man *brings Aſſiſe*, and the *Tenant aliens the ſame Day that the Aſſiſe is purchaſed*, yet the Writ is good; for this Day is adjudged in Law *all the Day of* the Plea; quod nota. Br. Brief, pl. 275. cites 17 Aſſ. 21.

S. C. cited Arg 2 Lutw. 1592. in Caſe of Bellaſis v. Heſter.

2. In Falſe Impriſonment the Defendant *juſtified*, for *that on the 29th Sept. he was choſen Mayor of Lynn, and* that *a Plaint was levied in the Court there againſt the Plaintiff, for which he was committed by the Mayor to the Gaol there.* Upon Demurrer it was objected, that the Defendant did not anſwer to the Time of the Day before he was choſen Mayor; for the Commitment might be the ſame Day before he was choſen Mayor; But adjudged for the Defendant; for the Juſtification ſhall be intended for the whole Day, and if the Commitment was before he was Mayor, the Plaintiff ought to ſhew it. Cro. Eliz. 168. pl. 4. Hill. 32 Eliz. B. R. Smith v. Hellier and Clerke.

3 Bulſt. 222. Mich. 14 Jac. S. C. —— Roll. Rep. 413. pl. 1. S. C.

3. A. became indebted to B. for Wares, and in Conſideration thereof Poſtea Eodem die promiſed to pay it; and ſuch Declaration was ruled good, not as a Promiſe in Law, but as an actual Promiſe raiſed upon a Conſideration continuing; which ſhews that *little Diſtance of Time* (tho' the ſame Day) *alters the Intendment of the Law*; cited per Roll. Allen. 70. as 14 Jac. the Caſe of Hodge v. Vavaſor.

4. If a *Writ abates* one Day, and *another* Writ is purchaſed which *bears Teſte the ſame Day*, it ſhall be intended after the Abatement of the firſt. Allen 34. Mich. 23 Car. B. R. in Caſe of the Earl of Northumberland v. Green.

5. Error was brought to reverſe a Judgment in an Action for Words, and aſſigns for Error, that the *Plaint* was *entered the ſame Day that* the *Words were ſpoken*, which was ſaid ought not to be, becauſe the Action ſhould be brought after the Words ſpoken, which ſhall not be intended to be, if it be the ſame Day; for the Law admits of no Fractions of Time, which will be if the Day be divided into ſeveral Parts as it here muſt be, for there muſt be one Hour ſuppoſed when the Words were ſpoken, and another Hour when the Plaint was entered. But Roll Juſt. ſaid, It was well enough, and ordered the Plaintiff to take her Judgment Niſi Cauſa, before the End of the Term. Sty. 72. Mich. 23 Car. Symons v. Low.

So in the Caſe of an *Execution, As* where 2 *Fieri Facias's are delivered to the Sheriff the ſame Day*, there is a Prius & Poſterius, and tho' that which was firſt delivered was teſted after the other, yet it ſhall be preferred. Otherwiſe the Sheriff is liable. 12 Mod. 14. Smallcomb v. Buckingham. —— 1 Salk. 320. pl. 4. S. C. —— S. C. cited Arg. 6 Mod 292. by the Name of Smallcombe. v. Croſſe.

6. If 2 *Informations* are preferred the ſame Day, which referr to the firſt Day of the Term, yet it may be examined which of them was firſt preferred. Per Levins Accouncel Arg. 2 Lutw. 1591. in the Caſe of Bellaſis v. Heſter.

1 Salk. 320. S. C. * S. P. Arg. Sty. 119. in Caſe of Corniſh v. Cowſey. —— Yelv. 87. S. P. and in general Intendment, what is done in one Day is done at the ſame Time. In Caſe of Dorington v. Eaſte.

7. There is no * Diviſion of a Day, unleſs in Caſe of *Neceſſity* as in Co. Litt. 135. and 6 Rep. 33. b. where there was a Priority of an Inſtant. Arg. 5. Mod. 377. in Caſe of Smallcomb v. Buckingham.

(B) *Year. How* it ſhall be *accounted.*

1. PER Statutum de Anno biſſextili editum, 21 H. 3. it is ordained that to avoid the Doubt which has been made, Computetur dies Excreſcens in Anno biſſextili in ipſo Anno, & ſic habeatur de menſe illo in quo excreſcit & contineatur dies ille excreſcens in integritate Anni prædicti & deputentur dies ille & dies proximo præcedens pro unico die.

2. If

2. If a Condition be that if a Rent be Arrear at Mich. by a Quarter of a Year after, it ſhall be lawful to re-enter, the Quarter of a Year ſhall be accounted by the Days of the Year which is that 91 Days make a Quarter, and for the 6 Hours over the Law has not any Regard. D. 17. 18 El. 345. 5.

3. Declaration in Debt for Rent *Pro Reditu Unius Anni finiti a Feſto Mich. primo ad Feſtum Anno Secundo Caroli*, After Verdict Judgment was arreſted, becauſe this cannot be a Year, being between the Feaſts. Palm. 531. Paſch. 4 Car. B. R. Bligh v. Trefrey

4. Where *Time* mention'd *in any Statute* is *expreſſed by the Year, half Year, or quarter of a Year* it is always computed in Law by *Solary Months*, viz. 12 Kalendar Months for a Year; But *where Months are mentioned* in a Statute and not Years, thoſe are always computed by the Moon, viz. 4 Weeks to the Month. And ſo the Statute againſt Deer ſtealing, appointing the Proſecution to be within 12 Months after the Fact, and 12 Lunary Months being expired before any Proſecution; The *Conviction was quaſhed* for the Reaſon. Carth. 407. Trin. 9 W. 3. B. R. in Caſe of the King v. Peckham.

Cro. J. 166. pl. 6. Trin. 5 Jac. B. R. Biſhop of Peterborough v. Catesby, S. P. —— 2 Show. 206. pl. 215. Trin. 34 Car. 2. B. R. the King v. Spiller. S. P.

5. It was moved to ſet aſide an Execution for Irregularity, upon Suggeſtion, that when he *confeſſed* the *Judgment* the Plaintiff and he *agreed, that Execution ſhould not be taken out till a Year after*; the Plaintiff inſiſted that he had ſtaid a Year; for the Warrant was in a Long Vacation, and the Judgment was enter'd as of Trin. Term before, and the Execution was after Trin. Term following; and ſo the Plaintiff had waited a Year after Judgment enter'd. But the Court was not agreed, *Whether* in ſuch Caſe *the Year* was *to be reckoned from the Date of the Judgment*, *or* of the *Warrant*. 6 Mod. 14. Mich. 2 Annæ B. R. Dillon v. Brown.

(C) *Month.* How the Month ſhall be *computed*.

See (B) pl. 4. —Rent (X. a)

1. IN all Statutes where Mention is of a Month, 28 Days ſhall be intended the Legal Computation. Trin. 5 Ja. B. R. *Catesby's* Caſe, per Curiam agreed.

A Month in *Statutes*, which are only *directory of a Puniſhment for an Offence*, which was at Common Law, is not a Pænal Statute; and in that Caſe the Month ſhall be computed according to the Calendar, and not 28 Days. Sid. 186. Paſch. 16 Car. 2. B. R. on Stat. 13 H. 4. 7. of Riots. King v. Cuſſens & al'. ——See Cro. E. 835. pl. 6. Trin. 43 Eliz. B. R. in an Information on the Statute of Liveries. S. P. Dormer v. Smith.

2. The 6 Months for Proof of a Surmiſe in a Prohibition according to the 2d E. 6. ſhall not be accounted by 28 Days to the Month, but according to the Calendar. Hobart's Reports 242. between *Copley and Collins* reſolved.

Hob. 179. pl. 211. Mich. 14 Jac. S. C.— 2 Mod. 58. Sharp v. Hubbard. Mich. 27 Car. 2. C. B. held accordingly.

3. If an Information upon the Statute of unlawful Games be againſt J. S. * for 7 Months Exerciſe of the Game, in this Caſe the Month ſhall be reckoned by 28 Days to the Month, and ſhall not be reckoned according to the Calendar. M. 11 Ja. B. R. *Whethered's* Caſe, per Curiam.

* Fol 522.

4. If

4. If a Rate be put upon Ale and Beer by the Mayor and Chief Officers of a Town, according to the Statute of 23 H. 8. to continue for 6 Months next enſuing; This ſhall not be reckoned according to the Calendar, but according to 28 Days to the Month. P. 7 Car. B. R. adjudged in the Caſe of one *Evans*, and divers others *Brewers of Exeter*, where it was averr'd that they ſold contrary to the Rate between the Time of the Rate made, and ſuch a Day, which was the End of the 6 Months, according to the Calendar; but [was] 6 Months and 2 Weeks according to 28 Days to the Month, And for this the Indictments quaſh'd.

5. The Words *Six Months*, *in the Statute of* **Uſury and Labourers*, are to be expounded half a Year; (for the Year is mentioned in thoſe Statutes) and they ſhall be reckoned *according to the Kalendar*, as in Caſe of a Lapſe. Jenk. 282. pl. 8.

* S. P. Per Popham Ch. J. which none gainſayed. Noy 37. Anon.

6. In the Caſe of *Policy of Aſſurance* made *to warrant a Ship*, one was bound to warrant a Ship *for* 12 *Months*; and the Truth was, the did not periſh within the Time of the 12 Months, being accounted according to 28 Days; but being accounted by the Kalendar, as January, February &c. it periſhed &c. 1 Le. 96. pl. 125. Mich. 29 Eliz. in the Exchequer, in Sir Wollaſton Dixie's Caſe, Arg. ſays it was ſaid and holden that the Inſurer had not forfeited his Bond.

7. *Tempus Semeſtre* to prevent a Lapſe is to be computed by the Kalendar. 6 Rep. 62. Mich. 3 Jac. C. B. Catesby's Caſe.

Yelv. 100. S. C.—Cro. J. 141. Biſhop of Peterborough v. Catesby. —— And Ibid. 167. pl. 6. in S.C. Yelverton ſaid that Juſtice Walmſley ſhewed him a Precedent in the Time of E. 1. (which was immediately after the Statute) where it was reſolved that Tempus Semeſtre ſhould be taken for the Half-year, and not for ſix Months only.—Per Menſes non per Hebdomedas. D. 327. b. pl. 7. and in Marg. cites Mich. 5 E. 1. Rot. 100 Queen Eleanor v. the Biſhop of Lincoln.——Jenk 282. pl. 8.———Cro. E. 835. Dormer v. Smith.—Verba accipienda ſunt ſecundum Subjectam materiam; and therefore becauſe this Computation of the Months *concerns thoſe of the Church*, it is great Reaſon that the Computation ſhou'd be according to the Computation of the Church, which they beſt know. 6 Rep. 62. Catesby's Caſe.

But where a *Preſentee* was *refuſed for Inſufficiency*, and Notice was given of ſuch Refuſal, and the Cauſe thereof, it was agreed and reſolved by the whole Court, that in the Computation of the 6 Months, in ſuch Caſes the Reckoning ought not to be according to the Kalender, but according to 28 Days. Le. 31. pl. 39. Trin. 27 Eliz. C. B. Albany v. the Biſhop of St. Aſaph.

The 2 Months for *reading the Articles of Religion* are to be reckoned by 28 Days. Lev. 101. Paſch. 15 Car. 2. B. R. Brown v. Spence.

8. A *Twelve-month* in the ſingular Number includes all the Year according to the Kalendar; but *twelve Months* ſhall be computed according to 28 Days for every Month. 6 Rep. 62. Mich. 3 Jac. C. B. Catesby's Caſe.

9. It was agreed by all the Court, that in a *Condition for Rent*, as 38 H. 6. 7. and in Caſe of *Inrolments*, as 5 Eliz. D. 218. and in Caſe of a *Leet* held within a Month after Eaſter and Michaelmas, it ſhall be accounted 28 Days. Cro. J. 167. pl. 6. Trin. 5 Jac. B. R. in Caſe of Biſhop of Peterborough v. Catesby.

Keb. 695. pl. 13. ſays, the Court would not quaſh it on this Exception without Plea.———S. C. cited per Cur. 4 Mod. 186. Paſch. 5 W. & M. in B. R. in Caſe of Barkſdale v. Morgan.

10. It was moved to quaſh an *Indictment upon* the Statute 13 *H.* 4 *cap.* 7 *for a Riot*; for that the Inquiry was not within a Month, (viz.) 28 Days after the Offence committed; but the Court ſaid, that the Time ſhall *not* be *confined to* 28 *Days*, *but to an Almanack Month*. Sid. 186. pl. 9. Paſch. 16 Car. 2. B. R. The King v. Coſins.

Show. 368. Burton v. Woodward, ſeems to be S. C. Adjornatur. —— 4 Mod. 95.

11. Upon the Statute of 1 *W.* & *M.* which *appoints all Biſhops* &c. *to take the Oaths*, the Queſtion was, Whether the 6 Months mentioned in the Statute are to be accounted Kalendar Months or Lunar Months? Per Holt & Curiam, abſente Gregory, This being upon the Conſtruction of an Act of Parliament, it ought to be conſtrued according to our Law, that the 6 Months ſhall be accounted *Lunar* Months. And Holt obſerv'd,

ſerv'd, that there was another Clauſe in the Act for Fellows of Colleges who are not Eccleſiaſtical Perſons, and ask'd whether the 6 Months ſhould be reckon'd Lunar Months for them in this Clauſe, and Kalendar Months as to Biſhops &c. in the other Clauſe, and ſo the ſame Word in the ſame Act be taken in 2 different Senſes? And he ſaid, No. Curia adviſare vult. But they ſeem'd ripe to give Judgment that the 6 Months ſhould be accounted Lunar and not Kalendar Months; and Dolben and Eyre doubted of **Copley and Collins's Caſe**; And Holt ſaid, that that Caſe alone ſtuck with him, and notwithſtanding he inclined fortiter ut ſupra. Skin. 313. Paſch. 4 W. & M. in B. R. Woodward v. Hamerſly.

Burton v. Woodward. Adjornatur. — Comb. 191. S. C. Adjornatur.

12. The Defendant, in Conſideration of 20 Guineas paid him by the Plaintiff, did *covenant*, *upon Payment of* 500 *l.* more, *within one Month next* following, *to transfer* to him upon Notice, *certain Eaſt-India Shares* &c. the Plaintiff averr'd that he tender'd the 500 l. within a Month &c. The Defendant pleaded that the Plaintiff did not tender it within a Month; for that before the Tender 28 Days were paſt from the Day of the Date of the Agreement. And the Truth was, that the *Plaintiff tender'd the Money after* 28 *Days*, *but within a Kalendar Month*. Per Cur. In Common Parlance a Month is taken to be 28 Days in all Caſes but in a Quare Impedit; and Words and Phraſes of Speech muſt be governed by the common Acceptation of the People, and as they are generally underſtood; And ſo held that the Computation in this Caſe muſt be after the Rate of 28 Days to the Month. 4 Mod. 185. Paſch. 5 W. & M. in B. R. Barkeſdale v. Morgan.

13. In Debt upon the Statute 5 *Eliz.* 4. *for uſing a Trade*, the Computation by Kalendar Months was held fatal, but being after Verdict, it was aided. 12 Mod. 641. Hill. 13 W. 3. B. R. Strechpoint v. Savage, and cites Mich. 6 W. 3. The King v. Stowbridge.

(D) *How* to be *underſtood* where it is mention'd generally.

1. WHere a Man *ſpeaks of the Feaſt of St. Michael*, and *does not ſay what St. Michael*, it ſhall be intended St. Michael the Archangel, which is the moſt notable, and not St. Michael in Tumba. Br. Jours, pl. 5. cites 20 H. 6. 23. 2 Inſt. 485. 486.

2. *But* if a Man ſpeaks of the *Feaſt of our Lady*, and does not ſhew which Feaſt, it is ſaid that this is not good. Br. Jours, pl. 5. cites 20 H. 6. 23.

(E) *Pleadings of Time. Neceſſary* to be pleaded. *In what Caſes.*

1. IN *Aſſiſe in London*, it is uſual to put *the Year and Day of the Diſſeiſin*. Contra in other Aſſiſe; for it *is not uſed but in Actions perſonal*, and not in Actions Real nor Mix'd; quod nota. Br. Pleadings, pl 62. cites 20 Aſſ. 6. See (F)

2. Where a Man declares upon an *Obligation without a Date*, he ought to declare *Quando factum fuit*. Br. Obligation, pl. 66. cites 3 H. 4. 5. per Richill.

3. In Treſpaſs, if a Man *juſtifies for Tithes as Parſon at the Time of the Treſpaſs* &c. it is not good; becauſe he *does not ſay*, that he was *Parſon*

as well at the Time of the Severance as at the Time of the Taking. Br. Pleadings, pl. 15. cites 35 H. 6. 48.

4. *So of Villeinage, and ſeiſing of Goods,* he *ought to ſay,* that he was *his Villein as well at the Time of the firſt Taking as at the Time of the ſecond Taking.* Br. Pleadings, pl. 15. cites 35 H. 6. 48.

5. *And* where a *Sheriff juſtifies an Arreſt by Capias,* he *ſhall ſay,* that he was *Sheriff as well at the Time of the Arreſt, as at the Time of the receiving of the Writ.* Br. Pleadings, pl. 15. cites 35 H. 6. 48.

Br. Pleadings, pl. 94. cites S. C.

6. Treſpaſs de clauſo fracto; the *Defendant ſaid, that the Place is a Piece of Land, and that J. W. was ſeiſed of a Houſe in D. of which this Piece was Parcel, and infeoffed A. in Fee, who infeoffed J. B. in Fee who had Iſſue W. and died ſeiſed, and W. enter'd as Heir and infeoffed the Defendant,* and gave *Colour* by J. W. The *Plaintiff ſaid, that he was ſeiſed of a Lane in the ſame Vill in Fee, of which the Place is Parcel, and that the Defendant did the Treſpaſs, Abſque hoc, that it was ever Parcel of the ſaid Houſe,* Prout &c. to which the Defendant ſaid, That it was Parcel of the Houſe in the Poſſeſſion of J. B. and the others e contra, and it was found for the Plaintiff; And Exception was taken inaſmuch as he did not anſwer if it was Parcel of the Houſe at the Time of the dying ſeiſed of J. B. and yet good by the Opinion of the Court; For *when he ſays, that it was Parcel when J. B. was ſeiſed, this ſhall be intended all the Time* that J. B. was ſeiſed, therefore it was Parcel at the dying ſeiſed, and it ſuffices to ſay that W. ut Filius & Hæres enter'd, for this Word (ut) is Tantamount, that he is Son and Heir in Fact. Br. Treſpaſs, pl. 304 cites 3 E. 4. 27.

So where he bought at Bartholemew Fair, without ſhewing the Year. Br. Pleadings, pl. 100. cites 12 E. 4. 1.—So if he had ſaid *upon a Work-Day.*

7. *Treſpaſs of Goods taken at A. in the County of E.* the *Defendant ſaid, that the City of London is an Ancient City* Time out of Mind, and that *there is a Market there every Day except Sunday, and that H. was poſſeſſed of the Goods at London, and on Friday before the Treſpaſs ſold them to the Defendant,* and *did not ſhew any Year*; And yet good per Catesby, Chocke, and Littleton, becauſe he ſaid, that there is a Market there every Day except Sunday. Br. Pleadings, pl. 100 cites 12 E. 4. 1.

Br. Repleader, pl. 31. cites S. C. — *So* in Treſpaſs, when a Man *juſtifies by Command of Ceſty que Uſe,* he *ſhall ſay, that the Feoffees were ſeiſed to this Uſe at the Time of the Command.* Br. Pleadings, pl. 166. cites 10 H. 7. 26.

8. If a Man *pleads that A. was ſeiſed in Fee to the Uſe of B. and that B. gave to him the Trees,* this is not good if he does not *ſay* preciſely, That A. was ſeiſed to the Uſe of B. *at the Time of the Gift*; For Alteration may be Meſne between them. Br. Pleadings, pl. 79. cites 6. H. 7. 3.

So 'tis if he *ſays, that the Place is his Franktenement,* he *ſhall ſay,* that *at the Time of the Treſpaſs,* the Place was his Franktenement, &c. Br. Pleadings, pl. 79. cites 6 H. 7. 3. —— *Contra of Things which may be intended to have Continuance.* Br. Pleadings, pl. 79 cites 6 H. 7. 3.

9. Where a Man *pleads a Leaſe for Years and Releaſe,* he ſhall ſay, that he was *poſſeſſed at the Time of the making of the Releaſe.* Br. Pleadings, pl. 166. cites 10 H. 7. 26.

10. The Time of *Seiſin in a Quare Impedit* is immaterial, and Seiſin *generally in the Time of Peace, in the Reign of ſuch a King,* being alleged, it is ſufficient. Per Holt Ch. J. Skin. 660. in Caſe of the King v. the Biſhop of Cheſter.

11. *Aſſumpſit to run a Horſe at ſuch Time and Place as the Plaintiff ſhould appoint,* and the Plaintiff *declares, that he did appoint ſuch a Day*; It was doubted, Whether this was appointing a Time, which is more certain and determinate than a Day: But Curiam, by appointing a Day *the Law will* ſupply the Reſt, and *fix it to the moſt uſual and convenient Time of that Day.* 3 Salk. 346. pl. 1. Trin. 11 W. 3. B. R. Scott v. Hogſon.

12. In pleading *want of Aſſets* by an Adminiſtrator the Time muſt be ſet forth. See 12 Mod. 611. Hill. 13 W. 3. Ingram v. Foot.

13. In

13. In *Tranſitory Actions* Time and Place are *not* material, but the Plaintiff may declare at any Time or Place. 10 Mod. 251, 348. Hill. 3 Geo. 1. B. R. Caſe v. Hawkins.

(F) Pleadings. In what Caſes a *Day* muſt be ſhewn *certain.*

1. IN Treſpaſs the *Defendant pleaded a Gift of the Plaintiff*; and the *Plaintiff ſaid, that after this Gift, and before the Treſpaſs, the Defendant re-gave it to the Plaintiff*, by which he was poſſeſs'd till the Treſpaſs, and the Defendant maintain'd his Bar, abſque hoc, that he re-gave after the firſt Gift; and this Plea admitted, *without alleging a Day certain.* Br. Pleadings, pl. 142. cites 10 H. 6. 16. Br. Viſne, pl. 110. cites S. C.

2. *In Debt upon Account by an Executor*, the *Defendant ſaid, that the Teſtator made the Plaintiff and one W. his Executors at London, who is in full Life, not named in the Writ*, Judgment of the Writ; and the *Plaintiff ſaid, that after this the Teſtator made him his Sole Executor at C. in the County of Middleſex*, Judgment &c. To which the Defendant ſaid, *That the Truth is, that he made the Plaintiff his Executor Sole, but after this he made both his Executors; abſque hoc that he made the Plaintiff his Sole Executor after this.* And he was compell'd to *ſhew Day certain*, viz. that ſuch a Day he made Both his Executors abſque hoc; that he made the Plaintiff Executor Sole after this. For, per Priſot, if all was alleg'd in one County, then the County may inquire of the Time well enough; or if all was alleg'd in two Counties which might join, Viſne ſhould be of both Counties; but London cannot join with any. Therefore, by him and Moile, *Day certain ſhall be alleg'd, and the Viſne ſhall come where the Affirmative is alleg'd.* Br. Viſne, pl. 5. cites 33 H. 6. 44.

3. Where a Man is bound [that J. S. ſhall] enter into ſuch *Land before Michaelmas peaceably*, it is ſufficient to ſay, that he enter'd into it peaceably before Michaelmas, without declaring what Day. Br. Conditions, pl. 79. cites 37 H. 6. 18. *So* where the Condition of an Obligation was, *that the Obligor ſhall not enter nor claim ſuch a Houſe*; and the *Defendant ſaid, that he did not enter nor claim.* Keble ſaid, be claim'd; Priſt. Brooke ſays, it ſeems that he ought to *ſay that ſuch a Year and Day he claim'd.* Br. Conditions, pl. 130. cites 4 H. 7. 13.

4. *Treſpaſs of a Cloſe broken* &c. The *Defendant juſtified, that J. S. held of him, and alien'd in Mortmain, and he enter'd for the Alienation within the Year.* And no Plea; per Cur. Becauſe he *does not ſhew what Day the Alienation was made, ſo that it may appear whether he enter'd within the Year.* Br. Jours, pl. 49. cites 7 H. 7. 5. Br. Count, pl. 59. cites S. C.——S. P. for it ſhall *not be intended that he enter'd within the Year, if* it be not ſhewn; for the Time there is Parcel of the Subſtance of the Bar, and it ſhall not be a good Plea there to ſay, that he enter'd within the Year, *without ſhewing the Day certain*, for the Notice of the Jurors. Arg. Pl. C. 27. b. in Caſe of Colthirſt v. Bejuſhin.—S. P. 33. b. in S. C. by Mountague Ch. J.

5. *But* in *Formedon*, if the *Tenant pleads Nontenure*, and the *Demandant ſaid that he was Tenant, and made Alienation to Perſons unknown, to the Intent* &c. *and that he took the Profits, and that he brought his Action within a Year of the Title accrued*; There he ſhall not ſhew Day of the Alienation, but when the Action accrued to him. Agreed, per tot. Cur. Br. Jours, pl. 49. cites 7 H. 7. 5. Br. Count, pl. 59. cites S. C.—— Heath's Max. 8. cites S. C. & 9 H. 6. 115. 16. a.

6. *And* in *Dum fuit infra ætatem* he ſhall not ſhew Day of the Alienation. Br. Jours, pl. 49. cites 7 H. 7. 5. Br. Count, pl 59. cites S. C.

7. But

7. *But* note, that *in* * *Real Actions*, 'tis not uſual to ſhew the Year and Day. *Contra* in *Perſonal* Actions. Br. Jours, pl. 49. cites 7 H. 7. 5.

* S.P. Nor in Mixt Actions, as in Aſſiſe, Waſte, and Quare Impedit. Br. Count, pl. 59. cites S. C.——Heath's Max. 8. cites S. C. and 9 H, 6. 115. 116.

8. If one be bound in an *Obligation to infeoff* another *between the Date* of the Obligation, *and the Feaſt of St. Michael next* enſuing, there, *if Action be ſued* upon the Obligation, it is no Plea to ſay that he infeoff'd him, but *he ought to ſhew the Day certain*; for the Time is Parcel of the Subſtance of the Bar, and if it be omitted it ſhall never be intended. And alſo the Plea ſhould not have been good, if he had ſaid that he infeoff'd him before the Feaſt of St. Michael, without ſhewing the Day certain, for the Information of the Jurors, if Iſſue be join'd. Arg. Pl. C. 27. b. Paſch. 4 E. 6. in Caſe of Colthirſt v. Bejuſhin.

9. Leſſee brought Bill of *Covenant againſt Leſſor*, who had covenanted with him, *that if he was lawfully ejected of any Part* of the Land, that *he ſhould have ſo much other Land* of the Leſſor *during the ſame Term*, and he ſhew'd that he had been ejected of ſuch a Piece of the Land, and did not ſay when; and it was held that he *ought to have ſhewn the Day certain*, inaſmuch as it is Matter of Subſtance. Arg. Pl. C. 27. b. in Caſe of Colthirſt v. Bejuſhin.

12. It is to be noted always for a *general Rule*, That *if he who pleads in Bar is preſcribed to a certain Time*, he ought to ſhew the Day of his Act certainly; Per Mountague Ch. J. Pl. C. 33. b. in Caſe of Colthirſt v. Bejuſhin.

As if one juſtifies *for Common between Lammas and Candlemas*, he ought to ſhew certainly the Time of his uſing thereof; ſo that it may appear to be done between this Time. Pl. C 33. b in Caſe of Colthirſt v. Bejuſhin.

So he who juſtifies *by Licence*, by *Warrant*, *or* by *Authority*, ought always to ſhew the Time certain of his Juſtification. Pl. C. 33. b. in Caſe of Colthirſt v. Bejuſhin.

But he who pleads in the Negative, need not plead certainly. Pl. C. 33. b. in Caſe of Colthirſt v. Bejuſhin.

But he who pleads *in Abatement of a Writ*, *or* pleads a Plea *after the laſt Continuance*, ought to plead certainly; Per Mountague Ch. J. who ſaid that theſe were obſerved as Principles in our Law. Pl. C 33. b. in Caſe of Colthirſt v. Bejuſhin.

Noy 93. S. C. but S. P. does not appear. ——Lat. 205. S. C. but S. P. does not appear.

11. In *Replevin* the Defendant made *Conuſance for a Rent due to J. S. who was ſeiſed as Remainder-man in Tail*, and *averr'd that* the *Tenant for Life was dead*, *but* did *not allege the preciſe Time when* he died. It was * argued, that he need not, becauſe an Avowry (which is in Lieu of an Action) is a real Action, and *in Real Actions* the preciſe Day need not be alleged. Poph. 200. Mich. 2 Car. Dicker v. Moland.

——— Palm. 508. Hill. 3 Car. B. R. S. C. and S. P. argued accordingly; but the Opinion of the Court ſeemed againſt him, and adviſed the taking a new Diſtreſs, becauſe here the Time of the Death of Tenant for Life does not appear whether it was before the Rent Arrear, or not.

* 3 Nelſ. Abr. 287, cites Poph. 201. **Ditcher v. Morland** as adjudged, that he need not ſhew the preciſe Time; but this ſeems to be an Error of the Preſs.

12. In *Aſſumpſit*, the Plaintiff counted, that Defendant in Conſideration of 2 s. promiſed *to carry* ſuch *Goods aboard a Ship*, *if Plaintiff would deliver* them to him, and ſhew'd that he delivered them, but Defendant did not carry them aboard. But Exception was taken, becauſe he *ſaid only Deliberavit*, *without ſhewing when or where*, and then the Law ſays they were not delivered. Per Jones J. The ſame is but Matter of *Inducement to the Promiſe*, and ought not to be ſhew'd ſo preciſely. Godb. 404 pl. 484. Paſch. 3 Car. B. R. Mole v. Carter.

(G) Plead-

(G) Pleadings. Good. Where Time is made *Parcel of the Iſſue.*

1. IN *Replevin Defendant avow'd*, for *that J. S. was ſeiſed and made a Leaſe to B. for* 21 *Years, who* being poſſeſs'd, *aſſign'd his Term to* H. *the Avowant, by which he* enter'd, and was poſſeſs'd; and *on the* 1*ſt Dec.* 18 *Car.* 2. at F. *demiſed for Part* of the Term *to the Plaintiff* rendring Rent; and for ſo much Rent Arrear he avow'd the taking the Beaſts. The *Plaintiff pleaded* in Bar, *that the Avowant upon the ſaid* 1*ſt December* 18 *Car.* 2. aforeſaid at F. *did not demiſe Modo & Forma*, as the Avowant has alleg'd, *Et hoc &c. Unde &c.* After Verdict and Judgment for the Plaintiff in C. B. it was aſſign'd for Error in B. R. that this was *an immaterial Iſſue*, by making the Day and Place Parcel of the Iſſue; for a Demiſe at another Day and Place would maintain the Avowry, and the putting them in is only for Conformity in pleading, but the Plea *ſhould have been general, Non dimiſit Modo & Forma* &c. The Court could not tell for whom to give Judgment according to the Right of the Matter; and after the Matter had been twice argued, whether this Caſe was remedied by the new Statute which cures Defaults where the Right is tried, the Court were of Opinion that it was not, and doubted what to do. But afterwards, upon other Exception taken by Hale Ch. J. to the Avowry, the Judgment was affirm'd. 2 Lev. 11. Trin. 23 Car. 2. in B. R. Holbech v. Bennet.

2 Saund. 317. Bennet v. Holbech, S. C. ſays that Hale Ch J. was of Opinion that the Iſſue and Verdict was aided by the Statute of Jeofails, but Twiſden contra, and that it was not aided by any Statute of Jeofails; but the Judgment was affirm'd. —2 Keb. 825. pl. 45. S. C. according to 2 Saund. as above.

2. In *Account* the *Plaintiff declared, that* upon the 1*ſt March*, 22 *Car.* 2. *and* thence *to the* 1*ſt May*, 27 *Car.* 2. the *Defendant was his Receiver* &c. *Defendant pleads, that* from 1*ſt March* 22 *Car.* 2. *to* the 1*ſt May* 27 *Car.* 2. *he was not his Receiver* &c. The Plaintiff demurr'd ſpecially, becauſe the Time from the 1ſt March to the 1ſt May are made Parcel of the Iſſue, which it ought not; becauſe Plaintiff muſt allege a Time for Form's ſake, and *Defendant might ſay* he was *not Receiver Modo & forma* &c. Beſides the Defendant was charged as Receiver on the 1 Day of March; and he pleads, that he was not Receiver from that Day; ſo the Day was excluded, which the Court held an incurable Fault, and that the Time ought not to be made Parcel of the Iſſue. And Judgment, quod computet. 2 Mod. 145. Hill. 28 & 29 Car. 2. B. R. Brown v. Johnſon.

3. When *by a Traverſe* the Time is made Part of the Iſſue, ſuch Traverſe is never good; per Cur. 5 Mod. 286. Mich. 8 W. 3. Blackwell v. Eales.

For more of Time in General, ſee **Arbitrement, Condition, Limitation, Payment, Stocks, Tender,** and other Proper Titles.

Title.

See Right (A) pl. 4.

(A) *What* is.

1. *Poſſeſſion* is a good Title, where no better Title appears. See Maxims, *In æquali Jure melior eſt Conditio poſſidentis*; and *Qui prior eſt tempore, potior eſt Jure, in æquali Jure.*

2. A *Preſcription*, that is *to claim a real Intereſt in Alieno ſolo*, is a Title, and as a Title muſt be ſtrictly and curiouſly pleaded; Per Sir Francis North Arg. Vent. 386. in Caſe of Potter v. North.

(B) *Preference. Where a Man has ſeveral* Titles, which ſhall be preferr'd.

See more at Tit. Remitter, and at Maxims Quando duo Jura &c.

1. WHEN 2 Titles concur, *the beſt ſhall be preferr'd*; as where *Diſſeiſor leaſes the Land to the Diſſeiſee* for Years, or at Will, if *he enters*, the Law will ſay that he is in of his Ancient and better Title. Finch's Law 16. a. S. 95.

2. It was enacted by Act of Parliament, that all the Lands of S. ſhould be forfeited to the King, of whomſoever they were holden. S. held ſome Lands of the King; the King had that Land *by Eſcheat by the Common Law, and not by the Statute.* Arg. Godb. 309. cites Sir Ralph Sadler's Caſe.

S. C. cited 4 Le. 141. in Englefield's Caſe, and in Mo. 319. S. C.

3. *Abbot* ſeiſed in Right of his Houſe, committed *Treaſon*, and *made a Leaſe* for Years, and *then ſurrender'd his Houſe* to the King after the Statute 26 *H.* 8. 13. 'Twas adjudged that the King was in by the Surrender, and not by the Statute, and ſo ſhould not avoid the Leaſe. But if the King had it by Force of the Statute, then he ſhould have avoided the Leaſe. Arg. Godb. 311. cites the Abbot of Colcheſter's Caſe.

4. *Tenant in Tail, Reverſion to the King.* Tenant in Tail makes a Leaſe for Years, and is attainted of *Treaſon*, the King ſhall avoid the *Leaſe* upon Conſtruction of the Statute of 26 *H.* 8. 13. which gives the Land to the King for ever. Arg. Godb. 311. cites Pl. C. 360.

See more of this at Tit. Deviſe.

5. If a *Deviſe* be made of Land *to the Heir at Law*, of the ſame Eſtate as would deſcend, it is a void Deviſe; for the Deſcent ſhall be preferr'd. Per Doderidge J. Godb. 412. pl. 489. Trin. 21 Jac. B. R. in Sommers's Caſe.

(C) *Excuſe.*

(C) *Excuſe. Coming in by Title,* How far *favour'd* in Law.

1. IF a *Man diſſeiſes me, and makes a Feoffment*, and *I re-enter*, I ſhall not have Treſpaſs againſt the *Feoffee*; for he *is in by Title, and no Treſpaſſor* to me. Br. Treſpaſs, pl. 35. cites 34 H. 6. 30. by the beſt Opinion.

So of the 2d Diſſeiſor, by ſome; Quære inde, for he is in by Tort. Br. Treſpaſs, pl. 35. cites 34 H. 6. 30. —— *Treſpaſs* lies for Diſſeiſee *againſt Feoffee* of Diſſeiſor; Per Keble and Wood. But Conſtable, Kingſmill, Frowike, and others ſeemed e contra; For by the Common Law, he that was in by Title ſhould not be puniſhed. For if the Heir of Diſſeiſor had Lands which deſcended, no Damages ſhould be recovered againſt him, any more than where he was in by Feoffment, and that was the Reaſon of making the *Statute of Glouceſter, That every one ſhould Anſwer for his own Time*; So where Diſſeiſor ſells Trees, and the Vendee cuts and carries them away, but where the carrying away is to the Uſe of Diſſeiſor, it is otherwiſe. But where Feoffee was Party to the Diſſeiſin by Covin &c. he ſhould be puniſhed. As if I diſſeiſe a Man, and infeoff my Father, who dies ſeiſed, Aſſiſe lies againſt me Hill. 13 H. 7. 15. b. pl. 11. —— See Treſpaſs (T) pl 8. and the Notes there.

2. *But* where *Diſſeiſor commands his Servant to do an Act upon the Land*, and I re-enter, Treſpaſs lies againſt the Servant, by the beſt Opinion. Quære. Br. Treſpaſs, pl. 35. cites 34 H. 6. 30.

(D) Pleadings. Declaration. In what Caſes a Title muſt be *ſet forth in the Declaration.*

1. IN *Aſſiſe of Common* the Plaintiff ſhall make Title in his Plaint; quod nota: *Tho' the Defendant or his Bailiff cannot challenge it*; quod nota bene. Br. Titles, pl. 22. cites 15 Aſſ. 5.

So in Aſſiſe of *Common of Piſcary* the Plaintiff was compelled to ſhew Title, becauſe it was *againſt Common Right*, and ſo he did; And this ſeems to be in his Plaint, by which he *ſaid, that S. was ſeiſed of the Manor of D. with the Piſcary Appendant, and gave him the Manor cum pertinentiis ſimul cum tota Piſcharia* &c. and alleged Seiſin Per my & per tout. Br. Titles, pl. 48. cites 34 Aſſ. 11. —— Br. Plaint, pl. 17. cites S. C.

2. The Plaintiff *need not to make Title in the Plaint, but where the Plaint is of ſuch a Thing, of which Aſſiſe did not lie at Common Law* but by Statute, As of *Common, Office, Eſtovers* &c. for it lay of the Land and Rent at the Common Law. Br. Titles, pl. 25. cites 22 Aſſ. 45.

Where a *Thing appears to be againſt Common Right as* 'tis of an *Office, Common* &c. there a Man ſhall make his Title in his Plaint; but of a Rent *e contra*, tho' it be a *Rent-Seck or Rent-Charge*. For that does not appear to be againſt Common Right; for it *may be Rent-Service by Intendment till the Title be made*; and *when the Plaint has the Appearance of a Thing which may be intended to ſtand with Common Right*, there the Plaintiff is not always compell'd to make his Title in his Plaint. Br. Aſſiſe, pl. 13. cites 35 H. 6. 6. 7. —— Br. Plaint, pl. 1. cites S. C.

3. In *Quod permittat of a Way* &c. the Plaintiff ſhall make his Title in his Count; per Cur. Br. Titles, pl. 60. cites 30 H. 6. 8.

4. *So in Secta Molindini* &c. becauſe it is a *Thing iſſuing out of another's Soil.* Br. Titles, pl. 60. cites 30 H. 6. 8.

5. *Contra of Common Right.* Br. Titles, pl. 60. cites 30 H. 6. 8.

6. Where a Man *is not to recover the Thing, but Damages for the Thing*, he ſhall not be compell'd to ſhew Title; and e contra in Quod permittat, Aſſiſe &c. where he may recover the ſame Thing. Note the Diverſity. Br. Titles, pl. 3. cites 34 H. 6. 28 & 43.

As in Treſpaſs Quare, Vi & Armis *Warrenam ſuam intravit*, and ſuch like, the Defendant ſhall not ſay, that the Place is his Franktenement, Judgment, if without Title ſhewn

ſhewn &c. For *this Action is in the Poſſeſſion*, and only Treſpaſs *to recover Damages*, and not to recover the Warren. Br. Titles &c. pl. 3. cites 34 H. 6. 28 & 43.——Br. Warren, pl. 2. cites S. C.

Heath's Max. 93. cites S. C.

7. *Entry in Nature of Aſſiſe of Common*; the *Defendant pleaded Non Diſſeiſivit*; and the *Plaintiff gave Preſcription in Evidence, and did not allege it in his Count*, and yet it was permitted; for it ſeems that *Title cannot be made in the Count in this Action, as in the Plaint of Aſſiſe*, and therefore does not lie of the Common. Br. General Iſſue, pl. 68. cites 4 E. 4. 1.

8. *Aſſiſe of an Office*, the Plaintiff made Title in his Plaint, and it ſeems that he ought ſo to do; for this is of a *Thing of which Aſſiſe does not lie by the Common Law*. Br. Titles, pl. 54. cites 2 H. 7. 12.

9. In *Waſte*, when the Defendant makes *Default at the Grand Diſtreſs*, or in a *Quare Impedit*, or in an *Avowry*, in ſuch Caſes the Plaintiff ought to count; *But* he has *no Occaſion to count of a Year and Day*; for the Defendant in one Caſe, and the Plaintiff in the other, where ſuch Default is, has no Day in Court to make a Defence; but in both Caſes a good Title ought to be ſhewn. Jenk. 124. in Caſe 52.

10. For the *Office of Parker or Steward*, there is no Occaſion for any Title; for they are *Offices of Common Right*. It is otherwiſe of a *Rent-Charge*, or *Rent-Seck*, which are againſt Common Right. In an Aſſiſe of theſe, a Title ought to be made. Jenk. 130. pl. 64.

S. C. cited Arg. 6 Mod. 313. to be good, becauſe it was againſt a Wrong Doer.

11. Action ſur le *Caſe*, ſuppoſing that he was *ſeiſed* in Fee of the Manor of H. and *of a Fair* to be held there every Aſcenſion-Day, and that the *Defendant diſturb'd him to take Toll* &c. The Defendant pleaded Not Guilty, and found againſt him. And now moved in Arreſt of Judgment, that the Declaration was not good, becauſe he doth not ſhew a Title to the Fair by Grant, nor by Preſcription, ſo he hath not any Cauſe of Action, Sed non allocatur; becauſe *it is but a Conveyance* to the *Action, and is not any Claim* thereof, as to the Right, as in a Quo Warranto; and therefore the Declaration, without Special Title compriſed therein, is good. Wherefore it was adjudged for the Plaintiff. Cro. J. 43. pl. 9. Mich. 2 Jac. B. R. Dent v. Oliver.

S. C. in Error ruled that he need not ſhew a Title, and it appears not to be the Defendant's Land. Skin. 213. Bold v. Broking.

12. The Plaintiff declared in *Action ſur Caſe for diſturbing his Cattle*, and lays no Title but only in uſing their *Common in ſuch a Cloſe*, but lays no Title; and *Judgment by Nil dicit*. And afterwards, upon a Writ of Error, Exception was taken, for that he lays no Title, which he ought in this Caſe, where he claims an Intereſt, and a *Charge in the Soil of a Stranger*, eſpecially here, being upon a Nihil Dicit, or *upon a Demurrer. After a Verdict*, it is true, it will be well enough; for it ſhall be preſumed the Judge, upon the Trial, made them ſhew their Title. Pollexfen, on the other Side, ſaid that this Action being upon the *Poſſeſſion*, is well enough; and compared it to a *Way*, to a Caſe of *Lights*, to a *Water-Courſe* &c. and cited Caſes where ſuch Actions had been brought. And cited, 1 Cr. 575. the Caſe of **Sands v. Treſuſis**, where an Action for Stopping the Water-Courſe, without laying a Title, was held good upon Demurrer. Skin. 115. Trin. 35 Car. 2. B. R. Brown v. Booking.—Cites 2 Cr. 121.——1 Cr. 325. 499. 575.—2 Cr. 673.

13. Where a *Common* or *Way* is claimed, the Title ought to be ſet forth in the Declaration; but for a *Fair* or *Franchiſe*, which is no Charge to another's Soil, there *Habere debuiſſet* is good without more; Per Holt Ch. J. 12 Mod. 35. Paſch. 5 W. & M. B. R. Anon.

14. Where *Action is brought upon the Poſſeſſion*, and is founded upon a Wrong done upon the Poſſeſſion, and not to the Title, as if brought by a Commoner for digging Coney-burrows, ſo that he cannot enjoy his Common in tam amplo Modo, he need not ſet a Title forth either by Grant Preſcription. 12 Mod. 97. Trin. 8 W. 3. B. R. Birt v. Strode.

S. C. cited per Holt J. 6 Mod. 313.

15. A *Seiſin in Fee* is not neceſſary to be ſet forth, but where a *Preſcription* is to be made; and therefore a Declaration on the Poſſeſſion where

where no Preſcription is made, is as good as upon a Seiſin in Fee. 12 Mod. 98. Birt and Strode.

in Caſe of Tenant v. Goldwin.

16. *Covenant by an Heir againſt an Aſſignee for Rent*; it ſeems that this being brought on the Title, the Title ought to be *ſet forth in the Declaration*, and that the Want thereof will not be made good by Verdict. See 11 Mod. 179. Trin. 7 Ann. B. R. Willet v. Boſcomb.

Where the *Demiſe was made by himſelf*, Plaintiff need not ſet forth any Title; but where it was *made by his Anceſtor, or another*, and he brings his Action, and *intitles himſelf under ſuch*, he muſt ſet forth his Title. Holt's Rep. 568. Willet v. ..... S. C.

17. A. was *poſſeſs'd of a Cloſe adjoining to a Cloſe of B.* the Fence between the ſaid 2 Cloſes had Time out of Mind been repaired by the Tenants and Occupiers of B.'s Cloſe. The Fence was not repaired; ſo that *B.'s Cattle came into A.'s Cloſe*; A. brought an Action on the Caſe againſt B. ſetting forth this Matter, and had Judgment in C. B. and upon Error brought in B. R. this Judgment was affirm'd. And per Cur. This is a Charge upon the Defendant againſt common Right; for the Law bounds every Man's Property, and is his Fence; and this is obliging another to make a Fence for him. And *where a Charge is impoſed upon another againſt Common Right*, and the Charge is laid on him *as Owner of the Soil, or* * *Tertenant*, the Plaintiff in his Declaration muſt make himſelf a good Title; *but where he declares againſt the Defendant as a Wrong-doer only*, and not as Tertenant, it is ſufficient that the Plaintiff declares on his Poſſeſſion. 1 Salk. 335, 336. Mich. 9 Ann. B. R. Starr v. Rookesby.

11 Mod. 168. pl. 4. S C. but S. P. is not expreſsly mentioned.

* Holt Ch. J. allow'd that formerly, and ſtill, there is a *Difference between charging a Tortfeaſor*, and the *Tenant of the Land*; for to charge a Tertenant, one muſt make a Title by Grant or Preſcription; but none need be made againſt a Wrong-doer. 6 Mod. 313. Mich. 3 Ann. B. R. in Caſe of Tenant v. Goldwin.

(E) In what Caſes a Title muſt be ſet forth *in the Pleading*.

1. IN Aſſiſe, if the *Tenant makes Bar by H. who was Heir of N. and ſhews certainly* &c. the *Plaintiff cannot traverſe that H. was not Heir of N. without making to himſelf Title*; Quod nota; for in Aſſiſe the Plaintiff ſhall always make to himſelf Title. Br. Titles, pl. 21. cites 14 Aſſ. 10.

2. Aſſiſe *againſt* 2; the *one pleaded a Releaſe of all Actions Perſonal*, and the *other Jointenancy with a Stranger*, and *none took upon him the Tenancy*, and the *Plaintiff choſe him who pleaded the Releaſe* for his Tenant, and the *Aſſiſe awarded to inquire of the Tenancy, which found for the Plaintiff*; by which *he who pleaded the Releaſe pleaded it again without taking the Tenancy*, and the *Plaintiff ſaid that after the Releaſe he was ſeiſed and diſſeiſed*, and *found for him*; by which he recovered, and the other brought Writ of Error, *becauſe the Plaintiff choſe his Tenant, who pleaded in Bar, and the Plaintiff did not make Title*; and yet becauſe the Defendant who pleaded the Releaſe did not take the Tenancy, therefore the Judgment was affirm'd. Br. Error, pl. 115. cites 17 Aſſ. 25. and 19 Aſſ. 3.——But 17 Aſſ. 25. the Opinion of the Court was againſt the Plaintiff in the Aſſiſe. Br. Ibid.

Br. Titles, pl. 24. cites S. C.

3. In Treſpaſs, the *Defendant ſaid that he gave to W. in Tail, who had Iſſue M. who married Q. and had Iſſue, and died, and the Iſſue died without Iſſue*, and Q. *Tenant by the Curteſy alien'd to the Plaintiff in Fee*, by which the *Defendant entered for Alienation* to his Diſheriſon; and the Plaintiff ſaid that Q. Ne aliena pas, and a good Plea without ſhewing Title; quod nota. And ſo it ſeems that a Man ſhall not be compell'd to

ſhew Title *in Treſpaſs*; for he by his *Poſſeſſion has Title againſt all who have no Title*; Nota; for *Treſpaſs is ſuppoſed in the Poſſeſſion.* Br. Treſpaſs, pl. 38. cites 40 E. 3. 5.

The *Plaintiff may traverſe the Bar* without making Title *in Treſpaſs*; Per tot. Cur. except Brian. Br. Titles, pl. 52. cites 18 E. 4. 10.

4. If a Man *traverſes the Bar*, the Defendant need not make Title *in Treſpaſs*; Otherwiſe it is *in Aſſiſe*. Br. Titles, pl. 6. cites 40 E. 3. 5.

5. *In Mortdanceſtor* &c. it is agreed that the *Tenant may ſay that the Plaintiff has an elder Brother alive, or that he is not next Heir* &c. without *making Title*; for the Action affirms him [Tenant.] Contrary againſt a Treſpaſſor; Note the Diverſity. Br. Treſpaſs, pl. 57. cites 47 E. 3. 5.

6. In *Coſinage*, the Plaintiff *intitled himſelf as Couſin and Heir*, and the *Tenant ſaid that he who is ſuppoſed to die ſeiſed, had Iſſue W. born* and begotten at D. who is *alive*; Judgment ſi Actio; and a *good Plea without intitling himſelf*; *for he has the Poſſeſſion*; And therefore if he can prove that the Demandant has no Title, it is ſufficient. Br. Bar, pl. 17. cites 11 H. 4. 56.

7. *But in Treſpaſs*, if the *Defendant intitles a Stranger*, yet this is no Plea without intitling him to do the Treſpaſs; for there the Plaintiff was ſuppoſed to be in Poſſeſſion at the Time of the Treſpaſs; Note the Diverſity. Br. Bar, pl. 17. cites 11 H. 4. 56.

8. In *Treſpaſs upon Anno 5 R. 2.* it is a good Plea *for the Maſter of an Hoſpital, that J. S. his Predeceſſor was ſeiſed and died, and he was elected Maſter, and entered*, and give Colour; for if he conveys to himſelf a lawful Entry, it is ſufficient. But *contrary in Aſſiſe*, for there he ſhall make Title; for it is not as a dying ſeiſed, and a Deſcent; Quod nota differentiam by ſeveral. Br. Aſſiſe, pl. 11. cites 34 H. 6. 27.

S. P. Per Pigot and Jenney. Br. Treſpaſs, pl. 188. cites 9 E. 4. 49.

9. In Treſpaſs, if the *Defendant pleads Bar, and gives Colour*, the *Plaintiff ought to make Title.* Br. Titles, pl. 44. cites 9 E. 4. 46.

S. P. Per Pigot and Jenney. Br. Treſpaſs, pl. 188. cites 9 E. 4. 49.

10. *But* where the *Defendant pleads Bar, and gives Title in the ſame Bar, and deſtroys it*, there it ſuffices for the Plaintiff to maintain the ſame Title without making other Title. Br. Titles, pl. 44. cites 9 E. 4. 46.

11. *As in Treſpaſs* the *Defendant ſays, that he was ſeiſed, till by B. diſſeiſed, who infeoffed the Plaintiff*, upon whom he enter'd; there it ſuffices *to ſay, that B. did not diſſeiſe the Plaintiff.* Br. Titles, pl. 44. cites 9 E. 4. 46.

S. P. per Pigot & Jenney. Br. Treſpaſs, pl. 188. cites 9 E. 4. 49.

12. *And in Aſſiſe*, if the *Tenant ſays, that he infeoffed the Plaintiff upon Condition, and for the Condition broke he enter'd*; there the Plaintiff may *ſay, that they were not broken.* Br. Titles, pl. 44. cites 9 E. 4. 46.

13. *So* if the *Tenant ſays, that he within Age infeoffed the Plaintiff upon whom he re-enter'd*, there *it ſuffices for the Plaintiff to ſay, that he was of full Age Tempore Feoffamenti*, without making other Title. Quære; for it is but the Opinion of ſome, and ſeveral econtra. Br. Titles, pl. 44 cites 9 E. 4. 46.

14. *So* if he *ſays, that he leaſed to the Plaintiff for Life who aliened in Fee, and he entered*, the Plaintiff may ſay, that he *Ne infeoffa pas.* Per Pigot and Jenney. Br. Treſpaſs. pl. 188. cites 9 E. 4. 49.

15. In Treſpaſs the *Defendant juſtified for Tithes as Parſon imparſonee*, and was compelled to *ſhew how he came to the Parſonage* and ſo he did. Br. Pleadings, pl. 117. cites 21 E. 4. 65.

16. If in Caſe, for diſturbing his Common &c. Plaintiff counts on his *Poſſeſſion*, and after it *appears by Pleading, that Defendant is Owner* of the Land, there a Title muſt be ſet out. As in Treſpaſs for taking and chaſing his Cattle, if Defendant *juſtifies as in his Freehold, and that he took them Damage feaſant*, there the Plaintiff muſt ſhew forth ſome Title in his Replication, in Anſwer to that of the Defendant's in his Bar.

But

But in a Declaration, where the Defendant may be as well ſuppoſed a Stranger as an Owner, there no Title is neceſſary to be ſhewn. Per Holt Ch. J. in delivering the Opinion of the Court. 12 Mod. 98. Trin. 8 W. 3. B. R. in Caſe of Birt v. Strode.

17. Replevin; the Defendant *avow'd for Rent*, that he was *poſſeſs'd of a Houſe for divers Years* then, and yet to come; and that he *leaſed it to the Plaintiff from Year to Year* &c. The Plaintiff replied, *Nil habuit* in Tenementis. Defendant *rejoin'd*, *Quod ſatis habuit in Tenementis*. And upon Demurrer to the Rejoinder it was alleg'd, that the Defendant in the *Rejoinder ſhould have ſet forth a Title*. But Northey for the Defendant moved, that there was no Neceſſity ſo to do; for tho' in *Debt for Rent*, if the Defendant pleads in Bar Nil habuit in Tenementis, the Plaintiff in his Replication muſt ſhew a Title; becauſe in Debt for a Rent, the Plaintiff is not obliged to ſhew a Title in his Declaration, but *Quod cum dimiſit* is ſufficient, Yet in an Avowry it is otherwiſe, for in an Avowry ſome kind of Title muſt always be ſhewn, as was here, viz. that he was poſſeſs'd for divers Years then and yet to come; which being done, there is no Neceſſity to ſet out a Title again in the Rejoinder. Whereon the Court took Time to conſider. And after Northey ſaid, he could not make good the Avowry, and therefore pray'd Leave to amend, paying Coſts. Quod Cur. conceſſit. 12 Mod. 188. Paſch. 10 W. 3. B. R. Chaloner v. Claiton.

Comb. 472. S. C. ſays, the Defendant demurr'd upon the Plaintiff's Replication, becauſe he ought to have traverſed the Title ſet out in the Avowry; it being neceſſary in this Action to ſet forth a Title, and therefore it differs from an Action of Debt for Rent, for

that being a perſonal Action, the Title need not be ſet forth; and if it ſhould, would be unneceſſary, and therefore need not be anſwer'd, as it ought to be in this Caſe. And the Caſe of Symons v. Paſhley, 2 Jac. 2. was cited as Authority in Point; and the Court inclined to that Opinion. Sed Adjournatur — 3 Salk. 306. pl. 1. S. C. according to 12 Mod. and that the Demurrer was to the Rejoinder, and that Mr. Northey moved to amend it; for that he ſaid he could not make it good for want of ſetting forth a Title, and that is not proper in a Rejoinder.—In an Avowry a Title muſt be ſhewn; per Holt Ch. J. 11 Mod. 220. Paſch. 8 Annæ, in Caſe of Harrington v. Buſh.

18. In Replevin for taking a Horſe, the Defendant *avowed*, *that he was poſſeſſed of the Cloſe*, being the Locus in quo &c. *for a Term of Years yet to come*, *and* being *ſo poſſeſſed*, *the Horſe was Damage-Feaſant* there &c. The Plaintiff *replied*, *that the* Defendant was to keep up his *Fences* round the ſaid Cloſe, but that the ſame *being down*, and out of Repair, *the Horſe eſcaped into the Cloſe for want of good Fences*, upon which they were at Iſſue; and at the Trial the Plaintiff was nonſuited; And now it was moved in Arreſt of Judgment, that this Avowry was ill, becauſe in all Avowries for Damage-Feaſant the *Avowant muſt ſhew where the Fee is*, *and and how the particular Eſtate is derived*, quod fuit conceſſum per Curiam, *if there is a Demurrer to ſuch Avowry*; *but* becauſe the *Plaintiff* by his Replication had waived the Matter, and confeſſed and *admitted a Poſſeſſion in the Avowant*, that is ſufficient to juſtify a Diſtreſs Damage-Feaſant, *and has cured this Defect* in the Avowry. 3 Salk. 307. pl. 3. Trin. 12 W. 3. B. R. Freeman v. Jugg.

19. Treſpaſs for going over the Plaintiff's Cloſe *with Horſes*, *Cows*, *and Sheep*; the Defendant *juſtifies*, that he has *a Way for Horſes*, *Cows*, *and Sheep*, *and ſays*, *that* ſuch a Day *he went over with Horſes*; And upon Demurrer it was adjudged ill; For 'tis a Juſtification only for Horſes. Judgment for the Plaintiff. Sed quære. 11 Mod. 219. pl. 7. Paſch. 8 Ann. B. R. Roberts v. Morgan.

20. Action of *Treſpaſs for taking Cattle*, the Defendant *pleads* quod *Poſſeſſionatus fuit* of the Cloſe, and that he took them *Damage-Feaſant*. The Queſtion was, Whether in this Caſe Poſſeſſionatus fuit was ſufficient, Or whether the Defendant ſhould have ſet forth his Title. Holt Ch. J. ſaid, That he thought the *Title could not come in Queſtion*; For the Action is brought only *for taking his Cattle*. If he had claimed the Land, the Action ſhould have been for entering the Land; but where the Treſpaſs is only for *a perſonal Act*, as beating or taking Cattle, Poſſeſſionatus is ſufficient. And Judgment for the Defendant. 11 Mod. 219, 220. pl. 9. Paſch. 8 Ann. B. R. Harrington v. Buſh.

Holt's Rep. 23. pl. 22. S. C. reports, that the Action was for driving and *impounding Sheep*; and that the Defendant *pleaded*, *that A. was poſſeſs'd* of the Cloſe where &c. *for a Term not expired*; *and* A. being *ſo poſſeſs'd*, and the Sheep in the Cloſe doing

doing Damage, *he by Command of A.* and as his Servant, *drove them out and impounded them.* To this the Plaintiff demurr'd, and ſhew'd for Cauſe, that there is no Title ſet forth; and to juſtify this Demurrer were cited for the Plaintiff, Yelv. 74. 2 Cro. 291. Mo. 847. Holt Ch. J. gave his Opinion as here, and per Cur. Judgment for the Defendant.

21. *If A. is poſſeſſed*, and *B.* comes and *treads down his Corn*, and *A. molliter manus impoſuit* to put B. out of his Corn, for which B. brings Aſſault and Battery, A. may plead Quod Poſſeſſionatus fuit &c. and that he molliter manus impoſuit to put C. out of his Corn; And it is good without ſetting forth a Title, for the *Action is Tranſitory and can't be made local but by a Clauſum fregit.* Indeed in an Avowry a Title muſt be ſhewn; but that is not like this Caſe. Per Holt Ch. J. Powis and Gould of the ſame Opinion. 11 Mod. 220. in Caſe of Harrington v. Buſh.

(F) *Pleadings* thereof, *How.* *And* the *Difference* thereof *in* the *Writ* or *Count*, *or* in *Bar.*

1. IN Scire Facias a Man *pleaded, that his Father was ſeiſed of the Manor, and died ſeiſed, and it deſcended to him as Son and Heir*; and per Cur. he *ought to ſhew of what Eſtate his Father was ſeiſed*; quod nota. Br. Pleadings, pl. 33. cites 24 E. 3. 75.

2. Error: A *Rent* was granted *of all his Lands and Tenements in B.* and the *Title was, that he was ſeiſed of certain Lands and Tenements in B.* and yet Judgment affirm'd; for it was ſaid, that it is apparent; but Brooke ſays, Quod mirum, for *Uncertain.* Br. Pleading, pl. 17. cites 8 H. 4. 19.

3. In *Aſſiſe*, the *Tenant ſaid that A. held for Life*, the *Reverſion to J. S. who granted it to his Father.* The *Tenant attorn'd and died*; the *Father enter'd and died*, and *he enter'd as Heir*, and gave *Colour*; and there it was held, that he ought to *ſhew of whoſe Leaſe the Tenant for Life was ſeiſed*; and therefore he ſhew'd of whoſe Leaſe. But Brooke ſays, it ſeems that *in Pleading he ought to ſhew, that A. was ſeiſed in Fee, and leaſed* &c. *But in Writ or Declaration* he may ſay, *that A. gave or demiſed* &c. without alleging that A. was ſeiſed, and gave or demiſed. Br. Pleadings, pl. 18. cites 9 H. 4. 5.

Nor the Heir in Avowry need not allege *what Day the Anceſtor died.*

4. *Avowry by Tenant in Dower*, after Endowment pleaded, aſſigned to her, ſhe need not *allege what Day her Dower was aſſign'd.* Br. Pleadings, pl. 19. cites 11 H. 4. 63.

Br. Pleadings, pl. 19. cites 11 H. 4. 63.

5. If a Man *makes Title in Aſſiſe, or pleads Fine between him and a Stranger, or a Recovery*, he *ſhall ſay, that the Parties to the Fine or the Tenant in the Recovery were ſeiſed at the Time of the Fine or Recovery*, and this by way of Title or Pleading; But Contra by way of Formedon or other Action, or by way of Declaration. Br. Titles, pl. 59. cites 10 H. 6. 21.

6. By Way of Title or Pleading, as *in Barr, Title* &c. a Man *ſhall ſay, that he was ſeiſed* &c. *and leaſed or gave, but by* Way of *Writ or Count* he ſhall ſay, *that he gave or demiſed, without ſhewing that he was ſeiſed and leaſed, or gave*; Note a Diverſity. Br. Pleadings, pl. 13. cites 34 H. 6. 48.

7. *Præcipe* quod reddat *of* 40 *s. Rent*, the *Plaintiff* in his Title *ſaid, that the Tenements put in View, out of which the ſaid Rent ariſes, was a Meſſuage and* 10 *Acres of Land in S. which makes the Houſe and Monaſtery of S. and ſo they did make and were time of Mind ſituate upon the ſaid* 10 *Acres* &c. Br. Pleadings, pl. 29. cites 9 E. 4. 19.

8. Debt

8. Debt upon a Leaſe for Years by the Plaintiff to the Defendant, who ſaid, *that E. was ſeiſed in Fee and leaſed to the Plaintiff at Will, who leaſed to the Defendant*, upon whom *E. entered and ouſted him, before which Entry Riens Arrear*; and 'twas held that it *ſuffices for the Plaintiff to ſay, that E. did not leaſe to him at Will*, without making other Title, Quod nota & quære. Br. Pleadings, pl. 48. cites 21 H. 7. 26.

(G) Pleadings. *What* ſhall be ſaid the *Title, or only Conveyance* to the Title.

1. IN Aſſiſe of Rent, the *Plaintiff made Title that A. his Anceſtor had been ſeiſed of the Rent Time out of Mind in Fee, and that A. granted the Rent to C. in Fee, and that it is deviſable by Cuſtom* &c. and *that C. deviſed to D.* which *D. deviſed to the Plaintiff, who was ſeiſed and diſſeiſed*, and ſhewed the Deed; and well; For the Preſcription is the Title and all the reſt is only Conveyance. Br. Titles, pl. 50. cites 38 Aſſ. 28.

(H) Pleadings. Where it muſt be *ſet forth at large.*

EXecutor *of him who had Land deliver'd to him by Elegit brought Aſſiſe*, and *made general Plaint*; and good. Br. Titles. pl. 25 cites 22 Aſſ. 45.

2. In Aſſiſe the *Tenant pleaded by Eſcheat of his Tenant*, and *gave Colour to the Plaintiff*, and good, and the *Plaintiff ſaid, that J. N. was ſeiſed, and infeoffed him, and ſo was he ſeiſed till diſſeiſed* &c. *and no Title per Cur.* For he *has not traverſed the Bar, nor confeſſed and avoided it*; And ſo it ſeems, that it is no Bar at large, quære inde. Br. Titles, pl. 46. cites 27 Aſſ. 71.

3. A Man need not make Title at large unleſs *in *Aſſiſe only, and in no other Action*, per Moile; which was not denied. Br. Titles, pl. 4. cites 34 H. 6. 46.

* Br. Titles, pl. 12. S. P. cites 21 H. 6. 18. & pl. 36. cites 5 H. 7. 13. —— S. P. Br. Traverſe per &c. pl. 185. cites 5 H. 7. 11. 12.

(I) Pleading Title. *Without ſhewing how his Anceſtor*, or *himſelf came to it* after a Feoffment &c. alleged.

1. IN Aſſiſe the Tenant pleaded in Bar *Deed of Feoffment of the Grandfather of the Plaintiff with Warranty as Aſſignee*, and *ſhewed both Deeds*; the *Plaintiff ſaid, that not confeſſing the Deed, his Grandfather was ſeiſed in Fee and Right, and dyed ſeiſed, by which he entered as Couſin and Heir, and was ſeiſed*, and a good Title, *without ſhewing how he came to it after.* Br. Titles, pl. 19. cites 9 Aſſ. 11.

But where * *Feoffment with Warranty is pleaded in Bar*, the

2. In Aſſiſe, *Releaſe with Warranty of the Anceſtor of the Plaintiff* was pleaded in Bar, and the *Plaintiff ſaid, that the Anceſtor died ſeiſed after*, Et non Allocatur *without ſhewing how he came to it after.* Br. Titles, pl. 20. cites 10 Aſſ. 23.

Plaintiff was permitted to plead the Dying ſeiſed of the ſame Anceſtor, without ſhewing how he came to it after. Quære the Diverſity. Br. Titles, pl. 20. cites 10 Aſſ. 23.

* S. P. per Cur. Br. Titles, pl. 55. cites 9 E. 3. Fitzh. Aſſiſe.

3. In Aſſiſe the *Feoffment of the Anceſtor of the Plaintiff, whoſe Heir* &c. was *pleaded in Bar*, and the *Plaintiff ſaid, that the ſame Anceſtor was ſeiſed and died ſeiſed, and he enter'd as Heir*, and was ſeiſed and diſſeiſed, and a good Title by Award, without ſhewing how he came to it after; quod nota; by which the Aſſiſe was awarded. Br. Titles, pl. 23. cites 17 Aſſ. 18.

4. In Aſſiſe, *Deed of the Anceſtor was pleaded in Bar*, and the *Plaintiff ſaid, that his Anceſtor was ſeiſed, and died ſeiſed*, after whoſe Death *he enter'd as Heir, and was ſeiſed and diſſeiſed* &c. and the Aſſiſe awarded; And yet he did not ſhew how he came to the Land after. Br. Titles, pl. 31. cites 29 Aſſ. 25.

5. In Aſſiſe of Rent, *Deed of the Anceſtor was pleaded*, and by Award the *Plaintiff was received to ſay, that the ſame Anceſtor died ſeiſed of the ſame Rent*, without ſhewing how he came to it after; as well as in Aſſiſe of Land. Br. Titles, pl. 32. cites 30 Aſſ. 33.

So if ſuch Title was *found by Verdict after ſuch Recovery*, per

6. In Aſſiſe, if *Recovery is pleaded in Bar againſt the Anceſtor of the Plaintiff*, it is no Title *that after the Recovery the Anceſtor was ſeiſed in Fee, and died ſeiſed, without ſhewing how he came to it after.* Br. Titles, pl. 55. cites 32 E 3.

Cur. Br. Titles, pl. 55. cites 32. E. 3.—*Contra of a Gift of the Anceſtor* made *by Deed.* Br. Titles, pl. 55. cites 29 Aſſ. 25. —— And ſo ſee *a Diverſity* between *Matter of Record, and* Matter of *Fact.* Br. Titles, pl. 55.

7. *Mortdanceſtor of Seiſin in Fee of J. Anceſtor of the Plaintiff* &c. The *Tenant ſaid, that H. Father of the Plaintiff, whoſe Heir* &c. *was ſeiſed in Fee and the Land is deviſable by Cuſtom*, and he *deviſed to A. for Term of Life*, the Remainder *to this J. in Tail*, and the *Remainder in Fee to be ſold*, and *that the Tenant for Life and* the ſaid *J. are dead without Iſſue*, and *conveyed himſelf to the Land by the Sale of the Fee Simple, and ſhewed the Teſtament* of the Father; Judgment if Aſſiſe &c. And per Cur. in this Caſe the *Plaintiff ſhall not ſay, that he was ſeiſed in Fee, abſque hoc, that he had any thing by the Deviſe*, without ſhewing how he came to it after, by Reaſon that the *Deviſe binds as a Deed indented.* Br. Titles, pl. 48. cites 35 Aſſ. 1.

8. Formedon of *the Gift of R. to B. Father of the Demandant, in Tail* &c. Rede ſaid *that before the Gift A. was ſeiſed in Fee, and leas'd to the ſaid R. for Life*, which *R.* after *gave to B. in Tail*, and the ſaid *A. enter'd after the Gift made to his Diſinheritance.* Hill ſaid, *After this Gift, and the Entry by A.* this ſame *R. was ſeiſed, and gave the Land to B. in Tail, of which Gift this Action is brought*, and no Title, *without ſhewing how R. came to it after the Forfeiture*; by which Hill ſaid, that *after the Death of A. one T. was ſeiſed, and infeoff'd R. in Fee, who gave to the Father of the Demandant* as in the Writ and Declaration &c. Rede ſaid, *T. whom you ſuppoſe to give, nothing had* &c. *and the others e contra.* Br. Titles, pl. 43. cites 3 H. 4. 17.

9. In Treſpaſs the *Defendant pleaded in Bar, and gave Colour to the Plaintiff by Leaſe made to the Father of the Plaintiff at Will, and the Plaintiff thinking that his Father had died ſeiſed in Fee enter'd* &c. The *Plaintiff ſaid that his Father died ſeiſed*, without ſhewing how he came to the Fee. And good per Cur. Becauſe the Defendant in his Bar does not bind the Plaintiff

Plaintiff by Matter of Record to the Eſtate at Will. Br. Titles, pl. 57. cites 10 H. 6. 1.

10. A Man ſhall not make Title *after Act of Parliament, Fine, or Recovery*, but by Matter of later Time; for by ſuch Act againſt his Father, if he enters again, and dies ſeiſed, and his Heir enters, this ſhall not make Title to the Heir, without ſhewing Title after the Recovery &c. Br. Titles, pl. 63. cites 10 H. 7. 5.

(K) Pleadings *by Confeſſing and Avoiding* the Bar by Elder Title.

1. IN Treſpaſs, the *Defendant made Bar, that J. P. was ſeiſed, and infeoff'd M. who leaſed to the Defendant* &c. The *Plaintiff ſaid that before that J. P. any Thing had, W. was ſeiſed in Fee, and infeoff'd two, who gave to W. and his Feme in Tail, the Remainder in Fee to W.* and after *W. and his Feme died without Iſſue*, and *M. as Heir of W. enter'd, upon whom the Plaintiff enter'd, to whom the ſaid M. releas'd all his Right, upon whom J. P. enter'd and infeoff'd* 4, *who leas'd to the Defendant, upon whom the Plaintiff enter'd*, and the Treſpaſs Meſne; this is a good Plea per tot. Cur. Br. Titles, pl. 58. cites 10 H. 6. 14.

(L) Pleading Title *by Recovery*. Good in what Caſes, and How.

1. IN Aſſiſe, the *Tenant pleaded Leaſe by R. his Anceſtor, whoſe Heir* &c. *to K. for Term of Life, who alien'd in Fee*; by which he *enter'd for the Forfeiture as Heir of his Anceſtor, and the Plaintiff claiming as Heir of R. where he was a Baſtard*, enter'd &c. The *Plaintiff ſaid Proteſtando, that he is not a Baſtard, pro Placito that he brought Aſſiſe againſt the Leſſee and the Alienee, and recover'd, at which Time this now Tenant had nothing, nor ever before*, and becauſe the *Judgment* was *againſt a Stranger*, which does not bind this Tenant, and can have no other Effect than to put him in the Poſſeſſion which he had before, the Court was of Opinion that Plaintiff ought not to have Aſſiſe, and ſo he was nonſuited. See Fitzh. Tit. Title, pl. 7. and Br. Titles, pl. 45. cite 10 Aſſ. 20.

2. In *Aſſiſe* by a Feme, the *Tenant ſaid that at another Time the Plaintiff brought Cui in Vita of the ſame Land againſt A. Que Eſtate he has, and appear'd to it*, Judgment if to the Writ of a more baſe Nature ſhe ſhall be admitted; and a good Plea; for by this was the Land diſcharg'd of Aſſiſe. Br. Titles, pl. 35. cites 33 Aſſ. 5.

By which the *Plaintiff ſaid that A. in the Cui in Vita diſclaim'd* &c. by which ſhe enter'd, and was ſeiſed till diſſeiſed &c. and a good Title, and the Aſſiſe awarded; for tho' ſhe by her Suit affirm'd him Tenant at one Time, yet ſhe may agree to the contrary with him at another Time. Ibid.

3. Where a *Recovery is pleaded* againſt a Man, there, Per Finch, *The Parties againſt whom* &c. *ſhall not make Title of later Time, without ſhewing how they came to it*; *but* he may make Title *of Elder Time*, without ſhewing how he came to it. Br. Titles, pl. 7. cites 47 E. 3. 13.

As where a Man ſeiſed of Land takes a Wife, and makes a *Feoffment*, and *ouſts the Feoffee*, and *he recovers by Aſſiſe*, the *Feme brings Dower*, the Defendant pleads the Recovery

covery against the Baron, she may say that long Time before her Baron was seised, so that she might have Dower. Br. Titles, pl. 7. cites 47 E. 3. 13.

And in *Tresspass of Distress taken*, a Recovery *of a Rent Service* is a good Title to it, and to Fealty; for this is *incident* thereto. Quære if the Service had been *Homage*; it seems all one, because a Præcipe quod reddat does not lie of Homage. Br. Titles, pl. 51. cites 39 H. 6. 25.

4. In *Tresspass*, a Recovery is a good Title *without shewing Matter in Fact*; Per Prisot. Br. Titles, pl. 51. cites 39 H. 6. 25.

5. *So* of a Recovery *in Formedon, without alleging that the Donee was seised and gave*; Per Prisot. Br. Titles, pl. 51. cites 36 H. 6. 25.

6. *And* the same Law of an *Assise*, and so in the Case of a *Writ of Right of Advowson*, it is a good Title *without alleging Presentment*. Br. Titles, pl. 51. cites 39 H. 6. 25.

7. *Contrary* of a Recovery *in Quare Impedit*, without Presentment; for Quare Impedit may be against Deforceor, who claims nothing in the Patronage, and there he can recover only the Presentment; and a Writ of Right of Advowson lies not but against the Patron, and there he recovers the Advowson. Note the Diversity; Per Prisot, which none denied. Br. Titles, pl. 51. cites 39 H. 6. 25.

(M) Pleading Title *of his own Possession.*

1. IN Assise, the *Plaintiff said that he himself recover'd the Tenements by Assise against one J. then Tenant, and the Estate, which the Plaintiff here has was by Abatement upon J. pending the Writ* &c. Judgment &c. and it was awarded a good Bar; to which the *Plaintiff said that a long Time before this Writ brought he was seised* &c. And the Assise upon this Title was awarded, *without shewing how he came* &c. Contra in Itin. Derby, Per Herle, where the Recovery was alleg'd against the Plaintiff; and see that he did not shew how he was seised before the Disseisin upon which the other recover'd, but only before his Writ brought, and the Title good, and the Assise awarded; Quod quære; for *at this Day the Plaintiff shall not make Title upon his own Possession, unless in special Case.* Br. Title, pl. 18. cites 9 Ass. 10.

2. In Assise, the *Tenant pleaded Bar by Custom, that the Widow shall hold the whole for her Life, if she remain'd sole; and* that *if she marry the Lord shall have it for her Life*; and that such a Widow married, and he as Lord enter'd &c. The Plaintiff said that she was seised in Fee before she married the first Baron; and it was awarded a good Plea, without shewing Title, and yet it is of her own Seisin; Quære at this Day. Br. Title, pl. 27. cites 25 Ass. 11.

3. *Tresspass* by the Prior of C. *upon Anno 5 R. 2.* the *Defendant said that T. D. was seised in Fee, and gave to W. N. in Tail, and conveyed several Descents, but he did not allege any dying seised to the Defendant*, and *gave Colour to the Plaintiff by him who last died*; and the *Plaintiff said that he was seised in his Demesne as of Fee and of Right in Jure Ecclesiæ suæ, till the Defendant entered where Entry was not to him given by Law, absque hoc that T. D. gave in Tail*, prout &c. and so to Issue, and *found for the Plaintiff*, who pray'd Judgment; and it was *pleaded in Arrest of Judgment, that this was no Title*, because it was *upon his own Possession, without shewing how the House came to it.* And by several it was argued long, that the Title was not good, and Markham Ch. J. was strong that the Title was not good, but the greater Number, and the best Opinion was,

was, that the *Title is good in this Action; for it is only Treſpaſs. Contra in Aſſiſe where a Man ſhall recover Franktenement*; and after Anno 4 E. 4. 17. Judgment was given for the Plaintiff in abſence of Markham, and the Action was in B. R. and Danby Ch. J. of C. B. was ſtrong that the Title is good. Br. Titles, pl. 38. cites 3 E. 4. 18.

For more of Title in General, ſee **Right, Toll, Traverſe, Treſpaſs,** and other Proper Titles.

* Toll.

*Toll to the Fair or Market *is a reaſonable Sum of Money due to the Owner of the Fair or Market, upon Sale of Things tollable* within the Fair or Market, *or for* † *Stallage*, Picage, or the like. 2 Inſt. 220.

(A) What is *Thorough Toll.*

1. †† **Thorough Toll is** properly **where a Toll** is taken of Men for paſſing thro' a Vill in the High Street. ‡ 22 Aſſ. 58. **by Thorpe. Mich. 41. 42 El. B. R. in** || *Smith and Shepherd's* **Caſe.**

† Information againſt B. Farmer of Newgate market, for Extortion, in *taking* diverſe Sums of *Money of the Market-People for* Rent for the Uſe of the little *Stalls* in the Markets, and diverſe great Sums for Fines, and was found guilty. It was held by the Court of B. R. and by Holt Ch. J. at Guildhall, that if the Defendant erects ſeveral Stalls, and does *not leave ſufficient Room for the Market People to* ſtand and *ſell their Wares*; ſo that for Want of Room they are forced to hire the Stalls of the Defendant, the Taking of Money for the Uſe of the Stalls in ſuch Caſes, is Extortion. *But if the People have Room enough* clear to themſelves, to come and ſell their Wares, *but for* their farther *Conveniency* they *voluntarily hire theſe Stalls* of the Defendant, *without any Neceſſity compelling them*, there it is no Extortion, tho' the Defendant takes a Fine and Rent for the Uſe of them. The Law has not appointed any Stalls for the Market People, but only that they ſhall have the Liberty of the Market, which the Defendant does not abridge, having left them Room enough beſides the Place where the Stalls are ſet; and then if they will enjoy the Convenience of the Stalls, they muſt comply with the Defendant's Terms. Ld Raym. Rep. 148, 149. Hill 8 & 9 Will 3. The King v. Burdett.

† S. P. *So* for paſſing Publick *Ferries*, *Bridges* &c. 1 Sid. 454. in pl. 24. cites Blount's Law Dict. Tit. Toll.

‡ Br. Toll, pl. 6. cites S. C.——Fitzh. Tit. Toll, pl. 1. cites S. C.——S. P. And Thorough-Toll is ¶ againſt Common Right. Fitzh. Tit. Toll, pl. 3. cites Trin. 20 E. 3.——And Ibid. pl. 4 cites Anno 8 E. 3. that it is where Toll is taken of Beaſts and Merchandizes which paſs thro' the Vill, tho' they are not ſold.

¶ S. P. Arg. Becauſe it is to be taken in the King's Highway. Mod. 231. in the Caſe of James v Johnſon.

|| Cro. E. 710. S. C.

2. **Thorough Toll** improperly **is when Toll is taken of Men** for paſſing thro' a Vill, in a Place which is not the High Street. **22 Aſſ. 58. by Thorp.**

Toll *Traverſe*, What.

3. **Toll Traverſe is** properly **where a Man pays certain Toll for** paſſing over the Soil of another Man in a Way not a High Street. * 22 **Aſſ. 58. by Thorpe. M. 41. 42. El. B. R. in** † *Smith and Shepherd's* **Caſe.**

* Br. Toll, pl. 6. cites S. C.

† Mo. 574. S. C.—Cro. E. 710. S. C.—S. P. And yet the Owner of the Land cannot juſtify the Taking, unleſs ſuch Toll has been uſed to be *taken Time out*

out of Mind; for otherwiſe he may take the Beaſts Damage feaſant. Fitzh. Tit. Toll, pl. 3. cites Tria. 20 E. 3.

S. P. *So* for paſſing *Ferries and Bridges* which are *private*. 1 Sid. 454. cites Blount's Dict. Tit. Toll. *And Toll-Turn* is a Toll paid upon return of Beaſts from a Fair. Ibid.——Br. Toll, pl. 12. S. P.—S. P. Br. Quo Warranto, pl. 3. cites It. Not. fol. 21. and 32 E. 3.

4. The Words *Toll-Thorough* and Toll-*Traverſe* are *uſed promiſcuouſly*. Arg. And the Court ſeem'd to agree. Mod. 232. in Caſe of James v. Johnſon.

(B) Thorough-Toll. [Pl. 1, 2, 3. and Toll-Travers, Pl. 4. *In what Caſes payable.*]

|| Br. Toll, pl. 6. cites S. C.—— Tho' Toll-Through, ſimply cannot be claim'd, according to 22 Aſſ. [58.] Yet when it is in Conſideration of *Repairing a Bridge*, and *Pavement* of their Street, and Reparation of the *Sea Bank*, it is well claim'd; and ſo it is of Toll-turn. Jo. 162. pl. 2. Trin. 3 Car. B. R. The King v. the Corporation of Boſton.

1. **A Man cannot** preſcribe to have **Thorough-Toll of Men paſſing** thro' a Vill in the High Street, **becauſe it is againſt the Common Law and Common Right; For the High Street is common to all.** || 25 Aſſ. 58. **by Thorpe.** M. 41. 42. El. B. R. **between** ‡ *Smith and Shepherd* **Dubitatur without alleging of a ſpecial Conſideration, as the** Repairing the Way; **but ſo he may.**

Toll for paſſing thro' a Vill may be good; for it *may be a nearer Way*, and he who has the Toll is bound to repair it. Per Holt Ch. J. Comb. 297. Mich. 6 W. & M. in Caſe of Warrington v. Moſely.

Toll-Thorough may be by Preſcription, *without* any *reaſonable Cauſe alleged for its Commencement*; for having been paid Time out of Mind, the True Cauſe of its Beginning in the Intendment of the Law cannot be known. Arg. and agreed to per Cur. Mod. 232. pl. 21. Hill. 28 and 29 Car. 2. C. B. in Caſe of James v. Johnſon.——2 Mod. 143. S. C. but S. P. does not appear.

‡ Mo. 574. S. C.——Cro. E. 710. per Popham, S. C.

2. **And the** King cannot **have ſuch Toll for paſſing in the High Street, as in the Caſe aforeſaid, for the Cauſe aforeſaid.** 22 Aſſ. 58. **by Thorpe.**

3. **A Man** cannot **preſcribe to have Thorough-Toll of Men for paſſing** thro' a Vill in a Place which is not the High Street; **for it is more than the Law allows to go there.** 22 Aſſ. 58.

Br. Toll, pl. 6. cites S. C.

4. **A Man** may **preſcribe to have** Toll-Traverſe **of Men paſſing** over his Soil in a Way which is not a High Street, **and the Preſcription ſhall be good.** 22 Aſſ. 58.

See (H)

[B. 2.] Toll. [*How much.*]

2 Inſt. 222. cites the ſame Book; but ſays, that * Fol. 523. at this Day there is not one certain Toll to the Market taken; but if that which is taken be not reaſonable, it is puniſhable by this Statute; and what ſhall

[1.] 5. **Mirror of Juſtices, fo. 4. b. cap. 1. S. 3. It was ordain'd,** That Fairs and Markets be made † in Places, and that Buyers of Corn and Beaſts give Toll to the Bailiffs of the Lords of the Markets or Fairs; that is to ſay, a Half-penny ‡ of Ten-pennyworth of Goods, and of leſs leſs, and of more * more, || to the Perſon to whom it belongs, ſo that no Toll exceeds one Penny of one Manner of Merchandize. **And this** Toll was invented for witneſſing of Contracts; **for every privy Contract was forbid.**

ſhall be deem'd in Law to be reaſonable, ſhall be judged, all Circumſtances conſider'd, by the Judges of the Law, if it come judicially before them.

† Orig. is (per Lieus.)
‡ Orig. is (de dire Sous.)
‖ Orig. is (al afferant.)

[2.] 6. **Among the Eiers of the County of Cornwall of** 30 E. 1. **inter Placita Coronæ, & infra Hundredum de Keryer, (which ſee, with Maſter Bradſhaw in the Exchequer) there it is preſented, that** in Helſton Burgh they take De novo de quolibet Animali groſſo, ſcilicet Bove &c. tam de Emptore quam de Venditoribus one Penny, **where they ought to take but one Penny de Emptore; and that they take of all Merchandize exceeding** 12 d. **of the Buyer a Half-penny, and of the Seller an Half-penny, where they ought to take but an Half-penny of the Buyer. See the like there in other Hundreds.** See (D)

3. The King may grant a Fair, and that Toll ſhall be paid; but it muſt be of a very ſmall Sum, as 1 *d.* or 2 *d.* or leſs, *but not more.* Per Popham. Cro. Eliz. 559. Heddy v. Wheeler, or Welhouſe. But Mo. 474. pl. 680. S. C. the Juſtices held 1 d. a Beaſt unreaſonable.

(C) Toll. *For what* Things it ſhall be *paid.*

1. OF Things bought by any for his own Uſe, **no Toll ſhall be paid.** 28 Aſſ. 53. Br. Toll, pl. 7. cites S. C. per Thorp, Green, and Seton, for Law.

2. De Communi jure, *no Toll* ſhall be paid for Things brought to the Fair or Market, *unleſs* they be *ſold*, and then Toll to be taken of the Buyer. *But in ancient Fairs and Markets* Toll may be paid *for the Standing* in the Fair or Market, tho' nothing be ſold. 2 Inſt. 221. Noy 37. in Pickman's Caſe, ſays, he cannot have Toll if the Things be ſold; and cites D. 227, 228. [But it ſeems miſ-printed by leaving out the Word (not.)]

Toll may be due *by Cuſtom for every Thing brought* to Market, *and for the Standing of the Seller there*, tho' the Things are not ſold. Arg. Le. 218. in Caſe of Lord Cobham v. Brown.——Adjudged, Mo. 835. pl. 1124. Trin. 12 Jac. **Hill v. Fawket**, that a Cuſtom to take Toll of Corn brought into the Market, but not ſold, is good; but without a ſpecial Cuſtom no Toll is due in ſuch Caſe.

3. No Toll is due for *Hens* or *Geeſe*, or for many other Things of ſuch Nature. Per Clench. Ow. 109. Trin. 36 Eliz. B. R. Eſcot v. Lanreny.

(D) Payable. *By whom.*

1. NOTE, the *King* ſhall go *Toll-free in* all *Markets and Fairs*, for Things bought &c. for the King ſhall not be prejudiced by his Grant of any Liberty which appertains to his Perſon &c. But *Quære of Toll-Traverſe*, if he ſhall pay it? It ſeems that he ſhall. Fitzh. Tit. Toll, pl. 5. cites 23 H. 3. The King ſhall not pay Toll or Cuſtom. Br. Toll, pl. 9. cites 35 H. 6. 27.——S. P. 2 Inſt. 221. cites S. C.

2. The *Buyer* ſhall pay Toll, and *not the Seller*. Br. Toll, pl. 2. cites 9 H. 6. 45. Fitzh. Tit. Toll, pl. 7. cites S. C.

Agreed clearly.——S. P. unleſs it be by Special Cuſtom F. N. B. 228. (E)——Ibid. in the new Notes there (b) the 2d Paragraph, cites 20 E. 3. Avowry, 129. and 9 H. 6. 45. that Goods of the Vendor were diſtrain'd for Toll.

3. If

3. If the Lord or Owner of the Fair or Market do *take Toll of the Seller of Horſes* &c. he is to be puniſhed within the Statute W. 1 cap 31. For he ought to take it of the Buyer only. 2 Inſt. 221.

(E) *Diſcharged.* Who and how.

Br. Action Sur le Caſe, pl. 37. cites S. C. —— S. P. Br. Toll, pl. 4. cites 9 H. 6. 66 —— F. N. B. 281. (E) cites * 7 H. 4. That a Tenant in ancient Demeſne *may merchandiſe buy and ſell*, and ſhall pay no Toll, and ſays, that the ſame agrees with the Regiſter.

1. TENants *of ancient Demeſne* ſhall be quit of Toll *for Things ſold and bought* in Fairs and Markets, *for Proviſion of their Houſhold, and to manure their Land.* Br. Toll, pl. 3. cites 7 H. 4. 44.

* F. N. B. 228. (E) in the *new* Notes there (b) ſays the Caſe 7 H. 4. 44 was in Treſpaſs againſt A. Quod Telonium aſportavit, & illud ſolvere recuſavit; (It was held that the Writ was good, and the firſt Words as to the Aſportavit void;) The Plaintiff counts that the Defendant had bought 12 Beaſts in his Market, and that he came the next Market in the next Week, and ſold 6 of the Beaſts (Oxen,) and the other 6 at a Fair held there at the Feaſt of &c. Defendant pleads, that he is a Tenant of ancient Demeſne &c. and that all thoſe Tenants have been free to buy and ſell Beaſts, for manuring their Lands &c. without Toll &c. Time out of Mind, and that he bought Ut ſupra, and ſome he uſed for manuring his Land, and ſome he put to Paſture † to make Graſſes, and after convenient Time ſold them &c. The Plaintiff offers to aver, that he bought the Beaſts to re-ſell them, and that he re-ſold them Ut ſupra; The Defendant demurs; but the Opinion of the Court being againſt him, he became Nonſuit; So that it ſeems for Things bought for their Suſtenance, or manuring their Lands, or concerning Husbandry they are diſcharged, but *not to merchandiſe*; And the Merchandiſe of theſe is different from other Merchandiſe, and cites 9 H. 6 15. & 66. 3 E. 3. (Toll) 138.

† The Words are (Pur eux faire groſs & Pluis able a vendre & puis apres eux vend' al Faire &c.) which is (that he put them to Paſture to make them fat and more fit for Sale, and ſometime after ſold them at a Fair &c.)

Br. Toll. pl. 1. cites 9 H 6. 25. That they ſhall be diſcharged of Toll in every Fair, Market, or Place, *for the Things ariſing of the ſame Tenements for ſelling or buying for their Suſtenance, according to the Quantity of their Tenements, as for Beaſts and other Things neceſſary for their Uſe within their Houſe*; By all the Juſtices. —— Fitzh. tit. Toll, pl. 8. cites S. C. —— F. N. B. 228. (E) cites S. C. accordingly; But ſays, that for other Things it is a Queſtion; but foraſmuch as they ſhall be quit of Pontage, Murage, and Paſſage, he conceives that they ſhall be *quit of Toll generally*, altho' they do Merchandiſe with their Goods. —— And Ibid 228 (A) ſays it appears that they ſhall be quit of Toll *for their Goods and Chattels which they merchandiſe with others*, as well as for their other Goods, for the Writ is general, Pro bonis & rebus ſuis. And it appears, that that *Writ* may be *ſued by all* the Tenants, as a Writ of Monſtraverunt ſhall be ſued; *and* alſo that *every particular Perſon* who is *grieved*, *may ſue* forth the Writ if he will

They ſhall be *free* by their Tenure *of Toll of all Things which they ſell, if it be ſold upon the ſame Soil, and of all Things which they buy to manure their Soil.* But Br. makes a Quære if they ſhall be free of all Things which they *ſell and buy* &c. Br. Auncient Demeſne, pl. 22. cites 19 H. 6. 66.

2 Inſt. 221. Says, That for Things coming of thoſe Lands they ſhall pay no Toll, Becauſe at the Beginning by their Tenure they applied themſelves to the Manurance and Husbandry of the King's Demeans, and therefore for thoſe Lands ſo holden, and all that came and renewed thereupon, they had the ſaid Privilege; But if ſuch a Tenant be a *Common Merchant for buying and ſelling of Wares* or Merchandiſes, *that riſe not upon the Manurance* or Husbandry *of thoſe Lands*, he *ſhall not have the Privilege* for them, becauſe they are out of the Reaſon of the Privilege of Ancient Demeſne; And the Tenant in Ancient Demeſne ought rather to be a Husbandman than a Merchant by his Tenure, and ſo are the Books to be intended. And herewith agrees an Ancient Record, the Effect whereof is Quod hii qui clamant eſſe immunes de theolonio præſtando, ut tenentes in antiquo dominico, vel per Chartas Regum, non debent diſtringi pro aliquo theolonio pro Merchandiſis ad uſus ſuos proprios emptis; imo pro Merchandiſis qu' emerint vel vendiderint ut Mercatores, debent ſolvere pro eis.

By the Cuſtom of the Realm they ought to be quit of Toll &c. in every Market, Fair, Town or City throughout the Realm; and upon that every one of them may ſue to have Letters Patent under the King's Seal, to all the King's Officers, and to Mayors, Bailiffs &c. And alſo the Tenants of Ancient Demeſne *may have a Writ* directed *to the Bailiffs*, or Mayor, or others who will compel them to pay Toll, *that they ſuffer them to go quit* &c. F. N. B. 228. (A)

The *Lord* in Ancient Demeſne, *himſelf* ſhall be as well *acquitted of Toll* throughout the Realm as the Tenants in Ancient Demeſne ſhall be; and that appears

2. If *Lord dwells in ancient Demeſne in a little Tenement*, he ſhall be diſcharged of Toll for Things touching his Suſtenance, to the Quantity of the Tenement only; quod nota. Br. Toll, pl. 1. cites 9 H. 6. 25.

appears by the Regiſter of an Attachment ſued by the Lord of the Manor in Ancient Demeſne againſt the Bailiffs of C. becauſe they took Toll of him. F. N. B. 228. (B)

3. *Non Moleſtando* was awarded *to the Mayor of Calice* out of Chancery, that he ſhall not take Toll of the Tenants of D. returnable in B. R. and ſo *Alias* and *Pluries*, and *no Writ was returned*, by which, by the Opinion of the Court, *Attachment iſſued to the Lieutenant of Calice againſt the Mayor*. Br. Proceſs, pl. 181. cites 21 H. 7. 31.

4. If *Citizens or Burgeſſes* have been *quit* of Toll *throughout the Realm by Grant* or Preſcription, and afterwards the King's Officer demands Toll of them, they may have a Writ not to moleſt them, and thereupon an Alias, Pluries, and Attachment. F. N. B. 226. (I) 227. (A)

So if any City or *Borough* ought to be *quit of Toll* for the Merchandiſes which they buy in another Town or Place, if any of them be compelled to pay Toll, *all the Corporation may bring the Writ by the Name of their Corporation*, and may have an Alias, and Attachment thereupon, if Need be. F. N. B. 227. (E)

5. Note, If the *King grants* to one *to be quit of Toll*, this does *not extend to Cuſtom* as it ſeems, *nor* is it any Bar *to a Demand of Toll*, by them who have Toll *by a Prior Grant* made to them. F. N. B. 227. (A) in the new Notes there (c) cites 39 E. 3. 13. and ſays, ſee 18 E. 1. Lib. Parl. 10.

6. *As well thoſe* Tenants *who hold of the Manor which is* Ancient Demeſne *in the* Seiſin, or *the Poſſeſſion of another Man*, *as* the Tenants which hold of the Manor in Ancient Demeſne *in the King's* Hands *and Poſſeſſion*, ſhall be quit of Toll. F. N. B. 228. (A)

7. * *Tenants at Will* within Ancient Demeſne ſhall be diſcharged of Toll as well as Free-Tenants, or Tenants for Life, or Years of Lands in Ancient Demeſne, ſhall be diſcharged of Toll for their Goods &c. F. N. B. 228. (D) cites 9 H. 6. 14.

* S. P. Br. Toll, pl. 1. cites 9 H. 6. 25. ——— Fitzh tit. Toll, pl. 8. cites S. C.

8. If the *King* or any of his Progenitors, have *granted to* any to *be diſcharged* of Toll either *generally or ſpecially*, this Grant is good to diſcharge him of all Tolls to the King's own Fairs or Markets, and of the Tolls which together with any Fair or Market have been granted after ſuch Grant of Diſcharge; but *cannot diſcharge Tolls formerly due to Subjects* either by Grant or Preſcription. 2 Inſt. 221.

The King granted to the Archbiſhop of York the Toll of Corn ſold in the Market of Rippon, and afterwards the King granted to the Mayor and Citizens of York to be diſcharged of Toll through the whole Realm; and afterwards the Archbiſhop exchanged his Manor of Rippon with the King for another Manor. It was moved, if now the Citizens of York ſhould be diſcharged of Toll, for the Grant to the Archbiſhop was eigne to the Grant to the Citizens of York to be diſcharged of Toll in Rippon. Dyer conceived that they ſhould not be diſcharged, for the King had no Right; And when the King grants over the Manor of Rippon, the Grantee ſhall have the Toll notwithſtanding the Grant made to the Citizens, for the Grant made to them was void, as to diſcharge them of Toll at Rippon; For the Grant to the Citizens ſhall not take Effect after the Exchange, for the Grant was void ab initio: But if the Grant of the King to the Archbiſhop had been but for Life, then the Grant afterwards made to the Citizens ſhould have taken Effect after the Eſtate for Life determined. And the better Opinion of the Court was, That Toll ſhould be paid. 4 Leon. 214. pl. 346. Mich. 16 Eliz. C. B. York Archbiſhop's Caſe. ——— 4 Leon. 168. pl. 274. S. R.

9. King H. 3. did grant to the Abbot of L. and his Succeſſors, *Quod ipſi & homines ſui ſint quieti ab omni theolonio in omni foro & in omnibus nundinis* &c. and there it is reſolved, that the Abbot ſhould have this Privilege by Force of this general Grant in this Manner, Quod ipſi & Homines ſui ſint quieti a Præſtatione theolonii in venditionibus & emptionibus *pro ſuis neceſſariis, ut in victu, veſtitu*, & ſimilibus & hoc *ad opus proprium* ipſius Abbatis & Hominum Suorum. 2 Inſt. 221.

10. In 16 E. 3. The *King* by Letters Patents for the Conſiderations therein mentioned, *Conceſſit pro ſe & Hæredibus* ſuis *to H. Earl of Lancaſter, and the Heirs of his Body lawfully begotten* (among other extraordinary Grants) *that the ſaid Earl* and his Heirs *& omnes Homines ſui in perpetuum ſint quieti de Pavagio, Paſſagio, Paagio, Leſtagio, Stallagio, Talliagio,*

agio, Cariagio, Peſagio, Pikagio, & Terragio per totum Regnum &c. After the Death of the ſaid Earl, *the ſaid Patents* being produced by his Son and Heir before the ſaid King and Council, they *were declared to be the Diſheriſon of the King, and by Aſſent* of the King and Council, and alſo *of* the ſaid Earl *the Son, were* revoked, *cancell'd*, and annulled; *and it was agreed, that all Patents before granted ſhould be reſtored and of no Force or Effect. Afterwards, 25 Sept.* 23 E. 3. *The* ſame *King reciting the ſaid firſt Grant, and that the ſaid Son had voluntarily reſigned the ſame and all Right and Claim* by Reaſon thereof, *in Conſideration thereof granted to the ſaid Son all the Liberties* &c. in *the ſaid firſt Grant mention'd for his Life.* In Replevin, tried before Mr. Juſtice Price at Exon Aſſiſes, at which theſe Charters were produced, there was a Verdict given for the Defendant, but a Rule to ſtay &c. in Common Form. And afterwards, on attending the Judge at his Chambers, he was of Opinion, that the firſt Charter was ſurrender'd, and that in the 2d Charter there were not Words ſufficient to exempt the Plaintiff from the Toll in Queſtion; and thereupon was enter'd up a Nonſuit of the Plaintiff, and the Defendant had the Coſts thereof. MS. Voyſey v. Tottle.

(E) *Grant Good.* In reſpect of the Manner &c.

Mo. 474. pl. 683. Heddy v. Welhouſe S. C The Juſtices all agreed, that Toll is not of Common Right incident to a Fair, and Judgment for the Plaintiff —— Popham ſaid, As where one has a *Fair* by Grant or Preſcription, *whereto Toll has uſually been paid, which afterwards is forfeited to the King*, who then grants it, Cum omnibus Libertatibus ad hujusmodi feriam Spectantibus, now by this Grant the Grantee ſhall have Toll; becauſe Toll was formerly belonging thereto, and therefore the King's Grant did not grant a New Fair, but the Ancient One, which was not extinct by the King's Poſſeſſion. Cro. E. 591. in S. C —— S. C. cited Palm. 78, 79. Hill. 17 Jac. B. R. in Caſe of the King v. the Corporation of Maidenhead; And Doderidge J. ſaid, He well remembered it, and that he argued it at the Bar. And Mountague Ch. J. ſaid, That the Parties ſued in Parliament to get it reverſed, but that it was affirm'd there —— S. C. cited 2 Inſt. 220.

1. IN Treſpaſs for taking a Cow, the Defendant juſtified by a Grant of H. 7. of a *Yearly Fair* to the Mayor &c. of N. *Cum omnibus Libertatibus, & liberis conſuetudinibus ad hujuſmodi feriam Spectantibus* &c. and that at a Fair there held, J. S. ſold a Cow to the Plaintiff, whereupon the Defendant demanded 1 d. for Toll, and becauſe he refuſed to pay it, he diſtrained the Cow as Bailiff &c. Popham, Gawdy and Fenner, delivered their Opinion, that by a Grant of a Fair cum omnibus Libertatibus &c. *Toll* was not due nor demandable, becauſe 'tis *not incident to Fair*, but that it may be due if it had been granted by expreſs Words in the Letters Patents; Cro. E. 558. pl. 15. Paſch. 39 Eliz. & pag 591. pl. 29. Mich. 39 & 40 Eliz. B. R. Heddy v. Wheelhouſe.

* S. P. becauſe it was once a Free Market, and when once a Market is in the City, that being with a Cuſtom for a Sum certain, they can never *raiſe* it but may *leſſen it.* Arg. 2 Show. 266. in Caſe of Quo Warranto.

2. If the *King grants* a *Fair or* **Market*, and grants *no Toll*, *he cannot after grant* a *Toll* to ſuch Free Fair or Market, without Quid pro quo ſome proportionable Benefit to the Subject. 2 Inſt. 220. cites it as reſolv'd in the Caſe of Northampton.

3. If the Toll granted with a Fair or Market be *outragious or unreaſonable*, the Grant of the Toll is void; and the ſame is a Free Market or Fair. 2 Inſt. 220. cites it as reſolved in the Caſe of Northampton.

4. The King granted to the City of London, *That all Perſons bringing into London ſaleable Commodities, ſhould pay ſo much for Toll*; This was held to be a good Grant, and yet generally ſpeaking, it may ſeem to be againſt

againſt the Liberty of the Subject. Hard. 55. pl. 1. Paſch. 1656. in Scac. in Caſe of Hayes v. Harding, cites Mich. 43 & 44 Eliz. in B. R. Hawkeshead v. Ward.

5. A Grant of ſuch Toll *as was us'd to be taken Ibi & Alibi infra Regnum Angliæ*, and averring Payment at another Place, but not there, was held ill for Uncertainty. See Prerogative (F. c) pl. 1. Lightfoot v. Levet.

6. It was held per 3 Juſt. that Toll was well granted, notwithſtanding that the *Quantity of Money to be paid* for Toll for every Thing was *not expreſs'd*; but Mountague Ch. J. contra. Palm. 86. Hill. 17 Jac. B. R. The Caſe of Maidenhead in Berks.

But Newberry, who argued for the Corporation, ſaid, That no Judgment was given for the King in this Caſe, but that the Corporation enjoyed the Privileges notwithſtanding this Action brought. Palm. 86. at the End of the Caſe. And ſee there the Caſe argued ſomewhat fully.

A *Preſcription* to Toll, and ſays not *what in certain* is void, and ſo is a *Grant* from the King of ſuch uncertain Toll. Arg. 2 Show. 266. cites Palm. 79.——Agreed Arg. on the other Side, that a Preſcription to have a Toll Uncertain, and as often as Occaſion requires to aſcertain it, is ill But that in London it is good, tho' it would be ſo no where elſe. 2 Show. 273. Hill. 34 & 35 Car. 2. B. R. in Caſe of the Quo Warranto v. the City of London.

7. The King cannot grant a Toll *for Things not brought to Market* to be ſold. 2 Lutw. 1502. Per Powel J. in Caſe of Kirby v. Whichelow.

(G) Toll. *Due* in what Caſes, and how.

1. A MAN cannot juſtify for Toll *of Waggoners* (Charrettours) &c. *nor* for Toll *for paſſing of Men* by Land or by Water, *unleſs by Uſage* or Preſcription. And Thorp ſaid, That a Man cannot juſtify it by Grant of the King, but may have Toll by the King's Grant of ſuch as buy in his Fair or Market. Fitzh. Tit. Toll, pl. 2. cites Hill. 50 E. 3.

2. *Toll-traverſe lies in* * *Preſcription*, but *not Toll-through*; for it is an Oppreſſion of the People. F. N. B. 226. (I) in the new Notes there (b) cites 22 Aſſ. 58. and ſays, yet ſee a Common Perſon may preſcribe for Toll-through, if he ſhews a *reaſonable Cauſe*, and proves that the Country has a Recompence; and cites 14 E. 3. Bar 275. 5 H. 7. 10. and ſo the King may preſcribe for Toll-through; Quære if without ſhewing Cauſe, and cites 11 H. 6. 39.

* S. P. Or may be by Grant, but *Toll-thorough cannot be by either Grant or Preſcription.* F. N. B. 227. (A) in the new Notes there (c) cites S. C. and 20 E. 3. Toll 3.

3. A Man by *Law* ſhall not pay Toll *for any Thing brought to a Fair, but for Things ſold*; *but by Cuſtom* he may pay *for every Thing brought* to the Fair, *and he ſhall pay for his Place*, viz. his Standing, tho' he ſell nothing. Br. Toll, pl. 2. cites 9 H. 6. 45. Fitzh. Tit. Toll, pl. 7. cites S. C.

4. Note, Toll-through is in the Highway, but Toll-traverſe is for paſſing over another's Land; yet it ſeems if a *Highway* be *in a City or Town, Toll-through may be there by Preſcription.* F. N. B. 227. (A) in the new Notes there (c) cites 5 H. 7. 10. 13 H. 4. 15. And Pontage, Murage, or Ferry, may be demanded in a Highway by the King's Grant, but not in a private Way; and cites 13 H. 4. 15. and ſays, See there that the King may grant Tronage, and good.

5. No Toll is due either *on the Part of the Lord*, when he has a Fair or Market, and not any Toll, *or on the Part of the Market-man who ought to be diſcharged* of Toll, *or of the Thing ſold that is not tollable.* 2 Inſt. 220.

6. No

* By *ſpecial Cuſtom* Toll may be due, tho' the Party *doth not ſell*. Arg. 2 Bulſt. 202. cites 9 H. 6. 45.——Ibid 204. Per Coke Ch. J. Paſch. 12 Jac. in the Caſe of Hill v. Hanks, alias Hawks.

6. No Toll for any Thing tollable brought to the Fair or Market to be ſold, ſhall be paid to the Owner of the Fair or Market *before the Sale* thereof, *unleſs* it be * *by Cuſtom* Time out of Mind uſed, which Cuſtom none can challenge that claim the Fair or Market by Grant within the Time of Memory, viz. ſince the Reign of King R. 1. which is a Point worthy of Obſervation, for the Suppreſſion of many outrageous and unjuſt Tolls incroached upon the Subject, to be puniſhed within the Purview of this Statute. So note, it is better to have a Fair by Preſcription than by Grant. 2 Inſt. 221.

——S. P. Agreed; *but* that cannot be where the *Corporation is erected within Time of Memory*. 2 Lutw. 1336. Trin. 2 Jac. 2. Leight v. Pym.

Cro. E. 558. pl. 15. Paſch. 39 Eliz. B. R. S. C. adjornatur.

7. Toll is not of Common Right *incident* to a Fair, and none ſhall have Toll in a Fair, unleſs he has it by Grant or Preſcription. Mo. 474. pl. 680. Mich. 39 & 40 Eliz. B. R. Heddy v. Wellhouſe.

——S. C. adjudged Cro. E. 591. pl. 29. Mich. 39 & 40 Eliz. B. R.

8. The Owner of a Port may have Toll *by Preſcription, without alleging any Conſideration*, ſaid by Treby Ch. J. 2 Lutw. 1523. Paſch. 12 W. 3. in Caſe of **Wilkes v. Kirby**, to have been ſo held in the Caſe of **Prideaux v. Warren**; but becauſe in the Principal Caſe the Defendant had taken upon himſelf to allege a Conſideration, it was left a Quære, ſuppoſing the Conſideration *not* to be *well alleg'd*, whether the Plea be then good.

See (B. 2)

(H) *How much. Puniſhment of Taking more* than due.

In the troubleſome and irregular Reign of H. 3. outrageous Tolls were taken and uſurp'd in Cities, Boroughs, and Towns, where Fairs and Markets were kept, to the great Oppreſſion of the King's Subjects, by Reaſon whereof very many did refrain from the coming to Fairs and Markets, to the Hindrance of the Commonwealth; for it has ever been the Policy and Wiſdom of this Realm, that Fairs and Markets, and ſpecially the Markets, be well furniſhed and frequented. 2 Inſt. 219.

1. 3 *Edw.* 1. *cap.* 31. ENacts, That *touching them that take* * *outrageous Toll againſt the common Uſage of the Realm* † *in Market Towns, if any do ſo in the King's own Town which is let in Fee Farm, the King ſhall* ‡ *ſeiſe into his own Hand the Franchiſe of the* || *Market.*

* That is, where a reaſonable Toll is due, and exceſſive Toll is taken, or *where no Toll at all is due*, and yet Toll is unjuſtly uſurped; for it is an Outrage to do ſuch a common Injury and Wrong. Sometimes it is called Superfluum vel indebitum, vel injuſtum. 2 Inſt. 220.

† That is, *in a City, Borough, or Town* of Merchandize, where Fairs and open Markets are kept for Merchandizing, and Buying and Selling. 2 Inſt. 220.

This is intended of Toll to the Fair or Market. 2 Inſt. 220.

‡ That is, ſhall ſeize the Franchiſe of the Fair or Market until it be redeemed by the Owner. But this is *intended upon an Office to be found*; for in Statutes, Incidents are ever ſupplied by Intendment. 2 Inſt. 222.

|| This Word here *includes as well a Fair as a Market*; for Forum, from whence Fair is derived, ſignifies both; and a Mart is a great Fair holden every Year, derived a Merce, becauſe Merchandizes and Wares are thither abundantly brought; and Mercatus is derived a Mercando. 2 Inſt. 221.

* That is, the *Owner of the Fair* or Market. 2 Inſt. 22.

And if it be another's Town, and the ſame be done by the * *Lords of the Town, the King ſhall do in like Manner; and if it be done by a Bailiff without the Command of his Lord, he ſhall render to the Plaintiff as much again for the outrageous Taking as he had taken from him, and ſhall have* 40 *Days Impriſonment.*

Fleta collects the Effect of this former Part of the Act in theſe Words, Inhibitum eſt ne quis in Villis Regis merchandiis, quæ dimiſſæ ſunt & commiſſæ ad Feodi firmam, indebita & injuſta capiat Theolonia; quod ſi quis fecerit

cerit extunc eo ipſo capiet Rex Libertatem mercati in manum ſuam; eodem modo facit Rex, licet in alterius villa præmiſſa fieri contigerit, ſi Balivus hoc fecerit *ſine voluntate Domini* ſui, reddet tantum querenti quantum cepiſſet Ballivus ab eo, ſi tolnetum aſportaſſet, & nihilominus habeat priſonam 40 Dierum. 2 Inſt. 222.

Touching Citizens and Burgeſſes, to whom the King or his Father has granted * *Murage to encloſe their Towns which take ſuch Murage otherwiſe than it was granted, and of this are attaint, they ſhall* † *loſe their Grant for ever, and ſhall be grievouſly amerced.*

* *Muragium* a Muro, as our Act does explain it, to wall in or incloſe with Wall a Town, under which Word is here included a City and Burgh. It *is a reaſonable Toll* to be taken of every Cart, Wayne, Horſe laden coming to that Town, *for the incloſing of that Town with Walls of Defence*, for the Safeguard of the People in Time of War, Inſurrection, Tumults or Uproars, and is due either by Grant or by Preſcription. But *if a Wall be made which is not defenſible*, nor for Safeguard of the People, *then ought not this Toll to be paid*; for the End of the Grant or Preſcription is not performed. 2 Inſt. 222.

He that has *Burghbote* granted to him, is diſcharged of Murage granted afterwards; and altho' Murage be here particularly named, yet there are Grants of like Nature within the Purview of this Statute, as Pontage, Paviage, Keyage &c. 2 Inſt. 222.

† Here *the whole Franchiſe is forfeited*; and ſo note a *Diverſity* between the Words (*Shall loſe the Franchiſe* &c.) and the Words (*Shall loſe the Grant*) the one implying a Seiſure, as has been ſaid, and the other a Forfeiture for ever; for it is a Miſuſer or Abuſer. And thereof Bracton ſays, Hujuſmodi autem Libertates &c. Statim quaſi transferuntur, & quaſi poſſidentur &c. donec amiſerit per abuſum, vel non uſum. 2 Inſt. 222.

Fleta renders this laſt Part of this Chapter in theſe Words, Item qui Muragium ad Villam claudendam gravius ceperint, quam conceſſum fuerit per Cartam Regis, perdant extunc gratiam ſuæ conceſſionis & graviter amercientur. And preſently after the making of this Act, the Effect thereof for Juſtices in Eyre to inquire of it, was inſerted in the Chapters or Articles of the Eyre, in theſe Words, Item de hiis qui ceperunt ſuperflua, vel indebita tolneta in Civitatibus, Burgis, vel alibi contra communem uſum Regni. Item de Civibus & Burgenſibus qui de Muragio per Dominum Regem eis conceſſo, plus ceperunt quam facere deberent ſecundum conceſſionem Domini Regis Factam. 2 Inſt. 223.

The Mirrour ſays touching Murage thus, Le Point que voet que ceux que miſuſent Murages les perdent ne fuit miſtier daver eſtre, car Ley voet que Cheſcum perdra ſon Franchiſe que miſuſera; So as this Statute was made in that Point for 2 Purpoſes, viz. to affirm the Common Law, and to add a further Puniſhment, viz. to be grievouſly amerc'd. 2 Inſt. 223.

(I) Remedy.

1. A *Diſtreſs* is incident to every Toll. Noy 37. in Hickmans's Caſe, cites 30 E. 3. 20. It was agreed on all Sides that if Toll be due, a Diſtreſs may be taken for it. Cro. E. 558. pl. 15. Paſch. 39 Eliz. B. R. in Caſe of Heddy v. Wheelhouſe.

2. The Party has no Remedy for the Toll, if the *Goods* are *carried out of his Juriſdiction.* Noy 37. in Hickman's Caſe, cites 20 H. 7.

3. Action upon the Caſe was brought by the Mayor and Burgeſſes of Glouceſter, againſt the Burgeſſes and Commonalty of B. becauſe they *have uſed*, Time out of Mind &c. *to have Toll of every Boat which paſs'd the Water of Severne by the Vill of Glouceſter with any Merchandize* &c. and that the *Defendant paſs'd with a Boat and 20 Pipes of Wine*, and did not pay Toll, where they ought to pay for every Pipe 3 d. for Toll &c. Marowe, of Counſel with the Defendant, ſaid, that if a Man paſs'd over Land which ought to have the Toll, and the other did not diſtrain for the Toll in his Land, but *permitted him to paſs without Payment or Diſtreſs*, he ſhall not have Action of Toll. Quære inde. Br. Action ſur le Caſe, pl. 70. cites 21 H. 7. 16. Br. Toll, pl. 5 cites S. C. — In *Caſe* the Plaintiff *declared of a Toll-Traverſe*, for paſſing over the Bridge at Ware; *and that the Defendant had carried ſo many Loads of Barley over* that Bridge; *that the Toll thereof*, at ſo much per Cart, *amounted to* 40 *l. which the Defendant refuſed to pay*, &c. Upon a Demurrer it was inſiſted, that an Action would not lie for a Toll-Traverſe for paſſing thro' the High Way *without ſhewing a Title, and Conſideration.* Beſides this Action was brought for a Non feaſance, (viz.) not paying &c. for which (if any thing is due) an Action of Debt, and not on the Caſe, ſhould be brought. But on the other Side it was anſwer'd, that an Action lies without

without ſhewing a Title or Conſideration, and that this ſhall come upon the Evidence; and as to the * Non-feaſance, many Caſes were cited to ſhew that Caſe lies for Non-feaſance. But Adjornatur. 3 Lev. 400 Trin. 6 W. & M. in C. B. Steinſon v. Heath.

* See Actions, (K. c.) pl. 2.

4. If a Man ought to have Toll in a Fair &c. and his *Servants* are *diſturb'd to gather* the ſame, he ſhall have Treſpaſs Vi & Armis for Aſſault of his Servants, and for the Loſs of their Service, and for the Diſturbance made unto them, and for loſing the Profit of his Toll, and all in one Writ. F. N. B. 91. (A)

5. An *Ox Hide* was brought into Leaden-hall Market on the Market-Day, and ſold, and the Bailiff of the Mayor &c. of London, and by their Command, took it there *Damage feaſant*. But it was agreed by all, that this Ox Hide, brought into the Market and ſold, cannot be diſtrain'd Damage feaſant. Cro. E. 627, 628. pl. 21. Mich. 40 & 41 Eliz. B. R. Sawyer v. Wilkinſon.

1 Salk. 248. S. C. adjudg'd accordingly.—5 Mod. 359. S. C. argued.—12 Mod. 216. Mich. 10 W. 3. S. C. by the Name of Winckeſline v. Ebden, adjudged accordingly.

6. A cuſtomary Toll was of 5 d. a Chaldron of Coals. And it was inſiſted, that a *Diſtreſs* ought not to be on any Thing, but on that Commodity out of which the Toll was payable. But the Anchor and Cable, and Sails, being diſtrain'd, it was adjudged that they were well taken. Carth. 357 Trin. 7 W. 3. Vinkinſtone v. Ebden.

S. C. cited Arg. Gibb. 174. as in Caſe of Foreſtalling, whereby Toll is loſt.—Per Wild J. 2 Vent. 26. in Caſe of Turner v. Sterling.——Ibid. 27. per Tyrrel J accordingly.—Ibid. 28. per Vaughan Ch. J. accordingly.

7. If A. has a Market and Toll, and B. is coming with Goods to the Market, for which, if ſold, Toll would be due, and *C. hinders B. coming to the Market*, the Lord of the Manor may have an *Action*, becauſe of the Poſſibility of Damages. Per Powell J. 6 Mod. 49. Mich. 2 Ann. B. R. in Caſe of Aſhby v. White.

8. An *Indebitatus Aſſumpſit* was brought for Toll. It was objected, that this Action would not lie for Toll, but the only Remedy was Diſtreſs. But the Court inclined to think it would, if the Corn is the Duty; but gave time to move this and other Exceptions at another Time. Afterwards the Matter was moved again, and the Rule for ſtaying Judgment was diſcharged. 2 Barnard. Rep. in B. R. 243. Paſch. 6 Geo. 2. and 484. Hill. 7 Geo. 2. Cock v. Vivian.

(K) *Writ* and *Declaration.* Good or not.

TReſpaſs *by the Vicar* againſt A. *that where he and his Predeceſſors ought to grind without Toll*, there *the Defendant has taken Toll, Vi & Armis*, viz. of one Quarter of Rye, and one Quarter of Corn, and of all the Corn that he ground there, from ſuch a Day to ſuch a Day. The *Defendant ſaid, that he is only a Servant*; Judgment of the Writ; Et non Allocatur; and the Writ was awarded good Vi & Armis, by which he pleaded to the Writ, becauſe the *Plaintiff has not alleg'd the Price of the Toll*; Et non Allocatur, becauſe he has pleaded more high before. By which he *traverſed the Preſcription, and pray'd Aid* of the Tenant for Life, to whom he was Deputy; quod nota. Br. Treſpaſs, pl. 47. cites 44 E. 3. 20.

Br. Brief, pl. 113. cites S. C.—S. P. Br. Action

2. The Action was *for non Payment* of Toll; *Quod Teoloneum aſportavit & illud ſolvere recuſavit*. Whereas Toll, not paid, cannot be carried away; and therefore *Aſportavit is falſe*. And notwithſtanding that this be void or

or Surpluſage, yet becauſe the other Word ſolvere recuſavit are ſufficient, therefore the Writ awarded good, and yet *falſe, repugnant, and Surpluſage*; quod nota. Br. Nugation, pl. 9. cites * 7 H. 4. 44.

ſur le Caſe, pl. 37. cites S. C. by which the

Defendant juſtified as Tenant of Wensbury, which is ancient Demeſne, by the Cuſtom of ancient Demeſne, to go Quit of Toll for Beaſts to manure their Land or [maintain their] Houſes, ſold or bought; by which he bought 8 Beaſts, with Part whereof he manured his Land, and the reſt he fed to ſell. Judgment &c. And the *Plaintiff ſaid, that the Defendant was a common Merchant, and ſold and bought every Day for Profit*; And the *Defendant demurr'd in Law*; And as to the other Beaſts he bought them one Day, and ſold them next Day, and ſo merchant. And the Defendant demurr'd in like manner. And the Opinion of the Court was with the Defendant, and the Plaintiff was nonſuited. Brooke ſays, Quære why, and whether the Opinion was only for the laſt Plea, or for both; for, upon the firſt Plea, it ſeems the Law is with the Plaintiff, unleſs this Buying for Paſture and Sale be one kind of Manurance of Paſture-Land. Quære.——Br. Toll, pl. 3. cites S. C.

* S. C. cited by Coke, 2 Bulſt. 228. in Caſe of Willamore v. Bamforde; for the Rule is, Utile per inutile non vitiatur.

3. *Treſpaſs for hindering him from taking the Profits of his Fair in S.* viz. Pro uno Equo vendito 4d. for Toll. And becauſe he *did not ſhew of whom the Buyer bought the Horſe*, therefore ill, by the Opinion of the Court; for the Buyer may have Notice of the Name of the Vendor. Contra in an Action of Wreck, or againſt an Hoſtler. But where he juſtifies the Buying of a Horſe in Market overt to change the Property, he ſhall ſhew of whom he bought. Br. Count, pl. 78. cites 9 H. 6. 45.

Br. Toll, pl. 2. cites S. C. ——F. N. B. 91 (G) in the new Notes there (b) ſays, it ſeems that the *Name of the Buyer, as alſo of the Thing ſold*, for which the Toll is due, *ought to be ſhewn in the* Count; and cites S. C. but adds Quære.

4. If a Man preſcribes to have *Toll of every Boat which paſſes by the Vill of B.* he ought there to *count upon what Water, by Name, the Boats were paſſing*. Br. Preſcription, pl. 92. cites 21 H. 7. 16.

Br. Toll, pl. 5. cites S. C.

5. In Caſe the *Plaintiff declared of a Leaſe for Years of the Toll*, and Profits of the Markets and Fairs, within the Manor &c. of T. *and that the Defendant diſturb'd him in taking divers Pieces of Wool*; it was objected againſt this Declaration, that the Plaintiff did not *ſhew that his Leſſor was ſeiſed at the Time of the Demiſe*. Sed non Allocatur; for the Plaintiff, in this Action, is to recover Damages only, and the Right or Title of Land is not in Queſtion. But contra, if it were in ſuch Action in which the Right of the Toll had come in Debate. Ow. 109. Trin. 36 Eliz. B. R. Eſcot v. Lanreny.

Clench took another Exception; becauſe he did not ſet forth that Toll was to be paid of Wool by common Uſage, for no Toll is due for Hens or Geeſe, or for many other Things of ſuch Nature, and ſo it might be that Toll was not due for Wool. Fenner was of the ſame Opinion; but Popham contra, who ſaid, that the Plaintiff had declared, that the Defendant had diſturbed him from the Toll of divers Pieces of Wool; and by that is imply'd, that Toll ought to be paid for Wool. And at another Day Judgment was given for the Plaintiff. Ow. 109. Eſcot v. Lanreny.

6. A Claim in Quo Warranto, to have Toll in *Specie of Grain expoſed to Sale*, whether ſold or not, *Ratione Manerii* was adjudged to be ill, becauſe it ought to have been *Ratione Mercati*. Noy 37. 41 Eliz. Hickman's Caſe.

7. In Action ſur le Caſe againſt the Town of Uxbridge, for taking Toll of a Thurſday Market there. The Plaintiff made Title by Conveyances under the Lord Derby, to whom it was granted heretofore, and allow'd in 38 H. 8. and 8 Car. 1. in 2 ſeveral Quo Warranto's, and the Town diſclaim'd. Twiſden J. excepted, becauſe in the Count it was *not ſaid by Grant or Preſcription, but on a Seiſin only*. 3 Keb. 12. pl. 16. Paſch. 24 Car. 2. B. R. Cook v. Baker.

8. In Caſe, the Plaintiff ſet forth, That the *City of Norwich has a common Wharf and Crane, and a Cuſtom that all Goods brought down the River, and paſſing by, ſhall pay ſuch a Duty* It was objected, that this is for Toll-Thorough, which is Malum Tolnetum. Twiſden ſaid, that

Vent. 71. Paſch. 22 Car. B. R. S. C. it was alleged, that

it

they maintain'd a common Key for unlading Goods, and held a void

if they had unladed at the Key, or at any other Place in the City, they ſhould pay the whole Duty; or if he had ſet forth, that they had cleanſed the River. It was order'd to ſtay. 1 Mod. 47. pl. 103. Hill. 21 and 22 Car. 2. B. R. Haſpurt v. Wills.

Cuſtom as to ſuch Veſſels as did not unlade at the Key, or elſewhere in the City; but if they had received their Freight at the Key, it might extend to them.——Sid. 454. **Ethord v. Wills**, S. C. that it was Debt brought on a By-Law, to have ſo much a Tun for Goods paſſing upon the River; and that the Plaintiff had Judgment in C B. But that upon Error brought in B. R. the ſame was held to be Error.

9. When Toll is *claim'd generally*, it ſhall be *intended Toll-thorough*. Per Atkins J. Mod. 232. in Caſe of **James v. Johnſon**, and ſaid that ſo is the Caſe in Cro. E. 710. Smith v. Shepherd.

(L) Pleadings.

Br. Cuſtom, pl. 23. cites S.C. —— The Preſcription ought to be

1. A MAN cannot preſcribe *in the Negative to pay no Toll, but in the Negative with an Affirmative*, viz. *that he and all &c. have us'd to Buy and Sell* &c. *without paying Toll.* Br. Preſcription, pl. 17. cites 7 H. 6. 32. and 8 H. 6. 3. Per Paſton.

in the Affirmative, viz. to be quit of Toll, and that he had not paid Toll. F. N. B. 227. (I) in the new Notes there (a) cites 14 H. 6. 12.

2. If a Man preſcribes to be quit of Toll, he ought to *ſhew how it has been allow'd and put in Ure*; Quære. Br. Patents, pl. 27. cites 14 H. 6. 12. Per Vamp.

Cro. E. 117 pl. 2. Mich. 30 & 31 Eliz. in the Exchequer Chamber, **Kingdon v. Earnes**, ſeems to be S. C. but differently ſtated, as if

3. Treſpaſs againſt him for taking a Quarter of Corn, he juſtified for that it was within the Town of L. and it was *Damage feaſant* in his Freehold; the Defendant pleads that they were by Charter in the Time of Queen Mary incorporate &c. and a Market was granted to them, and the *Place where* &c. *was appointed for the Market* Place, and he brought his Corn on the Market-day, and ſet it there, and the Defendant took it; and upon Demurrer it was adjudged without Argument, that upon this Matter the Mayor could not juſtify the taking. Cro. E. 75. pl. 34 Mich. 29 & 30 Eliz. B. R. The Mayor of Lawnſon's Caſe.

the Action had been brought in Right of the Patentee, for taking away the Corn which he had diſtrain'd Damage feaſant; and ſays the Defendant juſtifies as for his proper Goods, and pleaded a ſpecial Juſtification, that the Plaintiff made Title to them by Seiſure, and pleaded that King P. and Queen M. *by Letters Patents inroll'd in Chancery, dederunt & conceſſerunt Villæ de Launceſton Liberty of a Market* &c. and ſhews a ſpecial Cauſe of Seiſure as an Officer there; whereupon it was demurr'd, and Judgment for the Plaintiff. And now upon Error brought the Error aſſign'd was, that he pleaded that the King and Queen granted by Letters Patents &c. but did *not ſay* (*Sub magno Sigillo confectas*) and this was clearly held an Error; for if the Grant was not under the Great Seal, it is not good, and the ſaying it was inroll'd in Chancery is not ſufficient; for any Patent may be inroll'd there. And therefore the Judgment was revers'd.——10 Rep. 94. b. S. C. cited in **Dr. Lepfield's Caſe**; and there the Court ſaid that the Error aſſign'd in the Mayor &c. of **Launceſton's Caſe**, was the *Want of a Profert hic in Curia* of the Letters Patents; and that it was reſolved that for this Cauſe the Plea was inſufficient in Subſtance; and therefore reſolved by all the Juſtices of C. B. and Barons of the Exchequer, that the Judgment be revers'd.

4. In Treſpaſs for *taking an Ox-hide*, the Defendant *juſtifies* that the Mayor &c. of L. was ſeiſed in Fee of &c. and that it was *Damage feaſant*, and therefore he took it by Command of the Mayor of L. as Bailiff. The Plaintiff *replied, that the Place where &c. is a Market*, and *that he on a Market-day bought the Hide in the Market* of one W. B. *and delivered it to J. S. to carry away, who put it in a Basket; and in carrying*

it

it away on his Shoulders from the Market, *the Defendant took it away* &c. which he is ready to aver &c. Defendant demurr'd, 1ſt. Becauſe having juſtified Damage feaſant, the Plaintiff's Replication ſhews this Matter to take from Defendant his Authority for the Taking, whereas the *Plaintiff varies from the Manner of the Taking, and does not conclude Quæ eſt eadem* &c. 2dly. Becauſe Defendant juſtifies for a Taking, which is intended upon Land Damage feaſant; but the Plaintiff's Replication is of another, *and does not traverſe*; Sed non allocatur; for the Plaintiff ſhewing the ſpecial Cauſe of the Hide's being there, and that therefore the Defendant had Colour to take it, but that by reaſon of the Matter in Law which he ſhew'd, his Taking was not juſtifiable, it ſeems that the Replication was good, and needs no Traverſe; and that the Concluſion of the Plea, Quæ eſt eadem Tranſgreſſio, is not requiſite, he having agreed in the Time and Place of the Caption, but ſhews Cauſe why it is not diſtrainable. But Popham held that the Plaintiff ought to have travers'd, becauſe he does not agree in the Manner of the Caption; but Gawdy and Fenner e contra, becauſe it is his *Matter in Law*. Adjudged for the Plaintiff. Cro. E. 627, 628. pl. 21. Mich. 40 & 41 Eliz. B. R. Sawyer v. Wilkinſon.

5. Treſpaſs for taking of his Sheep, the Defendant juſtified as Servant to the Lord B. by *Preſcription to take 2 d. for every 20 Sheep paſſing per & trans the Vill; and if* it was *denied upon Requeſt, to detain* one *Sheep* of every 20 till Payment. Upon Demurrer it was adjudged for the Plaintiff, becauſe the Preſcription was not good to take Toll for *paſſing in via Regia*; for that the Inheritance of every Man for paſſing in the King's Highway is precedent to all Preſcriptions; but if the Party *ſhews Cauſe* for the Toll, *as* if he is bound *to repair a Bridge or Cauſeway &c.* This would be good, but no ſuch is ſhewn here; but it is clear that a Man may preſcribe for Toll Traverſe, becauſe it is a Paſſage over his own Freehold, but not ſo for Toll-thorough. Beſides, the Defendant ſhould have ſhewn that the Sheep were paſſing through the Town before he took the Diſtreſs, otherwiſe it does not ſuit with the Preſcription to diſtrain them. Mo. 574. pl. 793. Trin. 41 Eliz. Smith v. Shepherd.

Cro. E. 710. pl. 34. S. C. ſays that the Exception that the preſcribing to diſtrain the Sheep in Via Regia for the Toll was not good, becauſe it was againſt the Statute of Marlbridge, was not allowed; for

that this Statute intended only Diſtreſſes for Rents and Services, and not ſuch Things of which no Diſtreſs can be but in the Highway. And Exception being taken, becauſe the *Cuſtom was alleg'd to be, That if the Sheep of any Foreigner be driven thro', a Toll ſhould be paid; and if denied by any Foreigner that drives them thro', a Diſtreſs may be taken*, and it is *not averr'd that he who drove them thro' was a Foreigner*, but only that the Maſter was a Foreigner: Sed non allocatur; for the Driving of the Servant is the Driving of the Maſter, and if he be a Foreigner it ſuffices. Another Exception was, becauſe he *juſtified Quod cepit & abduxit*, and *ſays not* by Diſtreſs, *Nomine Diſtrictionis*; for that he cannot otherwiſe juſtify. This Per tot. Cur. was held a material Exception, becauſe without that it does not meet with the Preſcription. Popham thought Toll-traverſe and Toll-thorough might be by Preſcription, but that it ought to be for ſome reaſonable Cauſe which muſt be ſhewn, but no ſuch being alleg'd here, he conceived the Plea ill. Gawdy and Clench held the Plea well enough notwithſtanding, becauſe being by Preſcription, the Cauſe cannot be intended to be known, but ſince it might have a lawful Beginning, it is well enough without ſhewing it; but Gawdy doubted upon the Reaſon of 22 Aſſ. 58. whether ſuch Toll might be claimed by Preſcription; Fenner deliver'd not any Opinion herein. But for Default in the Pleading it was adjudged for the Plaintiff.

6. In Treſpaſs for taking a Cow, the Defendant juſtifies that the Biſhop of D. had a Fair by Letters Patents with Toll, and that the Plaintiff *ſold certain Hides*, and the Defendant demanded 1 d. for Toll, which the Plaintiff denied, and thereupon he diſtrained: The Plaintiff *replied*, that it was *Ancient Demeſne* in which he diſtrained, which is found againſt him. Jones moved in Arreſt of Judgment, that the Juſtification was ill; for Toll is againſt common Right, and here is *no Grant or Preſcription laid for diſtraining*; Judgment ſtay'd per Curiam, had not a Non Proſ. been before entered. 1 Keb. 342. pl. 14. Mich. 14 Car. 2. B. R. Harris v. Hawkins.

7. Treſpaſs of Taking, Cutting, and Spoiling ſo many Yards of Cloth, the Defendant juſtified as to the taking by *Preſcription to take ea ſonable*

Sum for Stallage, and that 5 s. was a reaſonable Sum; the Plaintiff demurr'd, becauſe this was [not] to diſtrain only, but to take and keep the Goods until the Sum is paid. 2dly. It is not ſaid certainly what, but a reaſonable Sum; Nor, 3dly, ſhewed how 5 s. was a reaſonable Sum, that the Court may judge it ſo; But per Twiſden J. The Preſcription for a reaſonable Sum is as ſufficient as for Fine of Copyhold, without ſhewing what Sum; for this is iſſuable: But the Juſtification of *the taking at the Place agreed, and carrying to another out of the County, ſhould be travers'd*; And Judgment for the Defendant Niſi; for it cannot be ſaid Quæ eſt eadem. 3 Keb. 722, 723. pl. 7. Hill. 28 Car. 2. B. R. Ricroſt v. Roberts.

2 Mod. 143. S. C. and it was ſaid that this Toll is not become a Toll in groſs by the Diſſolution; and Judgment for the Defendant.

8. In Treſpaſs for taking his Cattle, the Defendant juſtified by *Preſcription* to have Toll for all Beaſts driven over the Manor of B. A ſpecial Verdict found that the Manor &c. was Parcel of the Poſſeſſions of the Priory of B. That the Prior had ſuch a Toll by Preſcription *as appurtenant to the Manor*; *that by the Diſſolution* it *came to the Crown, and ſo to J. S. in whoſe Right*, and as Servant to him, *the Defendant juſtified*; and conclude, that if the Defendant may claim by a Que Eſtate, then they find for him, if not, then for the Plaintiff. It was argued, That Toll may be appurtenant to a Manor, as well as any other Profit apprender; and for the Que Eſtate, tho' a Thing which lies in Grant cannot be claimed by a Que Eſtate directly by itſelf, yet it may be *claimed* as appurtenant to a Manor, *by a Que Eſtate in the Manor*. And to this the Court agreed, and gave Judgment for Defendant. Mod. 231. pl. 21. Hill. 28 & 29 Car. 2. C. B. James v. Johnſon.

9. If Defendant *preſcribes* for Toll *for paſſing the Highway*, he *muſt ſhew* ſome Cauſe to intitle himſelf to the taking of it, as by doing *ſomething of Publick Advantage*. Admitted Arg, 2 Mod. 144. Hill. 28 & 29 Car. 2. C. B. in Caſe of James v. Johnſon.

2 Show. 34. pl. 26. Paſch. 31 Car. 2. B. R. S C. by the Name of Gill v. Prior, the Court ſaid that *the Queen's particular Intereſt is not recited at all*; and Pemberton ſaid it had been good, if general without Recital, becauſe it would and ſhould have paſs'd what the Queen had, but *here it refers to King John, and he never had this*. Scroggs ſaid, The Queen only paſs'd thoſe Tolls which belonged to the Kings of England, particularly which King John had, and not thoſe which came to her ſince, and by another Means; to which the reſt agreed, and Judgment was given for the Defendant.

10. In Treſpaſs for *taking a Buſhel of Oatmeal*, the *Defendant as to all beſides one Quart, pleads Not Guilty*, and *as to that he juſtified for Toll* in the Market at Penzance, *and made a Title* to the Market and Toll *by Preſcription* &c. The Plaintiff *replied that before the Defendant had any Thing in it* &c. *Queen Eliz. was ſeiſed* of the Market, *and by Letters Patents, reciting that R. 1. and K. John had granted to the Burrough of Hilſton, that it ſhould be* a Free Burrough, and *quit of Toll, of Pontage, Paſſage, Stallage, and Sallage thro' all Cornwall*; *She incorporated the ſaid Burrough, and preſerved to them all the ſaid recited Privileges*. Then he ſets forth, that *he was born in, and a free Burgeſs of Hilſton, and ſo exempted*. The Defendant *rejoined* &c. *that the Burgeſſes of Hilſton had always paid Toll*; And upon Demurrer the Court ſaid it was a Doubt whether this Toll be within the Word *Sallage*, or any other particular Word of Diſcharge, and that the Word *Theolonium will not extend to all the Particulars after mentioned*. And their Opinion was, that the Charter of Q. Eliz. did not diſcharge the Plaintiff, and ſo gave Judgment Quod nil capiat. 2 Jo. 118. Gill v. Prior.

11. In Treſpaſs for *taking* 4 *Buſhels of Wheat at* 4 *ſeveral Days*, (viz.) 2 *in the Market-place in Lanceſton, and* 2 more *in the Houſe of J. S.* &c. The *Defendant as to all but* 16 *Pints, pleads Not guilty, and as to theſe* Actio non, and *juſtifies as Servant* to the Mayor and Commonalty of Lanceſton, and by their Command &c. *for Toll* in the ſaid Market; *and that he took the* 16 *Pints at two ſeveral Markets*, (viz.) 12 *Pints for* 12 *Buſhels expoſed to Sale* &c. *and* 4 *Pints for* 4 *other Buſhels* &c. *quæ eſt eadem captio*. Plaintiff demurr'd, becauſe the taking in *the ſeveral Places* mentioned *in the*

the Declaration are not answered severally, so that it might appear whether the Pints of Corn were taken in or out of the Market; for tho' the Taking may be justified in a Market, yet it cannot be justified out of it: Sed per Curiam, the Plea is good; for it is sufficient for the Defendant to answer the Taking in the Vill, and the very Place where taken is not material in Trespass, as it is in a Replevin; and had the Taking been out of the Market, the Plaintiff ought to shew it. And Judgment quod nil capiat. 2 Jo. 207. Pasch. 34 Car. 2. B. R. Specot v. Carpenter.

12. In Trespass for taking his Corn, the Defendant justified for Toll, but did *not set forth that the Corn was sold*; and Exception being taken for this Reason, because none can otherwise be due, unless by special Custom, Judgment was given for the Plaintiff. 2 Lutw. 1329, 1336. Trin. 2 Jac. 2. Leight v. Pym.

13. Trespass for taking two Lambs at F. The Defendant pleads in Bar a *Grant of* 2 *Fairs* to W. R. and his Heirs, *to be held every Year in F. with all Tolls* &c. *to these Fairs belonging* &c. That a Fair was held there 5 Aug. &c. and that the Plaintiff bought 600 Sheep and Lambs, for which 6 s. became due for Toll, of which he gave Notice; but he refusing to pay it, the Defendant, as Servant to W. R. distrained the two Lambs for Toll, and took and carried them away, which is Residuum Transgressionis &c. The Plaintiff *replied*, that *he was Inhabitant* in T. *within the Dutchy of L. and so* prescribed to be *quit of Toll*, and that he gave Notice to the Defendant. Upon Demurrer it was objected, that no Toll was expresly granted, and therefore none is due by Law. The Grant is (as belonging, or accustomed to the Fair) which cannot be by Prescription, which ought to be averr'd. 2dly, For that the Defendant set forth, that he did take and carry away the Lambs for the Toll not paid, but did *not say Nomine Districtionis*, as was resolved Cro. E. 710, 711. in **Smith and Sheppard's** Case; but in this Case it was said that he distrained the Lambs for Toll. But admitting the Plea good, the Court were of Opinion, that the Prescription for Inhabitants to be quit of Toll is good, and so the Replication and Count being good, tho' the Bar was not, the Plaintiff ought to have Judgment, and so he had for this Reason. 2 Lutw. 1377. Pasch. 4 Jac. 2. Osbuston v. James.

14. Trespass for taking Deal-boards; The Defendant *prescribes to repair a Wharf, and Ratione cujus to have a Toll of* 2 *d. per Tun of all Merchandize landed within the Manor*, (but did *not say upon the Wharf*) *and for Non-payment to distrain* a reasonable Part of the Goods. The Plaintiff *replied De injuria sua Propria, and traverses the Prescription*; upon which they were at Issue, and there was a Verdict for the Defendant; and now it was objected that this Prescription was void, because without any Consideration, it being for landing Goods on the Manor, and not on the Wharf; so that this is as a Toll-thorough, and without Consideration, and not good. But the Court held, that *this is rather Toll-traverse than Toll-thorough*, and gave Judgment for the Plaintiff. 3 Lev. 424. Trin. 7 W. 3. C. B. Crispe v. Belwood.

15. In Trespass, &c. the Defendant *prescrib'd* for a Fair every Year on such a Day, to be held in the Place where &c. and *to have reasonable Toll*, (viz) *inter alia, one Shilling for every double or large Stall, and for the Ground near it and about it*. Upon Issue join'd, the Defendant had a Verdict. It was moved in Arrest of Judgment, that Toll could not be due for Stallage, for they are different Things. Sed non Allocatur; because *Tolnetum* may well *signify Stallage*, as a general Word for all such Duties and Payments. 2. It was objected, that the Defendant had prescrib'd for Toll, *inter alia*, (viz.) 1 s. for a large Stall, which is incertain; and since the Prescription is intire, the Duty ought to be so too. Sed non Allocatur; for the Defendant need not set forth more than what the present Occasion required. 3dly, The Words *near and about the Stall* were objected as uncertain and void. Sed non Allocatur; for this

shall

ſhall be aſcertain'd by the common Uſage of the Fair. And Judgment, per tot. Cur. for the Defendant. 2 Lutw. 1517. Paſch. or Trin. 12 W. 3. C. B. Bennington v. Taylor.

2 Ld. Raym. Rep. 1589. S. C. by Name of Wigley v. Peachy & al'. adjudged accordingly by Raymond Ch. J. Page, and Probyn, (Lee abſente.) And ſays it was never moved again.

16. In Treſpaſs of Goods taken, the *Defendant juſtifies*, that R. Biſhop of W. was ſeiſed in Fee of a Market in C. and that he, as Bailiff, *diſtrain'd* them *Damage feaſant*. Plaintiff *replied*, *a Grant by Letters Patent to J. late Biſhop of W. and alleges, that he brought the Goods into the Market for Sale*, when the Defendant took them of his own Wrong. The Defendant, by his *Rejoinder*, *craved Oyer of the Patent, and ſaid, that Plaintiff did not pay Toll, and therefore Defendant deſired him to remove his Goods*; which not being done, he diſtrain'd them &c. Plaintiff demurr'd, becauſe Defendant demanded Oyer of the Patent, which was not pleaded with a Profert; that he did not allege, that any Toll was due, nor for what, or in what Manner, nor that any was denied; and that the Rejoinder is a Departure from the Bar. The Defendant's Counſel agreed, that the Rejoinder could not be maintain'd: But ſaid, that the Replication admitted his bringing the Goods for Sale into the Market; but that Plaintiff, before his doing ſo, ſhould have tender'd Stallage to the Lord's Bailiff; and cited * 2 Roll's Abr. 123. relating to the Town of Cambridge. But the Court declared, they were by no means ſatisfied that Toll or Stallage was due to a Market, without any expreſs Clauſe in the Grant, or Preſcription for that Purpoſe; But if theſe Duties were incident to Markets of common Right, they thought that *Stallage* could *not* be *neceſſary to be tender'd before the Goods were brought into the Market*; and that it was enough to do it after they were brought in. And as to the Caſe cited out of 2 Roll's Abr. 123. the Ch. J. and Judge Page declared, that they doubted whether it was Law. Accordingly Judgment was given for the Plaintiff, unleſs Cauſe, on Thurſday next. 2 Barnard. Rep. in B. R. 161, 162. Trin. 5 Geo. 2. Bigley v. Pechey.

* 2 Roll's Abr. Market, (B) pl. 1. Mich. 15 Jac. B. R. Rumpton Fair's Caſe. And ſays, that Doderidge was e contra at a Day before.

(M) Verdict.

1 Salk. 248. pl. 4. S. C. but S. P. does not appear.—— 12 Mod. 216. Mich. 10 W. 3. S. C. by Name of Winckeſline v. Ebden. But ſame Point does not appear.

1. IF it be *found*, that the Corporation &c. *are bound to repair* &c. the Thing, on Account whereof the Toll is to be paid, it is ſufficient, *without finding that it was then in Repair*; for it is the Obligation which lies on them to do the Thing, and not the Performance of the Thing itſelf, which is the Conſideration of the Duty; Per Holt Ch. J. And Judgment accordingly. Carth. 359. Trin. 7 W. 3. B. R. Vinkinſtone v. Ebden.

(N) Toll-Book.

See Market (I. 4)

Ow. 27. S. C. accordingly by Windham and Rhodes, ——If one takes my Horſe, and ſells it in a Market Overt, and pays Toll for it, though he enters

1. A. Stole a Horſe, and ſold him in Market Overt; but he enter'd *a falſe Name* in the Toll-Book. This does not alter the Property of the Thing toll'd. Le. 158. pl. 225. Mich. 31 Eliz. C. B. Gibbs's Caſe.

enters his Name falſely in the Toll-Book, yet the Sale is clearly good, and the Property alter'd, if there was *no Covin in the Vendee*. For the Miſnoſmer of the Party is nothing to him, when he buys it bona fide, and is not conuſant of the tortious Taking. And they adviſed the Plaintiff to diſcontinue his Suit, and order'd that ſmall Coſts ſhould be aſſeſs'd; and it was ſo done. Cro. Eliz. 86. pl. 6. Hill. 30 Eliz. B. R. Wickes v. Morefoots.

For more of Toll in General, ſee **Market, Preſcription,** and other Proper Titles.

Tort.

(A) *Conſtruction of Law,* relating to Torts.

1. IF a Man *ſells a Diſtreſs* which he took and impounded, and after *rebuys it, and impounds it again*, yet the Selling is not excuſed. Per Mountague J. And Knightly ſeem'd of the ſame Opinion, and cited 5 E. 4. D. 35. b. pl. 34. cites in Marg. 2 E. 4. 55. a. 28 H. 6. 5. b.

2. The *ſame* of *Trees cut by Leſſee*, and by him ſold, and afterwards by him bought again, and employ'd for Repairs. D. 35. b. pl. 32. Trin. 29 H. 8. Maleverer v. Spinke. S. P. Co. Litt. 53. b. ——*So* if Leſſee *cuts Trees, and ſells them* for Money, *and with the Money repairs the Houſe*, it is Waſte. Co. Litt. 53. b.

3. A. deviſed a Term to B. and makes C. Executor, and dies. The *Executor takes a new Leaſe*, which is a Surrender and a Devaſtavit. *The Deviſee enters without Aſſent* of the Executor, by which he is a Diſſeiſor, and then grants *his Intereſt to the Executor*. Adjudged that this ſhall *enure as Aſſent* of the Executor *firſt* to the Term deviſed; and this makes the Deviſee to be in by Right, and then he is in of ſuch Term in Eſtate, as he may grant. Mo. 358. pl. 487. Trin. 36 Eliz. Carter v. Love.

4. When a Man enters, *having a good Title*, he ſhall not be ſaid to enter by a tortious one. Arg. Mo. 363. pl. 494. in **Bullie's Caſe**, cites 12 Aſſ. where the Lord diſſeiſed his Tenant by Knight-Service, who died his Heir within Age. This *purg'd the Diſſeiſin*. So 38 H. 6. Tenant pur Auter Vie is diſſeiſed, Ceſty que Vie dies, he ſhall be Occupant, and the Diſſeiſin purg'd.

5. A Man cannot *apportion* his Tort. Cro. E. 651. pl. 6. Hill. 41 Eliz. B. R. in Caſe of **Heliar v. Whitear.**——6 Rep. 24. b. **Helyar's Caſe.**

6. Where a *tortious Poſſeſſor* ſhall be liable to *anſwer* conſequential *Damages*, tho' a Poſſeſſor bona fide, ſhall not in the like Caſe, See Hob. 100. in Caſe of **Moore v. Huſſey**, cites 8 E. 3. 52. and 8 E. 3. 45.

7. When *Right and Wrong do meet together*, the Right ſhall ever be preferr'd. See 3 Bulſt. 47. in Caſe of **Harris v. Auſtin.** And ſee Roll Rep. 214. in S. C.

For more of Tort in General, ſee **Diſſeiſin, Ratihabitio, Releaſe to Diſſeiſors,** and other Proper Titles.

Tout temps Priſt.

(A) Tout temps Priſt. [*And Uncore Priſt.*]

1. IN Debt upon Obligation, upon Condition of Payment of a leſs Sum, **if Defendant pleads a Tender, and Refuſal by Plaintiff, yet he ought to ſay Uncore Priſt.** 10 H. 6. 16. b. 11 H. 6. 27. * 14 H. 6. 23.

* Br. Touts temps Priſt, pl. 21. cites S. C.——*But* if the Money was *to be paid to a Stranger*, he need not to ſay Uncore Priſt. And. 4. pl. 7. Paſch. 3 & 4 P. & M. in Caſe of Pannel v. Nevel.

Where a Man is *bound in* 60 *l. to pay* 40 *l.* if he *pleads Tender of the* 40 *l. in Action of Debt brought againſt him of the* 60 *l.* he ought to ſay that he is yet ready, and always has been ready to pay the 40 l. and bring the Money into Court, becauſe the *leſs Sum is Parcel of the greater Sum* expreſs'd in the Obligation, and there Refuſal of it ſhall not ſerve, for it is Parcel &c. Br. Tout temps &c. pl. 31. cites 20 E. 4. 1. per Brian & Cur.——But Ibid. pl. 33. cites 21 E. 4. 42. 52. That it was held, per tot. Cur. in ſuch Caſe, that he need not ſay that he is yet ready to pay; quod nota. But it is ſaid, that 21 H. 6. is contrary, and ſo are ſeveral other Books thereof.

But if the Obligation be of 60 l. *to enfeoff the Plaintiff by ſuch a Day*, or *to deliver to him a Horſe*, or ſuch like, *which is not Money*, Tender by the Defendant, and Refuſal by the Plaintiff, is ſufficient for the Defendant for ever. And there in Pleading the Defendant need not to ſay, that he has been always ready, and yet is; but in the one Caſe and the other the *Penalty is ſaved.* Br. Tout temps &c. pl. 31. cites 20 E. 4. 1. per Brian & Cur.

2. **If A.** covenants **with B.** to pay **him** 10 l. after Michaelmas, and before Eaſter; **in Debt upon this Covenant, if Defendant pleads, that within the ſaid Time he tender'd to the Plaintiff the ſaid** 10 l. **and Plaintiff refuſed it, it is not good without ſaying Uncore Priſt &c. Hill.** 1649. **between** *Newton and Newton*, **in 2 Actions. Adjudg'd upon Demurrer. Intratur. M.** 1649. **Rot.**

3. **In Debt upon** Obligation, **if** Condition **be,** that a Stranger ſhall make another Deed to the Plaintiff; **if he pleads a Tender to the Plaintiff, and Refuſal by him, he need not ſay Uncore Priſt.** 10 H. 6. 16. b.

4. **The** ſame **Law would be,** if the Defendant himſelf ought to make the Deed. **Contra,** 10 H. 6. 16. b.

S. P. per Brian & Cur. Br. Tout temps &c. pl. 31. cites 20 E. 4. 1.—*But in Debt upon Arbitrement*, he ſhall ſay that he has been always ready, and yet is &c. Br. Tout temps &c. pl. 31 cites 20 E. 4. 1. per Brian & Cur.

5. **In Debt upon Obligation upon** Condition to perform an Award **if the Defendant pleads a Tender and Refuſal of the Sum awarded, he need not to ſay Uncore Priſt.** 14 H. 6. 23. **Curia. Contra** 11 H. 6. 27.

6. If

6. If I deliver 10 l. to another without Deed, to my Uſe, and make a Defeaſance by Deed, if he pays 5 l. &c. **if he pleads a Tender at the Day, he needs not to ſay Uncore Priſt. Contra** 18 E. 3. 39. b.

7. **In Debt upon** Obligation, whereof a Defeaſance is made by another Deed to pay a ſmall Sum, **if he pleads Tender at the Day, he need not to ſay Uncore Priſt. Contra** 18 E. 3. 53. b.

S. P. That he need not to ſay Uncore Priſt, per Priſot and Littleton, by which they took Iſſue that he did not tender. qnod nota. Br. Tont temps &c. pl 4. cites 33 H. 6. 3. —— Heath's Max. 124 cap. 5 cites S. C. —— S P. accordingly, 9 Rep. 79. b in Peytoe's Caſe, cites 13 H. 6. 2. a. b. —— D. 36. pl. 119. Trin. 4 Eliz. Anon. per Dyer.

So in Debt upon an Obligation, it was held, That where an Obligation is made, and afterwards a Defeaſance is made thereof, if he pays a leſſer Sum &c. there, if he pleads the Defeaſance and the Tender of the leſſer Sum, he need not to ſay, Tout temps priſt; for by the Tender he was diſcharged of all. But otherwiſe it is of an Obligation, with a Condition to pay a leſſer Sum. Cro. Eliz. 755. pl. 16. Paſch 42 Eliz. in C. B. Cotton v. Sir Gervaſe Clifton.

8. **The** ſame **Law is where the** Defeaſance is upon a Statute, **Contra** 22 E. 3. 5.

S. P. 9 Rep. 79. b. in Peytoe's Caſe cites 33 H. 6. 2. a. b.

9. **If a Man** confirms **Land to a Man** in Fee upon Condition of Payment of certain Tinne, **if he pleads a Tender of the Tinne at the Day, he need not to ſay, Et uncore Priſt. Quære** 30 Aſſ. 11.

10. *In Detinue of a Horſe*, he ſhall not ſay, That he has been always ready &c. Br. Tout. temps &c. pl. 31. cites 20 E. 4. 1. Per Brian & Cur — So of Arbitrement. 16 H. 7. 7. Ibid.

11. It was ſaid, that *in Debt upon an Obligation*, it is a good Plea that the Defendant has been *always ready* to pay &c. *if he could have Acquittance.* Br. Tout temps &c. pl. 39. cites 1 R. 3. and Fitzh. Verdict 13.

Heath's Max. 127. cap. 5. cites 1 R. 3. 1. S. C. and adds, that by this it ſhould ſeem that the Plaintiff in that Caſe ought to offer an Acquittance as he is to demand Rent that is payable on the Ground, Quære inde.

12. When a *Bond* is *for Payment of Money in Diſcharge of a Debt*, Tout temps priſt muſt be pleaded, notwithſtanding a Tender; *But* where the Payment of the Money is *in Defeaſance of ſome other Collateral Matter*, as a Bond to ſave Harmleſs &c. it need not be pleaded. Arg. 10. Mod. 282. cites Co. Litt. 207. a.

13. A *Difference* taken between a *bare Debt* and a *Penalty to pay a Debt*, as an Obligation with a Condition; For in that Caſe it ſhall be ſufficient to plead a Tender at the Day without [with] an Uncore Priſt, without a Tout temps priſt; there he may plead a Tender toperform the Condition, without ſaying, that he was always ready; But when it is for a bare Debt, there he muſt plead, Tout temps priſt. And the Court agreed the Difference between an Obligation with a Penalty and a bare Debt. Freem. Rep. 205. pl. 209. Mich. 1675. in Caſe of Serle v. Bunnion.

So in Aſſumpſit where the Defendant imparl'd ſpecially, Windham J. ſaid, that if he had pleaded Tender, and that he was now ready, as in D. 300. it might have been good, but now it ſeems he is eſtopped to plead Always ready; And Atkins inclined to this, Cæteris abſentibus; Sed adviſare volunt. Freem. Rep. 134. pl. 156. Mich. 1673. in C. B. Bone v. Andrew's.—3 Salk. 220. pl. 9. S. C. but not S. P.— 2 Mod. 70. S. C. but not S. P.

14. If a *Promiſe* be *to pay Money on a particular Day*, there a Tender with a Tout temps priſt is good enough, but it is otherwiſe where the Money is to be paid on *Requeſt*; For there might be Laches before the Tender. Per Holt Ch. J. Cumb. 444. Trin. 9 W. 3. B. R. Giles v. Hart.

2 Salk. 622. S. C.

(B) *At what Time* he may plead this Plea.

1. IF the Defendant in the Action of Debt takes his Delays by Eſſoine and * comes by the Grand Diſtreſs, yet he may plead Tout Temps Priſt. 18 E. 3. 53. b.

* Fol. 524.

I. *Detinue againſt Executors*, they ought to ſay, that they have been always ready, and yet are &c. For otherwiſe they ſhall render Damages; And they were permitted to ſay ſo *at the Diſtreſs*; Quod nota. Br. Tout temps &c. pl. 37. cites 22 E. 3. and Fitzh. Damages 103.

In *Debt* the *Defendant came at the Diſtreſs, and ſaid that he has been always ready* to pay, *and yet is*, and brought the Money into Court, and the Plaintiff demurr'd becauſe he came at the Diſtreſs, Et non allocatur; For *it may be that he was never warned by the Sheriff*, by which he recovered the Sum tendered &c. without Damages, as it ſeems. Br. Tout temps &c. pl. 8. cites 7 H. 4 9.——Heath's Max. 128 cap. 5. cites S. C.

But in *Annuity*, the *Defendant came at the Diſtreſs, and ſaid that he has been always ready, and yet is*, to pay &c. and no Plea per Cur. becauſe he came at the Diſtreſs. Br. Tout temps &c. pl. 7. cites 2 H. 4. 3.

Heath's Max 128. cap. 5 cites S. C.

2. *Dower Unde nihil habet*, the *Tenant came at the firſt Day, and ſaid, that he had been always ready to render* Dower, and the *Demandant ſaid, that oftentimes before the Writ ſhe demanded Dower* and could not have it; and was received, inaſmuch as it was at the firſt Day. And it is ſaid elſewhere this is inaſmuch as the * Heir is in by Title, but Contra in Coſinage Aiel & Mortdanceſtor; for this is to diſaffirm the Title and Eſtate of the Tenant; note the Diverſity for there ſuch Averment ſhall not be taken. Br. Touts temps &c. pl. 34. cites 2 H. 4. 7.

* S. P. and does no Wrong till a Demand be made Co. L. 33. a.

3. In *Debt* the *Defendant join'd Iſſue for Part*, and *as to the reſt tendered it in Court*, and ſaid, that he has been always ready, and yet is, and ſaid, that he tendered it to the Plaintiff at the Summons, and Attachment, and Diſtreſs in London &c. Br. Tout temps &c. pl. 11. cites 11 H. 4. 55.

S. P. Br. Tout temps &c. pl. 36. cites 7 H. 7. 16. —— Heath's Max. 128. cap 5. cites ſame Caſes.

4. *In Dower, Eſſoin caſt for the Defendant does not eſtop him to ſay, that he has been always ready, and yet is*, to render Dower in Caſe the Demandant will render him his Evidence concerning his Land which he has by Deſcent &c. For the Eſſoin may be caſt by a Stranger, and therefore ſhall not prejudice the Tenant; quod nota, per Cur. Br. Tout temps &c. pl. 20. cites 14 H. 6. 4.

Heath's Max. 128. cap. 5. cites S. C. —— Br. Tout temps &c. pl. 42. cites S. C. —— In Debt upon an Obligation, the Defendant, after Oyer of the ſame, imparled, and now pleaded that he was ready to pay the Money at the Day and Place, and that none was there to receive it, and that he is now ready, and tendered the Money in Court, and ſaid not Tout temps, and a good Plea as it ſeems; for he had excuſed the Forfeiture by the Plea above, and he ſhall not be eſtopped by the Imparlance to plead the Plea above, per ſeveral Juſtices, but Lennard Cuſtos Brevium aliter ſentiit. D. 300. pl. 37. Paſch. 13 Eliz. Anon.—Cro. J. 627. pl. 22. Mich. 19 Jac. B. R. Steward v. Coles. S. P. and the Plaintiff offered to demurr becauſe the Defendant did not plead Tout temps priſt, and tho' he tendered it at the Day, whereby he ſaved it for the Time, yet if he pleads not this Plea, it ſhall be intended that he has forfeited his Obligation, and whether he ſhould have Judgment or no was much doubted: So that the Defendant durſt not inſiſt upon his Plea; but by Direction and Mediation of the Court he paid 500 l. in Satisfaction of the Debt, and 100 l. Coſts and Damages. —— 'Tis true in Debt upon Bond ſuch Plea is good after Imparlance, becauſe it is to *ſave the Penalty*. Arg. cites D 300. *but* when a *ſingle Duty is demanded, and the Party is intitled to Damages for Non-payment*, the Plea of Tout temps priſt is not good. Arg 2 Mod. 62. Anon. (And Judgment according to the laſt Part of the Diverſity.) —— The Caſe of D. 500 is good Law. Per Holt. Cumb. 334. Trin. 7 W. 3. B. R. Broom v. Pine.

5 In. Dower, the *Tenant ſaid, That he has been always ready to render* Dower, *and yet is*, to which the *Demandant ſaid, that to this he ſhall not be received*; For at ſuch a Day the Original was returnable and the Parties appeared, and the Demandant made her Demand, and the *Defendant imparled, and had Day* ſuch a Day; And per Aderne J. and Danby Ch. J. this is an Eſtoppel, to ſay that he has been always ready &c. Br. Tout temps &c. pl. 27. cites 5 E. 4. 141.

Aſſumpſit

Aſſumpſit for Money due for Work, The Defendant has a ſpecial Imparlance, Salvis omnibus exceptionibus tam brevi quam narrationi (& advantagiis omitted) and then comes and pleads that he tendered him the Money, and was always ready to pay him, and Uncore priſt. The Plaintiff in his Replication ſhews, that the Defendant did imparl Ut ſupra, and demands Judgment, whether or no, after this Imparlance, he ſhall be permitted to plead a Tender, and that he was always ready. And it was inſiſted, that it is a Contradiction after an Imparlance, to plead he was always ready; For if he were ready, why did he imparl? Beſides, the Entry is ſaving all Exceptions to the Writ and the Declaration, and he ſhall not have more than he has reſerved, and cites Br. Tout temps priſt 27 accordant. 2 H. 6. 13. Windham J. perhaps if you had pleaded your Tender, and that you are Now ready, as it is pleaded in Dyer 300. it might have been good; But now it ſeems that you are eſtopped to plead that you were always ready. And Atkins inclined hereto cæteris abſentibus; ſed adviſare volunt. Freem. Rep. 134. pl. 159. Mich. 1673. Bone v. Andrews in C. B.

It cannot be pleaded *in an Indebitatus Aſſumpſit* after Imparlance; for it is contradictory to ſuch Plea, for the Money was due on the Day of the Aſſumpſit. Carth. 413. Giles v. Hart.—— 2 Salk. 622. pl. 1. Mich. 9 W. 3. S. C.—12 Mod. 152. S. C.

So in Debt for Rent, The Defendant imparles generally, and then pleads Tout temps priſt. The Court held this Plea could not be pleaded after a general Imparlance; For it is *contradictory to ſay, he was always ready, and yet to take Time to Anſwer to the Declaration. Freem. Rep. 205. pl. 209. Mich. 1675. Serle v. Bunnion.

* S. P. Per Holt Ch. J. Comb. 334. Trin. 7 W. 3. B. R. in Caſe of Broom v. Pine. —— S. P. 2 Mod. 62. Anon.

One muſt plead Tout temps priſt *always before Imparlance*. 12 Mod. 72. Paſch. 17 W. & M. Anon. —— S. P. 12 Mod. 83 Mich. 7 W. 3. in Caſe of Wigmore v. Veale.

Upon Point of Pleading of Tender this *Diverſity* was taken by Holt Ch. J. That Tender *at the Day* is no Plea *to a ſingle Bill* but only in *Bar of Damages*, in which Caſe you muſt plead it *before Imparlance* with a *Tout temps* and Uncore priſt & profert &c. but Tender at the Time is a good Plea *to a penal Bond in Bar*, becauſe it ſaves the Forfeiture, and therefore may be *after Imparlance*. 12 Mod. 354. Paſch. 12 W. 3. in Caſe of Horne v. Luines. —— But the Reporter cites 1 Inſt. 207. a. 21 Ed. 4. 25. pl. 39. and ſays, This ſeems to hold only where the Penal Bond is for doing a *collateral Thing* and *not* where it is for *Payment of Money*, but ſays, Vide the Caſe in Dyer 300. a. That in Caſe of a Bond for Payment of Money, he may plead Tender and Uncore priſt after Imparlance. 12 Mod. 354. In Caſe of Horne v. Luines.

6. In *Debt, at the Capias the Defendant came and found Surety, and had Superſedeas, and tender'd the Money*, and ſaid that he has been always ready &c. and yet is, and tender'd the Money. And per Littleton, He may plead this well, becauſe he was return'd Nihil upon the Original, and had not Conuſance till the Capias. Contra if he had had Conuſance before. Br. Tout temps &c. pl. 30. cites 8 E. 4. 9.

7. *In Detinue of diverſe Parcels, Tender of Part* is a good Plea to it *before Verdict* &c. Br. Tout temps &c. pl. 39. cites 1 R. 3. Heath's Max. 127. cap. 5. S. C.

But if there be a Verdict, then is the Sum of the Value made a Thing entire, whereof the Plaintiff is not bound to receive Part without the whole.

8. In Debt upon a *ſingle Bill*, or for *Rent*, the Plaintiff declares that the Defendant hath not paid him Licet ſæpius requiſitus; the Defendant may plead that he was always ready and ſtill is ready, and pray Judgment of Damage; and then the Plaintiff, if he will have *Damage*, muſt reply, and ſhew a *ſpecial Requeſt*; Per Holt. Comb. 334. Trin. 7 W. 3. B. R. Broom v. Pine.

(C) Tout temps Priſt. [*And Uncore Priſt, after Verdict for Defendant on the Tender.*]

1. IF the Defendant be to pay a leſs Sum, and Defendant pleads a Tender at the Day with an Uncore Priſt, if the Plaintiff refuſe the Money, and takes Iſſue that he did not tender it at the Day, and it is found againſt him, he has not any Remedy for the leſs Sum. 18 E. 3. 39. b. Quære. 53. b. Quære. 25 E. 3. 45. b. Quære.

2. So if he pleads Payment of Part, and Tender and Refuſal of the Reſidue with an Uncore Priſt, and Plaintiff refuſes the Money, and takes

takes Iſſue that he did not pay the Sum alleg'd, and this is found againſt him, he ſhall not have the Reſidue of which Defendant pleaded Uncore Priſt. Contra 22 E. 3. 5. Curia.

3. But he might have taken that Money after the Iſſue joined. 22 E. 3. 5.

(D) How the Pleading ſhall be. Where he ſhall *bring the* Thing, [viz. *Money*] *into Court.*

1. IF a Man pleads a Tender of Money with an Uncore Priſt &c. it is no good Plea without bringing the Money into Court. Mich. 1650. between *Witham and Little* adjudged upon Demurrer. Intratur Hill. 1649. Rot. 121.

Debt upon an *Obligation* indors'd, that *if he pay'd* 10 *l.* *at D. ſuch a Day, that then* &c.

2. In Debt upon Obligation, if Condition be to pay a leſs Sum at D. if Defendant pleads a Tender and Refuſal, with an Uncore Priſt, it is not ſufficient to ſay Uncore Priſt at ſuch a Place, but he ought to bring the Money into Court. 11 H. 6. 27.

And he *ſaid that he was there that Day, and tendered it, & hoc &c.* Tirwhit ſaid, You ought to tender it in Court now. Et non allocatur; for he is not bound to pay it at another Place than is compris'd in the Condition; As in Replevin the Defendant avow'd, the Plaintiff alleg'd Tender upon the Land Tempore Captionis, and he refuſed, and good without Tender now; for the Rent is only payable upon the Land. Br. Tout temps &c. pl. 35. cites 5 H. 4. 18.——Br. Tender, pl. 6. cites S. C

But in Debt by *Obligation of* 60 *l.* upon Condition *to pay* 10 *l.* *at ſuch a Day and Place*, the *Defendant ſaid that he was ready at the Day and Place, and offer'd* &c. *and the Plaintiff refuſed*, and the Plea chal. leng'd, inaſmuch as he *did not ſay that he has been always ready after, and tender the Money in Court*; and the Defendant ſaid that he is not bound to tender it, unleſs at the Place expreſs'd in the Condition. And yet per tot. Cur. He ought to tender it Now. Contra 5 H. 4. 18. ſupra. But this Book is taken for the beſt Law at this Day. Br. tout Temps &c. pl. 43. cites 7 E. 4. 3.

So where the leſs Sum was to be paid at the Holt in the Manſion houſe of the Obligor, at a certain Day, and the Obligor pleaded that he was ready at Holt to have paid, but Nobody came to receive it, but did not ſay Uncore Priſt; and therefore held no Plea. And. 4. pl. 7. Paſch. 3 & 4 P. & M. Pannel v. Nevel.——D. 150. pl. 84. Trin. 3 & 4 P. & M. S. C. And becauſe he did not ſay Uncore Priſt, with a Tender of the Money in Court, nor ſay Uncore Priſt to pay at the Holt, the Court without Argument adjudg'd it no Plea; but that it would be otherwiſe if the Condition had been *to do a collateral Act, and not to pay Money, which is of the Nature of the Sum in the Penalty, and the very Duty*, by Intendment of Law, for Surety whereof the Obligation of the greater Sum was made, and cited 7 E 4. But per Catlyn and Griffin the Attorney General, the Law is not ſo, becauſe the Place of Payment is Parcel of the Condition, and it ought not to be paid elſewhere. And ſo is the Diverſity in 7 H. 4. where a Place of Payment is put, and where not &c.——Bendl. 54. pl. 90. S. C. adjudged no Plea by all the Juſtices, becauſe the Sum remains a Debt ſtill, notwithſtanding the Tender at the Holt; and cites 7 E. 4. according to this Judgment, tho' in 7 H. 4. it was adjudg'd contrary; but they did not hold this to be Law now. And the Reporter adds a Quære, if he had pleaded that he was Uncore Priſt to pay this Sum at the Holt aforeſaid, whether this would have been a good Plea?

Debt upon *Obligation upon Condition to ſtand to Arbitrement*; the

3. The ſame Law is, where the Condition is to perform an Award, which was to pay a Sum at D. It is not good to ſay, Ready at D. (Admitting that he ought to ſay Uncore Priſt. Contra 11 H. 6. 27.

Defendant pleaded that the Arbitrators awarded that he ſhould pay in ſuch a Place, which he has been always ready to pay, and yet is, and did not tender the Money in Court; And yet good by the Opinion there, becauſe it is payable at another Place, and he is ready to perform the Award. And ſo it ſeems that *if the Place certain had not been in the Award*, he *ought to have tender'd* the Money *in Court*. Br. Tout temps &c. pl. 41. cites 11 H. 6. 27.

4. In Aſſiſe of Rent the *Tenant pleaded to part a Releaſe*, and *to other Part Diſſeiſin of the Land for a Time, to ſuſpend the Rent*, and *to the reſt that he has been always ready*, and yet is, and tender'd the Money in Court; Nota. Br. Tout temps &c. pl. 25. cites 8 Aſſ. 35.

5. *Cove-*

5. *Covenant by the Leſſee againſt the Leſſor for ouſting him of his Term*, the *Defendant pleaded in Bar a Clauſe of Re-entry for Rent Arrear*, and the *Plaintiff to Part* of the Rent *pleaded Accord to recoup it for boarding the Defendant, and to the reſt pleaded Tender, and that the Defendant refus'd it* and ouſted him, and yet is ready &c. and tender'd the Money in Court; Quod nota, and demanded Judgment, and pray'd Reſtitution, and his Term and Damages. Br. Tout temps &c. pl. 5. cites 47 E. 3. 24.

6. In *Treſpaſs* the Defendant pleaded *Arbitrement to pay* 10 *l.* &c. This is no Plea, per Marten, if he *does not ſay that he has paid it, or* ſay *that he has been always ready, and yet is*, and bring the Money into Court, and this ſeems to be where the Day of Payment is paſt. Br. Tout temps &c. pl. 15. cites 8 H. 6. 25.

7. In *Debt* the *Defendant as to Parcel ſaid that he has been always ready to pay, and yet is, and brought the Money into Court, and to the reſt pleaded in Bar*, the *Plaintiff pleaded in Eſtoppel to the ſaying that he has been always ready* &c. *for that he imparl'd the laſt Term*; Jugdment if he ſhall be receiv'd to ſay that Always ready &c. And per Danby, the Plaintiff ſhall not have the Money here till the other Iſſue be tried, and this by reaſon that the Damages ſhall not yet be tried till the other Iſſue be tried; but per Priſot, he may have Judgment of his Debt of this Parcel, and his Damages, & Ceſſet Executio; for thoſe may be well aſſeſs'd by the Court as to this Parcel, but the Plaintiff ſhall not have it till the other Iſſue be tried, by Reaſon that the Coſts ſhall be entire, which cannot be tax'd till the other Iſſue be tried; and when the Plaintiff pleaded the Eſtoppel above, the Defendant pray'd to have his Money again. And per Priſot, he ſhall re-have it; quod non fuit conceſſum; for he has confeſs'd of this Part. And by him, if the Plaintiff will relinquiſh his Eſtoppel, he ſhall have Delivery of the Money without Damages and Coſts; and the Plaintiff afterwards relinquiſh'd the Eſtoppel, by which the Money was delivered to him. Br. Tout temps &c. pl. 22. cites 36 H. 6. 13.

8. Debt upon an *Obligation of* 10 *l. to pay* 40 *s. ſuch a Day*; the *Defendant pleaded Payment of* 20 *s. at the Day, and that he offer'd* 20 *s. Reſidue there the ſame Day, and the Plaintiff refuſed it, and* that he has been *always ready* to pay it, *and yet is, and tender'd the Money in Court*, and the *Plaintiff tender'd to aver that he did not tender the* 20 *s. at the Day.* Per Cur. Now the Defendant ſhall have the Money again, and ſo he had; and if the Iſſue be found for the Plaintiff the Obligation is forfeited, and if it be found for the Defendant, the Plaintiff has loſt the 20 s. Quod nota; for he has refuſed it by Matter of Record, and took the other Iſſue at his Peril. Br. Tout temps &c. pl. 32. cites 21 E. 4. 25. Heath's Max. 124. cap. 5. cites S. C.

9. In *Indebitatus* Aſſumpſit, *& quantum meruit*, the *Plaintiff laid a ſpecial Requeſt* at ſuch a Day and Place, and that the Defendant refuſed to pay, the Defendant *pleaded that ſuch a Day before the Requeſt, he tender'd, and the Plaintiff refuſed*, and that afterwards *Semper paratus* fuit, *& profert hic in Cur.* Holt Ch. J. ſaid, that where the *Agreement* is *to pay at a certain Time*, there a Tender at that Time, & ſemper paratus, is a good Plea; but where the Money is due, and *payable immediately by the Agreement*, there the Defendant muſt plead Semper paratus from the Time of the Promiſe. 2 Salk. 622. pl. 1. in Caſe of Giles v. Hart. Comb. 443, 444. S. C. Holt thought they ſhould have ſaid, that all Times after the Promiſe they were ready, & tali Die tendred &c.——3 Salk. 343. S. C.——Carth. 413. S. C. and adjudged ill upon Demurrer, becauſe the Defendant has *not ſaid any Thing as to the Time between the Promiſe and the Requeſt*, and the Money was due on the Day of the Promiſe; and therefore the Defendant ſhould have pleaded the Tender on that Day, and that he from that Day was always ready; for the ſpecial Requeſt laid in the Declaration is only Surpluſage, and therefore the Day on which the Requeſt was made is immaterial; and when once the Cauſe of Action accrued, a ſubſequent Tender could not take it away. But Per Holt Ch J. In theſe Caſes, the beſt Way of Pleading is to plead generally Semper paratus &c & profert hic in Curia, without pleading any Tender.——If he pleads that he was always ready, this refers to the Time of the Promiſe made, and not to the Time of the Tender; Per Holt Ch. J. Ld. Raym Rep 254. S C. and ſays that Judgment was given for the Plaintiff, and that if the Defendant had pleaded Tout temps Priſt, the Plaintiff ſhould have replied, and ſhewn the Requeſt, and the Time when it was made.

10. There

Where Debt is brought on a Bond, condition'd to pay Money at a Day certain, if the Defendant pleads a Tender at the Day, and that he has been always ready &c. it is good. But in Aſſumpſit, or Debt upon a ſingle Bill, he muſt plead, that he has been always ready. Ld. Raym. Rep. 254 per Holt Ch. J. in Caſe of Giles v. Hartis. ——3 Salk. 353. S. C.

10. There is a *Difference between Debt and Aſſumpſit*; for in Debt the Damages are but acceſſary, but in Aſſumpſit they are principal; therefore in Debt the Defendant may plead in Bar of the Damages; but in Aſſumpſit he muſt plead Semper paratus, with a Profert in Cur. and demand Judgment de Ulterioribus damnis. 2 Salk. 623. pl. 1. Mich. 9 W. 3. B. R. Giles v. Hart.

11. In Debt upon Bond, with Condition to pay the Money, if the Defendant pleads a *Tender with adhuc Paratus*, he ought to bring the Money into Court; becauſe it is Parcel of the Demand. Per tot. Cur. Ld. Raym. Rep. 643, 644. Hill. 12 W. 3. in Caſe of Horn v. Lewin.

(E) Where he ſhall bring the *Thing* into Court.

In *Detinue of a Cheſt of Charters*, it is no Plea that they came into their Hands enſeal'd, as Executors; and that they have been always ready, and yet are, to deliver them, &c. unleſs they offer them to the Court, *or ſay that they are ſo ponderous, that they cannot bring them here for the Weight*; quod nota, per Cur. Br. Tout temps &c. pl. 3. cites 9 H. 6. 65.

1. If the Thing in Demand be ſo ponderous, that it cannot be carried, he may plead uncore Priſt, without bringing it into Court. 11 H. 6. 29. b. 30 Aſſ. 10.

2. But in ſuch Caſe he ought to plead ſo; that is to ſay, that it is ſo ponderous, that it cannot well be carried. 11 H. 6. 29. b. 30. Aſſ. 10. ſo pleaded.

Heath's Max. 125. cap. 5. cites S. C.—— The *Defendant* in Writ of Ward, *pleaded, That he claim'd nothing* &c. *but for Nurture; and that W. has brought ſuch a Writ againſt him; and pray'd, that they interplead, and that he is ready to render him to whom the Court ſhall award; but he has not the Body ready; for it is in Peril of Death, and* in Peril *of Water* at S. Et non Allocatur. But it was awarded, that the Plaintiff recover the Marriage. Quære of the Damages; quod nota. For Green ſaid, that to thoſe Matters the Plaintiff cannot have Anſwer &c. Quære if this be the Reaſon. Br. Tout temps &c pl. 19. cites 24 E. 3.——Br. Gard. pl. 49. cites 24 E. 3. 66. S. C.——Heath's Max. 125. cap. 5. cites S. C.

Where *two ſeveral Writs of Ward* are brought, and the *Defendant ſays he is ready to render the Infant* to whom the Court ſhall award, and has not the Infant, there he ſhall find Mainpriſe to have the Infant there at the Day. Br. Touts temps, pl. 38. cites 8 E. 3. and Fitzh. Gard. 25.——Heath's Max. 125. cap. 5. cites S. C.

3. In *Ward*, he, who pleads that ſuch a Writ is brought againſt him, and *that he is ready to deliver to whom the Court ſhall award, and* ſays, *that he does not claim any thing but by Cauſe of Nurture*, ought to have the Infant ready at the Bar. Br. Tout temps &c. pl. 17. cites 24 E. 3. 31.

Br. Arbitrement, pl. 12. cites 7 H. 4. 31. S. C.

4. He who *pleads Arbitrement in Treſpaſs, to give a Piece of Cloth*, ſhall ſay, that he has been always ready to give it, and yet is, and bring the Cloth into Court; quod nota. Br. Tout temps &c. pl. 9. cites 5 H. 4.

Heath's Max. 126. cap. 5. cites S. C.

5. In *Detinue of* 10 *Quarters of Barley*, the *Defendant*, as *to four Quarters, ſaid, that he has been always ready* to deliver them, and yet is, which he could not have in Court for Portage, but is ready to deliver them &c. and to the reſt waged his Law. And the Plaintiff to the four Quarters ſaid, that after the Bailment, and before the Action brought, he requir'd him at D. in the County of S. and he refuſed &c. Br. Touts temps &c. pl. 28. cites 6 E. 4. 11.

(F) *Uncore Priſt. Neceſſary* to be pleaded, or not. *In what Caſes.*

1. IN *Audita Querela*, the Plaintiff *declared upon Defeaſance to pay* 10 *l. at ſuch a Day, and* 10 *l. at another Day, and that he paid the firſt Sum at the Day, and tender'd the laſt at the Day, and he refuſed, and he is yet ready to pay, and tender'd the Money in Court*; quod nota. Br. Tout temps &c. pl. 6. cites 47 E. 3. 25.

2. *Debt upon an Obligation.* Newton ſaid, It is *indorſed* upon Condition, *that if J. N. ſhall ſtand to the Award of W. P.* of all Matters between him and the Plaintiff; if the Award be made before ſuch a Day, or that the ſaid J. N. render himſelf to the Plaintiff about the ſame Day, that then &c. And *ſaid, that the Arbitrators did not make any Award*; *but* the ſaid J. N. *about the aforeſaid Day, profer'd himſelf to the Plaintiff, and he refuſed him*, & hoc &c. Judgment ſi Actio &c. Caund. ſaid, You ought to ſay, that you are yet ready, As upon Obligation of 40 *l.* to pay 20 *l.* But the Court held the Plea good, and a great Diverſity between the Caſes. The Reaſon ſeems to be, inaſmuch as the one is *to do an Act dehors*, and the other of Payment of Money. Br. Tout temps &c. pl. 21. cites 14 H. 6. 23.

3. In Debt upon *an Obligation of* 20 *l. to pay* 10 *l.* if the Defendant *pleads Tender and Refuſal*, he ſhall ſay, that he has been always ready, and yet is, and tender the Money in Court. Br. Dette, pl. 98. cites 22 H. 6. 39.

Br. Tout temps Priſt, pl. 16. cites S. C. for he has no other Remedy but upon the ſame Obligation —— S. P. Ibid. pl. 6. cites 47 E. 3. 25. —— S. P. Ibid. pl. 44. cites 16 H. 7. —Heath's Max. 124. cites S. C. —— S. P. For this is Parcel of the Sum in the Obligation; per Cur. Br. Tout temps Priſt, pl. 1. cites 19 H. 8. 12.

4. *But* if it be upon an Obligation *to ſtand to the Arbitrement*, which *awards to pay* 10 *l. before Chriſtmas*, and Debt is brought after Chriſtmas, and he pleads Payment and Refuſal, he need not ſay that he has been always ready, and yet is &c. Br. Debt, pl. 98. cites 22 H. 6. 39.

Br. Tout temps Priſt, pl. 16. cites S. C. per Newton; for he cannot be ready to pay before the Day, where the Day is paſt. Contra by him, if it had been to be paid at a Day which is to come, and in this Caſe he may have Debt upon the Arbitrement, over and above the Obligation.

S. P. Br Ibid. pl 44. cites 16 H. 7. 7. For the Sum awarded by the Arbitrement is not any Part of the Sum in the Obligation. —— Heath's Max. 128. cap. 5. cites S. C

S. P. Ibid. pl. 1. cites 19 H. 8. 12. For it is an exterior and collateral Act.

S. P. Arg. Show. 129. in Caſe of Carter v. Dowriſh, cites 1 Inſt. 207. Peytoe's Caſe, 9 Rep. 79. —S. P. per Littleton. But by him, in Action of *Debt upon Arbitrement*, he *ſhall ſay*, that he has been *always ready* &c. Quod non negatur. Br. Tout temps &c. pl. 4. cites 33 H. 6. 3.

5. B. brought *Debt for* 40 *Quarters* of Malt, and counted upon 2 Obligations, in which the Defendant acknowledged himſelf to owe 20 Quarters, to be deliver'd at L. ſuch a Day, and if he fail'd, to forfeit 40 Quarters; and averr'd, that he did not deliver the 20 Quarters. The *Defendant pleaded Tender, and that* the *Plaintiff refuſed to receive them.* Judgment &c. The Plaintiff demurr'd, and had Judgment; and he remitted 20 Quarters &c. For Defendant ought to have ſaid, that he was Uncore priſt to deliver the 20 Quarters. D. 24. b. pl 154. Mich. 28 H. 8. cites Trin. 12 H. 8. Brickhead v. Wilſon.

This ſeems to come within the Reaſon of D. 150. pl. 84. that the Thing to be paid is of the Nature of the Sum in the Penalty, and the very Duty by Intendment of Law, for Surety whereof the Obligation of the greater Sum was made. —— 9 Rep. 79. a. b. Mich. 9 Jac. C. B. in Peytoe's Caſe, cites it as held in 28 H. 8. according to Carrel's Report of it, that the Obligor needs not plead it with an Uncore Priſt; becauſe this Corn is Bonum Perieurum, and it is a Charge to the Obligee to keep it. —— Co. Litt. 107. a. accordingly.

6. In *Debt upon an Obligation of* 20 *l.* which is *indorſed, to pay* to the Plaintiff ſo *much Money for ſuch a Treſpaſs as J. N. ſhall aſſeſs*, it is a good Plea, that *J. N. aſſeſs'd* 10 *l. which he offer'd to the Plaintiff, and he refuſed, without ſaying* that he is *Uncore Priſt*, and tendering the Money in Court; for it is an exterior and collateral Act. Br. Tout temps &c. pl. 1. cites 19 H. 8. 12.

7. Where J. S. is *bound to me in* 20 *l. that W. ſhall perform the Covenants contain'd in a certain Indenture* &c. which Covenant is, *that W. ſhall pay to me* 10 *l.* &c. if the *Defendant ſays, that W. tender'd the Money to me, and I refuſed it*, this is a good Plea, and need not ſay, that he is Uncore Priſt, and tender the 10 l. &c. And the Reaſon ſeems to be, inaſmuch as the *Defendant is a Stranger to the Payment.* And alſo the Condition is to perform the Covenants in the Indenture; and it is not as an Obligation of 20 l. upon Condition that the Obligor ſhall pay 10 l. by a Day. Note the Diverſity. Br. Tout temps &c. pl. 2. cites 27 H. 8. 1.

8. A *Legacy* is deviſed to H. and the Executor gives Bond to perform the Will, and yet he is not bound to tender the Legacy without *Requeſt.* And in Debt upon the Bond, Tout temps Priſt, and Uncore Priſt, is a good Plea; for the Bond has not alter'd the Nature of the Legacy, but the ſame remains payable as before upon Requeſt. Le. 17. pl. 20. Paſch. 26 Eliz. B. R. Fringe v. Lewes.

9. In Debt on *Bond*, no Place being named, if the Defendant *pleads that the Plaintiff was beyond Sea at the Day*, he ought to ſay Uncore priſt. Sid. 30. pl. 7. Hill. 12 Car. 2. B. R. Hobſon v. Rudge.

Raym. 416. S. C. accordingly.

10. Condition of a *Bond* was to pay Money *to B.'s Adminiſtrators within 2 Months after B.'s Deceaſe*; tho' *no Letters of Adminiſtration were granted within 2 Months* after B.'s Deceaſe, yet to an Action of Debt for the 200 l. Defendant muſt plead Uncore priſt; for the Debt is not loſt. 2 Show. 143. Mich. 32 Car. 2. B. R. Lee v. Garret.

* Per Gould. Where the *Thing in its Nature requires a Demand*, a *Bond for doing thereof* is not forfeited till Demand; and in that Caſe the Defendant muſt take Advantage of the Want of Demand, by pleading that he was always, and ſtill is ready to pay it; for if he plead Performance generally, and Plaintiff aſſigns a Breach in his Replication, the Defendant ſhall not rejoin, and allege Want of Demand; for that would be a Departure; quod Holt conceſſit. 12 Mod 414. in Caſe of Levins v. Randall, cites 1 Cro. 76, 77.

11. Uncore Priſt is *no where neceſſary but* where the Duty is * demanded; here is only Covenant, which is not to recover the Duty, but Damages. But were it otherwiſe, whereſoever the *Money is payable to a Stranger*, or *at a particular Place*, there needs no Uncore priſt. Arg. and Judgment accordingly. Show. 129. Mich. 1 W. & M. in Caſe of Carter v. Downiſh.

12. There is no Neceſſity for Uncore Priſt in any Caſe of *Covenant* where Damages, and not the Debt, is in Demand; Per Pollexfen Ch. J. Show. 130. Carter v. Downiſh.

13. Debt on Bond *conditioned to pay to Obligee, or ſuch as he ſhould appoint*, he appoints it to be paid to J. S. and the Defendant tender'd it to J. S. who refuſed, it is good without an Uncore Priſt. Arg. Show. 130. in Caſe of Carter v. Downiſh.

(G) Uncore Priſt. Neceſſary to be pleaded, or not. *In what Actions, and How.*

1. A *Aſſiſe of* 10 *s. Rent, and* 40 *Acres of Land put in View*, and the *Tenant ſaid that the Plaintiff himſelf is ſeiſed of* 15 *of the Acres, and he himſelf is Tenant of the reſt, and* ſaid *that he has tender'd the Services for the*

the Portion of the Land which he has, *and yet is ready* &c. Br. Tout temps &c. pl. 24. cites 4 Aſſ. 5.

2. In *Dower* the *Tenant ſaid that the Demandant detained from him certain Evidences concerning the ſame Land*, and if ſhe will deliver the Evidences, he is and always has been ready to render Dower, Judgment &c. Br. Tout temps &c. pl. 13. cites 14 H. 4. 33. S. P. And the *Demandant ſaid that ſhe is, and always has been ready to render the Evidences, Priſt*; by which ſhe had Judgment immediately; and yet it does not appear that ſhe offered the Evidences to the Court. Br. Tout temps &c. pl. 14. cites 21 E. 3. 8.

Uncore Priſt is no Plea *in Dower*, unleſs an actual Aſſignment is made. Arg. and ſeems admitted. 8 Mod. 25. Hill. 7 Geo. 1. 1721. in Caſe of Spiller v. Adams.

3. *Annuity of Arrears by 5 Years*, the *Defendant ſaid that it was granted till he promoted the Plaintiff to a competent Benefice, and he tender'd to him a competent Benefice pending the Writ, and he refuſed*; and a good Plea without ſaying that he is Uncore priſt; for by the Refuſal the Annuity is determined. Br. Tout temps &c. pl. 18. cites 5 H. 5. 1. and 14 H. 7. 32. Heath's Max. 126. cap. 5. cites S. C. And ſays the Defendant ought not to tender the Arrears, becauſe the Plaintiff ſhall have Debt for the ſame.

4. *Detinue of a Writing*, the *Garniſhee came by Proceſs, and ſaid that it was delivered to the Defendant, upon Condition to ſtand to the Arbitrement of J. N. that then he ſhall re-have it*, and *that J. N. awarded that he ſhould pay to the Plaintiff* 40 *s. which he tender'd, and the Plaintiff refuſed it*, and did not offer the Money now in Court, nor ſay that he is Uncore priſt &c. and yet good per Cur. Becauſe the Money is not now in Demand; quod nota. Br. Tout temps &c. pl. 23. cites 36 H. 6. 26. Heath's Max. 126. cap. 5. cites S. C.

5. Where the *Defendant in Treſpaſs of Goods makes a good Juſtification*, he ſhall not ſay that he has been always ready, and yet is to deliver them to the Plaintiff, notwithſtanding that he has confeſs'd that they belong to the Plaintiff. Br. Tout temps &c. pl. 29. cites 7 E. 4 3. S. P. Heath's Max. 126. cap. 5. cites 7 H. 4. 3.

6. In a *Quantum Meruit*, or other Declarations, it is uſual to plead Uncore priſt *ſpecially*, viz. *that* the *Plaintiff deſerv'd only ſo much*, which the Defendant was always ready to pay. Sid. 365. a Nota of the Reporter's, at the End of the Caſe of Ludlow v. Stacy.

(H) Uncore Priſt. Pleadable, *at what Time.*

See (B)

1. DEBT *upon a Leaſe for Years rendring Rent, payable annually at D.* The *Defendant ſaid, that he has been always ready to pay*, and yet is, *and tender'd the Money to the Court.* The Plaintiff *pleaded Eſtoppel; that the Sheriff return'd the Defendant ſummon'd, and after return'd him attach'd, and after return'd Diſtring. Nihil*; By which *Capias iſſued till the Pluries, when he came in Ward of the Sheriff, and Day given over. At which Day he made Default, and Diſtreſs iſſued, and return'd that he had nothing; and Capias iſſued again, returnable* &c. *at which Day he came and pleaded*, Judgment, *if againſt this Record* he ſhall ſay always ready. And per Hank and Hill, the Return of the Sheriff is no Eſtoppel; but Thirn e contra, & Adjornatur. And much Default was ſaid to be in the Defendant, becauſe he appear'd and had Day over, and made Default, and after came again; ſo that it cannot be that he has been always ready &c. And per Norton, he ought to plead this Tender at D. according to the Reſervation. Quære inde. And ſo, per Hill and Hank clearly, he ſhall not be eſtopp'd; for it *may be that he was never ſummon'd, attach'd,*

tach'd or diſtrain'd, notwithſtanding the Return. But Thirn contra, and that if it be ſo, he ſhall have Action of Diſceit againſt the Sheriff. Br. Tout temps &c. pl. 12. cites 11 H 4. 61.

S. C. For Tout temps Priſt need not be pleaded in that Caſe. 12 Mod. 8. Mich. 13 W. 3. Anon.——So in Caſe upon a *Mutuatus* for 20 s. the Plaintiff likewiſe declared upon 2 other Promiſes; and the Defendant, after an Imparlance, pleads Uncore Priſt. Upon Demurrer it was held per Cur. that where the Sum and Day are certain, the Defendant may plead Uncore Priſt; but not after an Imparlance, for that ſhews, that he was not Tout temps Priſt. Sid. 364. pl. 12. Paſch. 20 Car. 2. B. R. Ludham v. Stacy.

2. It was ruled, that *after Imparlance* in Debt upon an Obligation, the Defendant ſhall be admitted to plead Always ready; tho' 13 Eliz. in **Dyer,** was urg'd to the contrary. Win. 68. Mich. 21 Jac. C. B. Anon.

For more of Tout temps Priſt in general, ſee **Condition, Detinue, Dower, Tender,** and other Proper Titles.

(A) Town and County.

1. A *Ccount upon Receipt in Newcaſtle* upon Tyne, brought in the County of Northumberland, the Defendant demanded Judgment of the Writ; for Newcaſtle is a County in itſelf; and becauſe it *was made a County after the Teſte of the Writ,* therefore the Writ awarded good. Br. Brief, pl. 530. cites 2 H. 4. 18.

2. Treſpaſs; the *Writ was put T. D. of Norwich Gentleman,* the Defendant demanded Judgment of the Writ, becauſe Norwich extends into the County of N. and into the County of the Vill of N. And yet the Writ good per Cur. But if it was againſt T. D. of the County of Devon, or of Devon, which is a County, and not a Vill, it is ill. Contrary of this which is a Vill and County. Br. Brief, pl. 23. cites 27 H. 6. 4.

3. A Man in Plea of *Land in the County of York recovered* Land *which lay in York,* and after, *before Execution, the Vill of York was made a County,* by which he ſued Scire Facias to the Sheriff of the County of the City of York, and not to the Sheriff of the County of York. Br. Variance, pl. 8. cites 28 H. 6. 1.

4. The *County of the City of Glouceſter extends* 4 or 5 Miles *further than the City.* Arg. Cro. E. 264. Mich. 33 & 34 Eliz. in the Sheriff of Glouceſter's Caſe.

And likewiſe there was a Saving for the Sheriff of the County to hold his County-Courts there and to keep their Seſſions and County Courts for any Matter ariſing out of the ſaid County of the Town aforeſaid, and that they ſhall have a Mayor, 2 Sheriffs, and one Recorder, and that the Miniſters of the Sheriff of the County ſhall not enter to execute there any

5. King R. 3. made the City of Glouceſter a County, with a *Clauſe of Exemption from the County* of Glouceſter, *and from the Power of the Officers of the County and Magiſtrates, ſaving* to the King and his Heirs, *Liberty for* their *Juſtices of Aſſiſe, Gaol-Delivery and Peace, to keep their Seſſions there.* And upon the Reſolution of all the Juſtices at Serjeant's-Inn, this was a good Saving, and that thoſe *Juſtices in their Seſſions* to be held within the City, *may hear and determine Offences done in the County, but *no Offence done in the City, tho' done in Time of the Seſſions.* This was a Queſtion moved by Pirryam Ch. J. of Aſſiſe there, Anno 35 Eliz. Mo. 661. pl. 905. 35 Eliz. at Serjeant's-Inn. The City of Glouceſter's Caſe.

any Thing whereto their Office of Sheriff appertaineth or any Ways to intermeddle with it, except for the Sheriff of the County to hold his County Courts, and the Mayor and Aldermen, and their Succeſſors &c. to determine &c. all Things which Juſtices of Peace of the ſaid County did before, and the Juſtices of Peace of the County not to intermeddle. Poph. 16. S. C.

* S. P. Tho' it be a Felony done in the Hall during the Seſſions. Poph. 17. S. C.

6. Where a Corporation is a County, there the *Sheriff is Miniſter to this Court*, and ſhall be charged with the Priſoners here at Weſtminſter; Per Jones J. Lat. 19. Hill. 1 Car. in Caſe of Walden v. Veſey. Lat. 51. Paſch. 1 Car. S C And Doderidge ſaid, That where the City is a County alſo, if the Sheriff or Bayliff does Execution, he ſhall not perchance take the Fees limited by the Statute; and Jones J. ſaid it would be a Queſtion if an Execution iſſued out of the County to take one in a City, and the Sheriff makes a Mandate to the Bailiff there, if he ſhall have the Fees by the Statute. But if the Town be alſo a County, and an Execution comes out of B. R. he ought to have his Fees. And to this Doderidge and Whitlock accorded.

7. Formerly *Black-Fryers* was not within the Franchiſe of the City; yet it is and always was within the County of London. Per Holt Ch. J. 12 Mod. 155. Mich. 9 W. 3. B. R. Brown v. Burlace.

8. A *Mandamus* was directed *to the Mayor of the City of Lincoln in the County of Lincoln*, and not in the County of the City of Lincoln; and was quaſhed, there being no ſuch Perſon. 12 Mod. 190. Paſch. 10 W. 3. B. R. The King and Morrice v. the Mayor &c. of Lincoln.

For more of Town and County in General, ſee **Trial** and other Proper Titles.

Trade.

(A) *What* Trade is *within* Statute of 5 *Eliz. cap.* 4.

1. A *Brewer* is within the Statute. See (K) pl. 1.

2. None can hold a *Cook's-ſhop* to ſell to others unleſs he has been an Apprentice &c. For they are expreſsly named in the Act as Arts and Myſteries. 13 Rep. 12. Mich. 6 Jac. in Caſe of Taylor v. Shoiles.

3. The Act of 22 *H.* 8. *cap.* is explained, That a *Brewer, Baker, Surgeon, and Scrivener* Aliens, *are not Handycrafts* mention'd within certain Penal Laws: *But* the ſame *does not prove, but that they are Arts or Myſteries*; for Art or Miſtery is more general than Handycraft, for the ſame is reſtrained to Manufactures. Per Cur. 13 Rep. 12. pl. 4. Mich. 6 Jac. Taylor v. Shoiles.

4. A *Miller* is of an Art and Faculty. 2 Inſt. 621.

5. The Court all inclined that an *Upholſter* was not a Trade within the Reſtraint of this Act; But pronounced no final Judgment. 2 Bulſt. 186. 191. Hill. 11 Jac. The King and Allen v. Tooley. 1 Roll Rep. 10. Paſch. 12 Jac. B. R. The King v. Tollin and the Appurtenances of a Bed. S. C. adjornatur. The Reporter remarks, that it ſeems to be great Skill to make Valence,

After a Verdict for the King in an Information at the Seſſions in Middleſex for uſing the Trade of an Upholſter; The Cauſe was removed into B. R. and an Exception (among others) being taken that an Upholſter is not a Trade within the Statute, and cited the Caſe of 2 Bulſt. 286. and Calth. City Law, 48 & 59. But contrary to theſe 2 Authorities, after 2 ſeveral Debates, the Court were of Opinion that it is a Trade within the 5 Eliz. and they ſaid, they knew not the Reaſon of the Caſe above. Sid. 367. pl. 4. Trin. 20 Car. 2. B. R. The King v. Cellers —— Lev. 243. The King v. Sellers. S. C. and the Court, viz. Keeling, Twiſden, and Windham, held it a Trade within the Statute, and affirmed the Judgment. —— S. P. cited by Scroggs Ch. J. and Dolben J. to have been lately ruled to be within this Act. Vent. 346 Hill. 31 & 32 Car. 2. in B. R. in Caſe of the King v. Plume —— Holt Ch. ſaid, that 2 Bulſt. 186 is not Law. 2 Salk. 611. pl. 3. Hill. 11 W. 3. B. R. in Caſe of the King v. Slaughter.

Vent. 326. Hill 29 & 30 Car. 2. B. R. in the Caſe of the King v. Plume, it was ſaid Arg. that a Gardener hath been reſolved not to be within this Act.

6. There is a Corporation of Gardeners, and yet a *Gardener* is out of the Statute of 5 Eliz. for every one, that will, may be a Gardener. Per Coke Ch. J. 2 Bulſt. 191. Hill. 11 Jac. in Caſe of the King and Allen v. Tooley.

Hob. 183. pl. 220. Daviſon v. Barber S. C. accordingly. —— Palm. 393. Mich. 21 Jac. B. R. Anon. Exception was taken to an Indictment for uſing the Trade of a Baker becauſe it did not ſhew that it was an ancient Trade, Sed non Allocatur; for the Court will take Notice of it. —— None can hold a Common Bakehouſe, to ſell to others, unleſs he has been an Apprentice &c. For they are expreſsly named in the Act as Arts and Miſteries. 13 Rep. 12. Mich. 6 Jac. in Caſe of Tailor v. Shoiles.

7. In an Information for uſing the Trade of a *Baker* within the City of Norwich, not having been an Apprentice 7 Years, the Informer had a Verdict. It was moved in Arreſt of Judgment, that a Baker is not within the Statute by the Name of a Miſtery; But it was ruled that it is. Then it was moved that it was not ſaid he was a *Common Baker*; But this was diſallowed. Mo. 886. pl. 1245. Hill. 14 Jac. Daviſon v. Barker.

8. An Information was brought upon the Statute 5 Eliz. for exerciſing the Trade of an *Ironmonger*, not having been an Apprentice, and after Verdict and Judgment for the Plaintiff, the ſame was affirmed in Error. Cro. C. 316. pl. 8 Trin. 9 Car. Anon.

S. C. cited Arg. Vent. 326. in Caſe of the King v. Plume. —— and alſo 2 Salk. 611. pl. 2. in Caſe of the King v. Paris Slaughter. —— And alſo 12 Mod. 312. in S. C.

9. In Error on a Judgment in London, upon an Information upon the 5 Eliz. it was held per tot. Cur. that a *Hempdreſſer* is not within the Statute; for it is not a Trade requiring much Learning or Skill, and every Husbandman uſes it for his neceſſary Occaſions, and it is not within the Words or Intent of the Statute. Cro. C. 499. pl. 4. Paſch. 14 Car. in B. R. The King &c. v. Fredland.

10. An Action of Debt was brought againſt a *Tagger of Points*, for uſing that Trade, not having ſerved &c. which is a Trade of low and mean Concernment. To which he pleaded the Cuſtom of London, that a Man who had ſerved an Apprenticeſhip to one Trade might exerciſe any other. And the Cuſtom ws found againſt him, and Judgment given againſt him accordingly. Hard. 54. pl. 1. Paſch 1656. in Scacc. in Caſe of **Hayes v. Harding**, cites it as Mich. 14 Car. B. R. Appletoſt v. Sturton.

11. Action was brought for uſing the Trade of a *Draper*. After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That the Statute does not name the Trade. But it was anſwered by the other Side, That the Trade *is compriſed in the Meaning* of the Statute, *becauſe it was a Trade uſed at the Time of making the Statute*. Sty. 223. Trin. 1650. Naylor v. Aſh.

12. Whether the Art of *Soap-making* be within the 5 Eliz. cap. 4. See Hard. 53. Paſch. 1656. in the Exchequer. Hayes v. Harding.

13. Upon

13. Upon an Indictment on the Statute 5 Eliz. the Queſtion was, if a *Tallow-Chandler* is within it. But adjornatur. 2 Sid. 177, 178. Hill. 1659. B. R. Stubington's Caſe.

The Trade of a *Tallow-Chandler* ſeems admitted to be within the Statute. See 4 Le. 9. pl. 39. at (C) And ſee (D) the King v. Coller.

14. In an Action on the Statute 5 Eliz. for uſing the Trade of a *Barber*, Twiſden J. heſitated at firſt whether it be a Trade within the Statute; but at length all agreed that it is. Lev. 87. Mich. 14 Car. 2. B. R. Anon.

Keb. 411. Turner v. Wood, and 422. pl. 143. Mich. 14 Car. 2. B. R. ſeems to be S. C. and held accordingly.——Vent. 326. Hill. 29 & 30 Car. 2. B. R. in the Caſe of the King v. Plume, Arg. it was ſaid, that in 14 Car. 2. an Indictment was for uſing the Trade of a Barber, but no Judgment given. But others ſaid, that in that Caſe Judgment was given for the King. —2 Lev. 206. in the Caſe of the King v. Plym, S. C. Arg. ſaid this Point was adjudged, and that it was agreed.

Sid. 367. pl. 4. Trin. 20 Car. 2. B. R. in Caſe of the King v. Cellers, it was ſaid, per Cur. to be commonly held that the Law is, that a Barber is within the Statute.—— Lev. 243. S. C. the Court ſaid, it had been reſolved that a Barber is a Trader within that Act.

15. The uſing the Trade of a *Butcher* in ſelling Meat, was conceived per Cur. not to be within the Statute 5 Eliz. 4. 2 Keb. 391. pl. 76. Trin. 20 Car. 2. B. R. the King v. Jackſon.

16. The Court ſaid, that the Law is commonly held to be, that a *Mercer* is within the Statute of 5 Eliz. Sid. 367. pl. 4. Trin. 20 Car. 2. B. R. in the Caſe of the King v. Cellers.

17. The Court ſaid, that it had been reſolved, that a *Taylor* is a Trader within the Statute 5 Eliz. Lev. 243. Trin. 20 Car. 2. B. R. in the Caſe of the King v. Sellers.

18. Whether a *Silk-Weaver* is. See 2 Mod. 246. Trin. 29 Car. 2. Foreſt qui tam &c. v. Wire.

19. P. was indicted upon the Statute 5 Eliz. for uſing the Trade of a *Fruiterer*, not being Apprentice to it for 7 Years. Upon Demurrer to the Indictment the Court was divided; two Judges thought it was a Miſtery within the Statute, there being great Art in chuſing the Times to gather and preſerve their Fruit. The other Judges ſeem'd of Opinion otherwiſe; but the Court took Time to deliver their poſitive Opinions, & Adjornatur. Vent. 326. Hill. 29 & 30 Car. 2. B. R. and Ibid. 346. Hill. 31 & 32 Car. 2. B. R. the King v. Plume.

2 Lev. 206. Mich. 29 Car. 2. B. R. the King v. Plym, S. C. of a *Coſtermonger*, or *Fruiterer*, ſays, that Twiſden and Jones held ſtrongly, that it is not a Trade within the Statute. Rainsford dubitante, Wilde abſente, adjornatur.—2 Salk 611. pl. 2. in Caſe of the King v. Slaughter, Arg. ſays, that Paſch. 4 Jac. 2. ſuch Indictment was reverſed.

Roll Rep. 10. Paſch. 12 Jac. B. R. in the Caſe of the King v. Tollin, it was cited by Coke Ch. J. to have been adjudg'd and affirm'd in a Writ of Error, that a *Pippin-monger* is not within the Statute, becauſe it requires not any Skill to exerciſe this Trade.——S. P. cited by Coke Ch. J. 2 Bulſt. 189, 190. to have been adjudg'd and affirm'd in Error; for the Statute ſpeaks of Miſtery or Trades, and they reſolved there was no Miſtery in buying of Pippins.

20. In the Caſe of the King v. Plume, Vent. 346. Hill. 31 & 32 Car. 2. B. R. it was ſaid by Scroggs Ch. J. and Dolben J. to have been lately ruled, that a *Coach-maker* is within the Act of 5 Eliz.

21. Upon Demurrer to an Indictment, the ſole Queſtion was, Whether a *Saleſman* was within the Statute of 5 Eliz. becauſe it ſeem'd to be a new Trade. But reſolved it was a Trade then uſed, and ſo within the Statute. Raym. 385. Trin. 32 Car. 2. B. R. the King v. Biſhop.

2 Keb. 610. pl. 47. Hill. 21 & 22 Car. 2. B. R. the King v. Greenway, the Court conceived it no Trade at the Time of the Statute.

22. A *Pin-maker* was reſolved within the Statute. Arg. Show. 241. Mich. 2 W. & M. in Caſe of Hobbs Qui tam &c. v. Young, cites it as reſolved 3 Jac. 2. in Caſe of Maſon v. Nightingale.

3 Mod Rep. 314. in Caſe of Hobbs v. Young. S. C. cited by the Name of Morſtyn v. Nightingale.

23. A

23. A *Horner* is an ancient Trade for the Preſſing of Horns. Per Holt Ch. J. Show. 242. Mich. 2 W. & M. in the Caſe of Hobbs v. Young.

12 Mod. 311. S. C. accordingly, per Holt Ch. J.——

24. S. was indicted on this Statute for uſing the Trade of a *Felt-monger*, not having been Apprentice for 7 Years. It was urg'd, that it is a Buſineſs which requires no Skill. Per Holt Ch. J. If in the Indictment it be *averr'd to be a Trade at the Time of making the Statute, we will not quaſh it; for whether it was a Trade or no, or whether Skill is required or not, is † Matter of Fact proper for the Inquiry of a Jury; and there are *many Trades within the General Words and Equity of this Act, beſides ſuch as are mention'd therein.* And the Court would not quaſh the Indictment. 2 Salk. 611. pl. 2. Hill. 11 W. 3. B. R. the King v. Slaughter.

* Where it is ſo *averr'd*, the Court cannot intend it not within the Statute. 2 Salk. 611. Queen v. Harper.

† Sid. 269. pl. 21. Trin. 17 Car. 2. B. R. in the Caſe of **Blair v. Pettit**, where the Queſtion was as to the Trade of an Upholſter. It was ſaid and agreed, per Cur. that tho' it be Matter of Fact to be try'd by a Jury, whether this Employment was uſed at the Time of making the Statute, or whether the Defendant had uſed it, and to the proving whereof it is no Evidence, that a Maid-ſervant ſow'd a Bed, or that the Maid-ſervant of a Tailor ſow'd the Pockets; yet this Fact being found, the Court are Judges whether an Upholſter &c. are Trades within the Statute.

25. It was affirm'd by Holt Ch. J. that the Trade of a *Wool-comber* is within the Statute, tho' the contrary has been adjudged 4 Jac. 2. 12 Mod. 312. Mich. 11 W. 3. in Caſe of the King v. Slaughter.

26. Exception was taken to an Order of Juſtices for diſcharging an Apprentice, becauſe it appeared upon the Face of the Order, that the Maſter was a *Collar-maker*, and Non conſtat what the Trade is, nor that it is within the Statute, like **Comfort's Caſe**, where one was bound to a *Mantua-maker*, when there was no ſuch Trade within the Statute, nor at the Time of the Statute. 2 Salk. 490. pl. 53. Paſch. 13 W. 3. B. R. in **Ditton's Caſe**, but nothing was anſwered thereto.

27. Whether a *Seamſtreſs* be or not within the Statute. See (K) pl. 2

28. *Merchant Taylor* is not within the Statute. See (K) pl. 14.

29. It was moved to quaſh an Indictment againſt a Woman, for uſing the Trade of a *Millener*, not having ſerved an Apprenticeſhip. But the Court refuſed to quaſh it, and Holt ſaid it ought to be tried if it was within the Statute, or not; for it did not appear to the Court but that it might be a Trade at the Time of making the Statute; and all Trades are not enumerated in the Statute, but yet they may be within the Meaning. 11 Mod. 63, 64. pl. 5. Trin. 4 Ann. in B. R. Anon.

30. Whether the Trade of a *Barber-Surgeon* is within the Statute, was argued, but adjornatur. 11 Mod. 110. Paſch. 1707. 6 Ann. B. R. The Queen v. Standiſh.

31. One was indicted for uſing the Trade of a *Salter*, contrary to the 5 Eliz. not having ſerved 7 Years Apprenticeſhip. An Exception was taken, that this Myſtery was not within the Number of thoſe mentioned in the Act, and conſequently not puniſhable by that Statute. But it was anſwered, that this Act had provided a very proper Remedy for the Advancement of Trade; and therefore was not to be confined barely to thoſe Myſteries mentioned in the Act; but where there are like *Trades, that require Knowledge and Experience*, they *are within the Intention* of it, *and the Myſteries mentioned in the Act are only ſet down for Examples.* Accordingly the Court over-ruled this Exception. Barnard. Rep. in B. R. 30. Mich. 1 Geo. 2. 1727. The King v. Liſter.

32. A *Rope-maker* was thought by Page and Probyn J. not to be a Trade within the Statute 5 Eliz. tho' Page J. ſaid it might be otherwiſe of a *Cablemaker*. 2 Barnard Rep. in B. R. 225. Hill. 6 Geo. 2. The King v. Langley.

(B) *What*

(B) *What* is *an Uſing* a Trade within the 5 *Eliz.* cap. 4.

1. THE making Candles for a Man's own Uſe, or a Servant's making them for the private Uſe of his Maſter, without making any Sale of them, is not uſing the Trade of a *Tallow-chandler*, ſo as to be puniſhable within the Intent of the Act; for the Sale is the wrong, and *Trade* is *in Tradendo*, which is to deliver over; Per Coke, to which Foſter and Daniel agreed. 2 Brownl. 289. Mich. 7 Jac. C. B. Waggoner v. Fiſh. 8 Rep. 129. a. S. C. accordingly, by the Name of the Caſe of the City of London.

2. Debt on the Statute 5 Eliz. for uſing the Trade of a *Clothworker*, not being brought up Apprentice; The Jury found that the Defendant was a *Turkiſh Merchant*, and *exported Woollen Cloths* thither; and that he *employed Clothiers, who had ſerved Apprenticeſhips, to work the Cloaths in his own Houſe at his own Charge, and with his own Materials*, which he ſent into Turkey as Merchandize; but that the Defendant never ſerved an Apprenticeſhip. Per Cur. The Defendant is the Trader, becauſe he employs the reſt, who work but as his Servants, and the Loſs and Gain is to be his: That this is a Trading within the Statute, becauſe the Cloth is not confined to be uſed in his Family, but to be vended by Way of Commerce. 2 Salk. 610. pl. 1. Trin. 3 W. & M. B. R. Hobbs qui tam &c. v. Young. Show. 241. Mich. 2 W. & M. S. C. argued. And Ibid. 266. Trin. 3 W. & M. adjudged a Uſing the Trade within the Statute, by 3 Juſt. contra Dolben.—— Carth. 162. S. C. accordingly.——Comb. 179. S. C. accordingly ——3 Mod. 313. S. C. accordingly.——S. C. cited as adjudged to be an Uſing the Trade. Skin. 428. Arg. Paſch. 6 W. & M. in B. R. in Caſe of the King v. Buggs.

3. If a Man uſe to trade 14 *Days in one Month, and then ceaſes, and* uſes again 14 *Days in the next Month*, he is not puniſhable by the Statute. 12 Mod. 642. Hill. 13 W. 3. B. R. Strechpoint v. Savage.

(C) *Service.* What is a Service *ſufficient.*

1. IN an Information upon the Statute of 5 Eliz. cap. 4. againſt one for exerciſing the Trade of a *Chandler*, not having been an Apprentice to the ſame by the Space of 7 Years, it was holden by the Juſtices, That foraſmuch as he *had been Apprentice to a Taylor for 7 Years*, which is one of the Trades mentioned in the ſaid Statute, that the Penalty thereof did not extend to him: But Judgment was given againſt the Informer; for it was holden clearly upon the ſaid Statute, That if one has been an *Apprentice for 7 Years at any Trade mentioned within the ſaid Statute*, he *may exerciſe any Trade named in the ſaid Statute*, altho' he has not been an Apprentice to it. 4 Le. 9. pl. 39. Mich. 33 Eliz. in the Exchequer, Anon.

2. Moor was indicted at Hicks's-Hall upon 5 Eliz. cap. 4. for uſing the Trade of a Weaver, not having ſerved as an Apprentice 7 Years; the Evidence was, he *ſerved* 6 *as an Apprentice, and* had *ſince as Journeyman in the ſame Trade work'd above that Time*; And by all the Juſtices, the ſerving 7 Years is ſufficient either Way; and the Defendant was found Not guilty; and ſo by Thompſon for the Defendant, it was reſolved by Hale Ch. Juſtice at the Niſi Prius at Weſtm. for Middleſex, in the Cauſe of the Damme But Offly ſaid that 15 Car. 2. in Forth's Caſe, at the Guildhall, it was held by Hale Ch. J. as Party per Pale, and no ſufficient Service; which was agreed if the Service were not in

the ſame Trade. 3 Keb. 400. pl. 106. Mich. 26 Car. 2. B. R. The King v. Moor and Dibloe.

Upon Indictments on the Statute of 5 Eliz. we allow in Evidence the following

3. If a Man takes one to live *with him in the Exerciſe of the Trade for 7 Years*, this is a ſufficient Qualification, tho' the Party is never bound as an Apprentice; and he ſhall have equal Privileges with one bound; Per Cur. 12 Mod. 46. Mich. 5 W. & M. Maſter, Warden, and Company of Cutlers in Highamſhire v. Buskin.

the Trade for 7 Years to be ſufficient without any Binding, this being a hard Law. 2 Salk. 613. pl. 7. Paſch. 5 Ann. B. R. The Queen v. Maddox.

But where one was indicted for uſing the Trade of a *Grocer*, and he offered to give Evidence of his having *exerciſed this Trade for 7 Years*, as being Matter Tantamount to his having ſerv'd an Apprenticeſhip for that Time Ch. J. Eyres did allow, that the Caſes had gone ſo far as to allow a Wife's living in the Shop with her Husband for 7 Years to be equivalent to an Apprenticeſhip, but thought the preſent Caſe not ſtrong enough to comply with the Meaning of the Statute. Accordingly the Evidence was diſallowed. Barnard. Rep. in B. R. 367. Trin. 3 Geo. 2. The King v Morrice.

4. One *Brother living with another* at the Trade of a *Tallow-Chandler for 7 Years*, may ſet up the Trade, tho' there be no Indenture; and he is a good Apprentice within the Statute of 5 Eliz. Per Eyres J. Comb. 254, 255. Paſch. 6 W. & M. in B. R. The King v. Coller.

A Man that has *ſerved an Apprenticeſhip beyond Sea*,

5. H. *ſerved 7 Years* as an Apprentice *beyond Sea, but was not bound*; This is ſufficient to excuſe him from the Penaltie of 5 Eliz. Per Holt Ch. J. at Surrey Aſſiſes. Salk. 67. pl. 5. 10. Will. 3. Froth's Caſe.

is thereby qualified to uſe a Trade in England. 1 Salk. 67. Paſch. 11 W. 3. B. R. King v. Fox.

So it was reſolved *obiter*, by the Court upon the 5th of Eliz. that *ſerving 5 Years* to a Trade *out of England and 2 in England* was enough, and ſatisfied the Statute. But there muſt be a Service of a full Time either in *England* or out of *England*; Therefore ſerving 5 Years in a Country, where by the Law of the Country more is not required, will not qualify a Man to uſe the Trade in *England*. 10 Mod. 70. Mich. 10 Ann. B. R. The Queen v. Morgan.

6. *A Wife living with her Husband 7 Years*, may after his Death continue the Trade; for the Act does not require a Man or Woman to be an actual Apprentice; but the Words are *tanquam an Apprentice*. 10 Mod. 70. Mich. 10. Ann. B. R. The Queen v. Morgan.

7. If a Man *lives with another that uſes a Trade*, which other is not *qualified for uſing it*, 7 Years, he may ſet up the Trade as well as if he had lived with one never ſo well qualified. 10 Mod. 70. The Queen v. Morgan.

(D) Service. In what Caſes a Man may *Uſe a Trade without Service* &c.

But 12 *Ann.* 13. *enables diſbanded Soldiers to uſe ſuch Trades as they are apt for in any Town or Place within the Counties where they were born.*

1. 5 *Eliz. cap.* 4. S. 31 ENacts, That, *it ſhall not be lawful to any Perſon to uſe any Occupation, now uſed within England or Wales, except he ſhall have been brought up therein 7 Years as an Apprentice, nor to ſet any Perſon on Work in ſuch Occupation, except he ſhall have been Apprentice, or having ſerved as an Apprentice will become a Journeyman; upon Pain of 40 s. for every Month.*

——— At *Common Law* no Man was reſtrained from working at any lawful Trade, or uſing as many Arts and Myſteries as he pleaſed. 11 Rep. 54. Mich. 12 Jac. in the Taylors of Ipſwich's Caſe. — Show. 266. Hobbs v. Young. S. P. — Per Tirrel J. Cart. 118. cites Hob. 211. but ſays a *Cuſtom* may reſtrain, and cites 43 E. 3. 52. — Per Bridgman Ch. J. ibid. 120.

2. In

2. In an Information againſt T. for uſing a Trade different from that to which he had ſerved an Apprenticeſhip, he pleaded a Cuſtom in London, that every Citizen and *Freeman of London* may *relinquiſh his Trade wherein he has been an Apprentice for the Space of 7 Years and exerciſe another* Trade; and the Queſtion was, if this be warrantable by the Rules of Law or no, inſomuch that before the Statute of 5 Eliz. 4. which reſtrains it, it was lawful for every Man to uſe what Trade he would, altho' he had not been Apprentice by the Space of 7 Years; And then it being the Common Law of the Realm, that a Man might uſe any Trade altho' he had not been an Apprentice for 7 Years, it may not be alleged by Way of Cuſtom in London, but it ought to have been ſhewed as the Cuſtom of the Realm; for that which is the Common Law of the Realm, is the Cuſtom of the Realm. It was anſwered and agreed, that as this Cuſtom was alleged in this Information, the Allegation of it was warrantable in the Law, and it may well be ſaid to be a Cuſtom before the Statute of 5 Eliz. for firſt *the Cuſtom is reſtrained to a Citizen and Freeman of London*, ſo as he that is not a Citizen and Freeman may not enjoy the Benefit of this Cuſtom; and it being reſtrictive of the Common Law, which gives Power unto all, as well Freemen as Citizens, to exerciſe what Trade they will, ſtands well in Cuſtom and may well be alleged by Way of Cuſtom. 2. This is alleged to be the Cuſtom of London, and ſo is tied to a particular Place; and howſoever it may be the Common Law of the Realm in other Places, yet in London, which is for the moſt Part governed by their particular Cuſtom, it may well be ſaid a Cuſtom; and ſo the Plea in Bar good enough as to this Exception. Calth. Rep. 15, 16, 17. Hill. 12 Jac. B. R. Allen v. Tolley.

Upon an Iſſue joined, Littleton, *Recorder of London, certified* Ore tenus, *that there was not any ſuch Cuſtom* generally; For he ſaid, that *the Cuſtom is not that one brought up as an Apprentice in the Trade of a Goldſmith, Cutler*, &c. being a Freeman of London, by Colour thereof *may uſe any other manual Trade; but one of a Trade, who uſes buying and ſelling, may exerciſe another Trade of buying and ſelling.* But this he did not mention in his Certificate, but generally that there is no ſuch Cuſtom as is pleaded. Cro. C. 361. pl. 1. Paſch. 10 Car. B. R. The King v. Bagſhaw. ——— S. P. certified accordingly by the Recorder, with the Difference of Manual Trades and Trades of Buying and Selling, as Mercer, Grocer &c. Cro. C. 516. Mich. 14 Car. B. R. in Caſe of Appleton v. Stoughton. ——— See (H) pl. 1.

3. *Indictment for uſing* the *Trade* of a Woolen-Draper at F. in Suffolk, *not having been Apprentice to that Trade for 7 Years*; the Defendant *pleaded the Patent of H. 3. to London, that every Citizen* &c. hereafter *ſhould freely Trade* tam per Mare quam per Terram, and ſaid that he was a Freeman of London, and ſo juſtified and traverſed his uſing it Aliter vel alio Modo. Upon a Demurrer, the Court held the Traverſe and alſo the Plea ill, becauſe a Patent cannot be pleaded in Bar of the Statute; and tho' the Cuſtoms of London are confirmed by Parliament yet this Statute intends to include all but their Cuſtom concerning taking Apprentices, and not their Cuſtoms in general. And Judgment for the King. Sid. 427. Mich. 21 Car. 2. B. R. The King v. Kilderly.

Saund. 311. S. C. and it was argued that the Charter did not *intend* to grant any other Liberty, but *only that the Citizens and Freemen* of London *may ſell their Merchandizes and reſide where they will, notwithſtanding ſome Cities and Boroughs claim a Liberty of excluding Foreigners* from ſelling and buying Merchandizes within ſuch City or Borough, as appears Cro. Eliz. 110. 352. Dy. 279. b. Co. 8. 128. and that that was the ſole Intent of the Charter, as by the Words thereof it fully appears, wherefore it was concluded that the Plea was ill, and of ſuch Opinion were the whole Court. And Judgment was given pro Rege niſi &c, and it was not moved afterwards ex parte Defendentis.

4. 5 Eliz. is a Negative Statute, and no one ſhall exerciſe a Trade againſt it unleſs by Virtue of a Cuſtom, As the *Widows of Tradeſmen* who by *Cuſtom* carry on the Trades of their Husbands, which the Court held not within the Statute. 2 Salk. 610. pl. 1. Trin. 3 W & M. B. R. Hobbs v. Young.

Show. 266. Per Eyres J. S. P. and S. C.

(E) In

(E) In what Caſes a Man may *uſe ſeveral Trades.* And what Trades.

1. AN Information was brought upon 5 Eliz. cap. 4. (for uſing the Trade of a *Dyer*, whereof he had not been an Apprentice) at the Quarter-Seſſion in Southwark, and was removed by Certiorari and Traverſe taken; and upon the Evidence it appeared, that the Defendant was a *Feltmaker*; and that the Feltmakers for the Space of 60 Years laſt paſt have uſed to dye Felts; And many Haberdaſhers depoſed, that the Colours dyed by them was better than that which was coloured by the common Dyers. And it was adjudged by the Court, that that is part of their Trade of Feltmaker. And the Jury found accordingly for the Defendant. Noy 133. Hunter v. Moone.

2. He that uſes one Trade can't uſe the *Trade of another for or about the ſame Commodity* uſed in his own Trade; as a **Coachmaker* can't *make the Wheels* of his own Coaches; a *Wheelwright* can't uſe the *Trade of a Smith.* Per Holt Ch. J. Show. 267. Trin. 3 W. 3. B. R. Hobbs. v. Young.

* Comb. 179. S. C. and S. P. — Carth. 163. S. C. and S. P.

ſo if he keep Workmen to curry his own Leather, this is againſt the Statute, becauſe it is he only who receives all the Profits of the ſeveral Trades, and the Wheelwright and the Currier are but his Servants.

Show. 242. S. P. per Holt Ch J. in Caſe of Hobbs v. Young — S. P. cited

3. A *Comb-maker preſſes and Smooths Horns for his own Uſe in his Trade*, this was held at the Aſſiſes to be within the Statute 5 Eliz. and the Counſel were well ſatisfied with the Judgment. Cited by Holt Ch. J. Comb. 180. Trin. 3 W. and M. in B. R. in the Caſe of Hobbs v. Young.

by Holt Ch. J. as adjudged, becauſe it was a diſtinct Trade. 11 Mod. 190. 7 Annæ B. R. in Caſe of the Queen v. Prew.

4. A Man is a *Mercer* and he *ſells Hats*, and the Party is *Apprentice to him as Mercer*, he may uſe the Trade of a Hatter (in the Petty Towns it is uſual) becauſe he ſerved him who did ſo. Show. 242. Arg. in Caſe of Hobbs v. Young cites it as a Shrewsbury Caſe of Rotheram v. Morris.

5. A *Serge-maker cannot* Uſe the Trade of a Dyer to *dye his* own *Serges.* 11 Mod. 189, 190. pl. 4. Mich. 7. Ann. B. R. The Queen v. Prew.

(F) In what Caſes Securities given in *Reſtriction of Trade* are good.

1. 28 *H.* 8. cap. 5. *NO Maſter, Wardens &c. ſhall cauſe any Apprentice or Journeymen, by Oath or Bond, or otherwiſe, that he after his Term expired ſhall not ſet up nor keep any Shop, Houſe or Cellar, nor occupy as a Freeman without Licence of the Maſter, Wardens &c. nor take of any ſuch Apprentice or Journeyman, nor any other occupying for themſelves, nor of any other Perſons for them after their Years expired, any Money or other Things for their Freedom or Occupation otherwiſe than is appointed in the Act 22 Hen. 8. cap. 4. upon Pain to forfeit 20 l. the one half to the King &c. and the other half to the Party that will ſue &c.*

2. N. bound himſelf Apprentice to a Mercer at Nottingham and after the Maſter took *Bond* of him *not to exerciſe his Craft in 4 Years in Nottingham*

tingham. In Debt upon the Boud, it was held that the Action is not maintainable. Mo. 115. pl. 259. Paſch. 26 Eliz. Anon.

3. A Bond condition'd that the Obligor ſhould not exerciſe the *Trade of a Blackſmith in South-Mims in Surry*, was held void by all the Juſtices; becauſe the Condition is againſt the Neceſſity of the Commonwealth in ſome Place within the Realm. Mo. 342. pl. 379. Mich. 29 Eliz. Anon.

2 Le. 210. pl. 259. in C. B. Anon. but S C. that the Bond was void and againſt Law. ——— 3 Le. 217. pl. 288. Mich. 30 Eliz. S. C. in the ſame Words.—But as was obſerved by Sir Bartholemew Shower in his Argument in the Caſe of the Taylors of Exeter v. Clarke. 2 Show. 357. this was an Extra-judicial Opinion.

4. In Debt upon a Bond of 30 l. the Condition was, that if R. B. Son to the Defendant, *did uſe the Trade of* Haberdaſher, *as Journeyman, Servant, or Apprentice, or* as a *Maſter*, within the County of Kent, within the Cities of Canterbury and Rocheſter, within 4 *Years after* the Date, that *then, if he pay* 20 l. upon Requeſt, the Obligation to be void. And all the Juſtices agreed, that the Condition was againſt Law, and then all is void; for it is againſt the Liberty of a Free-man, and againſt the Statute of Magna Charta, cap. 20. and is againſt the Commonwealth, and cited 2 H. 5. & 5. And Anderſon ſaid, that he might as well bind himſelf that he would not go to Church. And Judgment was given againſt the Plaintiff. Ow. 143. Mich 43 & 44 Eliz. Claygate v. Batchelor.

Cro E 872. pl. 8. Colegate v. Bachelor, S. C. and that to prohibit or reſtrain any at any time, or at any Place, is againſt Law: For as well as he may reſtrain him at one Time, or at one Place, he may reſtrain him for longer Times and more Places, which is againſt the Benefit of the Commonwealth; and tho' the Prohibition be not abſolute, not to exerciſe the Trade, but that if he exerciſe it he ſhall pay 20 l. and ſo was ſaid to differ from the Caſe of 2 H. 5. 5. b. Yet the Court ſaid it was all one; for he ought not to be abridg'd of his Trade and Living.——S. C. cited Noy 98. in Caſe of Jellet v. Broade, by the Name of Leggate v. Batchelour.——S. C. cited All. 67. Trin. 24 Car. B. R. in Caſe of Prugnell v. Goſſe, and agreed by Roll Ch. J. for Law; but ſaid, that if there were a Conſideration for the Reſtraint, as the taking off braided Ware, ſuch Bond or Promiſe is good; and ſo it was adjudged in Froward's Caſe, upon a Writ of Error out of Bridgenorth. But a Reſtraint General throughout England is void, notwithſtanding a Conſideration.

5. The Defendant, in Conſideration of ſo much by him paid to the Plaintiff, *promiſed not to exerciſe the Trade of a Joiner in a Shop, Parcel of a Houſe to him demiſed for* 21 *Years, durante Termino prædicto.* All the Court agreed clearly, that as this Caſe here is, for a Time certain, and in a Place certain, a Man may be well bound and reſtrain'd from uſing of his Trade; and ſo, by the whole Court, here is a good Breach of Promiſe aſſign'd, which well intitles the Plaintiff to his Action, and that the Declaration is good. And ſo, by the Rule of the Court, Judgment was given, and ſo enter'd for the Plaintiff. 2 Bulſt. 136. Mich. 11 Jac. Rogers v. Parry.

S. C. cited by Ld. Ch. J. Parker, Wms's Rep. 186. in Caſe of Mitchel v. Reynolds, that where ſuch a Contract is made upon a good and adequate Conſideration, ſo as to make it a proper and uſeful Contract, it is good. Tho' he ſaid, that Caſe is wrong reported, as appears by the Roll, which he had cauſed to be ſearch'd; for it is B. R. Trin. 11 Jac. 1. Rot. 225. And ſaid, that the Reſolution of the Judges was not grounded upon its being a particular Reſtraint, but upon its being a particular Reſtraint with a Conſideration; and the Streſs lies on the Words, as the Caſe is here; tho' as they ſtand in the Book they do not ſeem material.

6. T. in Conſideration of 10 s. *promiſed to pay B.* 100 *l. if he thenceforward kept any Draper's Shop in Newgate-Market*; and adjudg'd good, and the Plaintiff recover'd. Cro. J. 597. pl. 19. in Caſe of Broad v. Jollyfe, cites Paſch. 18 Jac. Bragg v. Tanner.

Palm. 172. Paſch. 19 Jac. B. R. S C. that the Plaintiff had bought as much Goods of the Defendant as came to 500 l. in Conſideration whereof the Defendant made the Promiſe; and reſolved that the Aſſumpſit was good, and Judgment for the Plaintiff.

7. In Aſſumpſit Plaintiff declared, that the Defendant was a *Mercer*, and kept a Shop in N. and *had his Shop furniſh'd with old ſullied Wares*, and the Plaintiff had a Shop there furniſh'd with new and freſh Wares; and *in Conſideration the Plaintiff would buy his Wares, and pay for them ſuch*

This Judgment was afterwards affirm'd in the Ex-

chequer Chamber, Mich. 19 Jac. Ibid. 597.——— Jo. 13. pl. 15. S.C. accordingly; and ſays it was affirm'd by all the Juſtices, except Tanfield, who ſaid nothing againſt it.— 2 Roll. Rep. 291. **Jollie v. Broad,** S. C. but the Cauſe was firſt in C. B. and the Judgment there affirm'd in B. R. by Mountague Ch. J. Doderidge, and Chamberlaine J. but Haughton contra.———Mar. 77. pl. 121. Trin. 16 Car. C. B. S. P. cited by Littleton Ch. J. to have been adjudged in B. R. which ſeems to mean this Caſe; but that if one be *bound that he will not uſe his Trade*, it is no good Bond.——Noy 98. **Jelliet v. Broade,** S. C. reſolved, that the Action well lies; for it was a voluntary Promiſe for a good Conſideration, and is reſtrain'd to a Place; otherwiſe had it been a general Reſtraint, or upon a Co-action, or without Conſideration.

Prices as he paid when he firſt bought them, the Defendant *promiſed he would no longer keep any Shop at N.* and alleged he bought the Defendant's Wares, and paid 300 l. for them, the Price the Defendant bought them at, whereas the Wares were then not worth 100 l. and yet the Defendant, contrary to his Promiſe, kept his Shop there, and furniſh'd it with new Wares &c. to the Plaintiff's Damage 500 l. On a Verdict for the Plaintiff it was ſaid, that this Promiſe being to reſtrain Trade, was againſt Law; but all, except Haughton J. held the Aſſumpſit good; for that it is voluntary, and a Man upon a valuable Conſideration may reſtrain himſelf from uſing his Trade in ſuch a particular Place; and it is uſual in London for one to let his Shop and Wares to his Servant when out of his Apprenticeſhip; as alſo to covenant not to uſe that Trade in ſuch a Shop or Street; ſo for a valuable Conſideration, and voluntarily, one may agree that he will not uſe his Trade; for Volenti non fit Injuria. Cro. J. 596. pl. 19. Mich. 18 Jac. B. R. Broad v. Jollyſe.

8. In Debt againſt a Surety in a Bond *to perform Covenants, one* of which *was not to ſet up a Trade in Ciceſter.* To which the Defendant demurr'd, becauſe void, being Encouragement of Idleneſs; and the Defendant's being a Surety does not alter the Caſe. Windham ſaid, that an Apprentice might be bound on this Condition, as **Hall v. Haws,** 9 Car. 1. when the * *original Taking and Inſtruction is on theſe Terms.* But he doubted this Caſe; for he ſaid, to oblige a Lawyer not to give Council to any Man in Salisbury was held void by Jones; and the Court inclined it was void here; but adjournatur. 2 Keb. 377. pl. 35. Trin. 20 Car. 2. B. R. Ferby v. Arrowſmyth.

* See pl. 12.

Sty. 111. **Prugnel v. Goff,** S. C. and Judgment affirm'd.——— S. C. cited 3 Lev. 242, 243. in Caſe of Clerk v. the Taylors of Exeter.

9. A. in *Conſideration* that *B. would marry her Daughter, promiſed,* inter alia, *to aſſign over her Shop in Bazingſtoke to B. and that ſhe would not uſe her Trade in Bazingſtoke any longer.* Upon an Action brought, the Plaintiff had a Verdict and Judgment in C. B. and now that Judgment was affirm'd in B. R. Allen 67. Trin. 24 Car. 2. B. R. Prugnell v. Goſſe.

2 Show. 345. pl. 353. Paſch. 36 Car. 2. B. R. the **Taylors of Exeter v. Clerke,** in B. R. ſtates it, that the Condition of the Bond was *to pay 20 l. within a Month after he ſhall uſe the Trade of a Taylor in Exeter, otherwiſe than as a Journey-*

10. Debt on a *Bond* conditioned *not to uſe the Trade of a Taylor in Exeter,* the Defendant pleaded that he was an expert Taylor, and skilful in that Art; and that the Plaintiff, pretending that no one, who was not a Member of the Company of Taylors there, ought to uſe that Trade there, did many Ways vex and trouble the Defendant, which to get clear of, he gave this Bond, which is againſt Law, and void; the Plaintiff replied that the Defendant ſeal'd and deliver'd the ſaid Bond as his Deed. And it was adjudged in B. R. that the Bond, being only to reſtrain Trade in a particular Place, was good. Whereupon Error was brought in the Exchequer-Chamber, and this Judgment was reverſed, and *the Bond held void. But an Aſſumpſit, upon a good Conſideration not to uſe a Trade in a particular Place,* they held *would be good*; becauſe in ſuch Caſe, Damages only being to be recover'd, the Jury may aſſeſs the ſame, having Reſpect to the Conſideration upon which the Promiſe was made. But in this Caſe all the Penalty is forfeited, be the Conſideration what it will, and tho' the Offence be never ſo little; and ſuch Promiſes upon good Conſiderations have always been allow'd in ſuch Caſes, becauſe the Jury may try of what Value the Conſideration was, and what Damage

Damage the Uſe of the Trade is to the Party to whom the Promiſe was made; and cited ſeveral Authorities. And the Reverſal was by the unanimous Conſent of all the Juſtices. 3 Lev. 241. Mich. 1 Jac. 2. in the Exchequer-Chamber. Clerke v. Taylors of Exeter.

man; and if he leave the Town on 40 Days Notice, then &c. Ad-

judged, that the Bond was good. But at the End of the Caſe, pag. 364. ſays, that in the Exchequer-Chamber the Bond was held void, and the Difference between a Bond and Aſſumpſit agreed, becauſe of the Conſideration, without any Regard to the Conſideration implied in Law, upon ſealing and executing the Bond; and ſo the Judgment was reverſed.

11. A Bond recited, That whereas the Defendant had *aſſign'd to the Plaintiff a Leaſe of a Houſe and Bake-houſe, in ſuch a Pariſh, for the Term of 5 Years.* Now if the Defendant ſhould *not exerciſe the Trade of a Baker within that Pariſh, during the ſaid Term; or, in caſe he did, ſhould, within 3 Days after Pooof thereof, pay to the Plaintiff the Sum of 50 l. Then* &c. The Court were all of Opinion, (as the ſame was deliver'd by Parker Ch. J.) that a ſpecial *Conſideration* being ſet forth *in the Condition*, which ſhews it was *reaſonable* for the Parties to enter into it, the ſame is good; and that the true Diſtinction, in this Caſe, is not between Promiſes and Bonds, but between Contracts with or without Conſideration; and that wherever a ſufficient Conſideration appears to make it a proper and an uſeful Contract, and ſuch as cannot be ſet aſide without Injury to a fair Contractor, it ought to be maintain'd; but with this conſtant *Diverſity*, viz. where the *Reſtraint* is * *general*, not to exerciſe a Trade throughout the Kingdom, *and where it is limited to a particular Place*; for the former of theſe muſt be void, being of no Benefit to either Party, and only oppreſſive. Wms.'s Rep. 181, 182. pl. 44. Hill. 1711. Mitchell v. Reynolds.

10 Mod. 27. 85. 130. S. C. accordingly.— * *General* Reſtraints are all void, whether by Bond, Covenant, or Promiſe &c. with or without Conſideration, and *whether* it be *of the Party's own Trade or not.* Per Ld. Ch J. Parker, in delivering

the Judgment of the Court. Wms.'s Rep. 185. Mitchel v. Reynolds.

The Reſtraint muſt be upon good Conſideration, and the *Breach* of it muſt *apparently tend to the Damage of the Obligee*, or otherwiſe the Reſtraint is void, tho' for a particular Place. Per Ld. Ch. J. Parker, 10 Mod. 133. in Caſe of **Mitchel v. Reynolds**,——For what does it ſignify to a Tradeſman in London what another does at Newcaſtle? And ſurely it would be an unreaſonable Thing to fix a certain Loſs on one Side, without any Benefit to the other; per eundem. Wms.'s Rep. 190, 191. in S. C.

12. In Debt by A. againſt E. on Bond of 100 l. condition'd, that *whereas A. at the Special Requeſt of E. is to take E. into her Shop for her hired Servant, to attend* in her Shop, and inſpect her Cuſtomers, and to aſſiſt A. in her Trade of a Linnen-Draper. *And whereas the ſaid A. conſents to hire and take the ſaid E. upon her expreſs Agreement, that after her leaving A.'s Service ſhe will not exerciſe ſuch Trade*, either by herſelf or any other, directly or indirectly, *in any* Shop, Room, or *Place, within half a Mile of A.'s now Dwelling-houſe in Drury-Lane*, or other Houſe ſhe may remove to; *nor ſhall aſſiſt any other Perſon* to carry on ſuch Trade &c. which Agreement is the ſole Conſideration of A.'s taking the ſaid E. into her Service. The Breach aſſign'd was for aſſiſting J. S. in carrying on the ſaid Trade within half a Mile of A.'s Houſe in Drury-Lane, and Verdict and Judgment for the Plaintiff, and afterwards affirm'd in B. R. and afterwards in the Houſe of Lords, with the unanimous Opinion of all the 12 Judges, and with 40 l. Coſts. 2 Ld. Raym. Rep. 1456. Hill. 13 Geo. 1. Cheſman v. Nainby.

13. An Action was brought on Articles, by which the Defendant agreed not to exerciſe a certain Trade *within the Weekly Bills of Mortality*. Judgment was given for the Plaintiff. And in Error brought it was ſaid, that ſuch Agreement was determin'd to be good in the Caſe of **Jaſpen v. Lamper**, Hill. 13 Geo. 1. and likewiſe in the Caſe of **Mitchel v. Reynolds**; for which Reaſon the Court affirm'd the Judgment directly. 2 Barnard. Rep. in B. R. 463. Trin. 7 Geo. 2. Clerk v. Crow.

(G) Reſtrain'd.

(G) Reſtrain'd. By *Charter*, *Cuſtom*, or *By-Laws*.

It was adjudged upon Demurrer, that the Inhabitants of the Market-Town may ſell Goods in another Market-Town, not

1. 1 & 2 P. & M. 7. ENacts, That *no Perſon dwelling out of any City, Borough, Town Corporate, or Market-Town, ſhall ſell by Retail any Woollen or Linnen Cloth, Haberdaſhery Wares, Grocery or Mercery Wares, within any of the ſaid Cities, Towns Corporate, or Market-Towns, or Liberties of the ſame, except in open Fairs, on Pain of 6 s. 8 d. for every Offence, and the Forfeiture of all Wares ſo offer'd to be ſold, one Moiety to the Crown, and the other to the Proſecutor, to be recover'd in any of their Majeſties Courts of Record.*

prohibited by this Statute; for this extends only to ſuch as are living in Country Towns, and come and ſell their Goods in Market-Towns. 2 Lev. 89. Trin. 25 Car. 2. B. R. Davis v. Leving.

An Indictment upon this Statute ſet forth, that the Defendants had ſold Earthen-Ware in London, contra Formam Statuti; but it was quaſh'd upon a Motion, becauſe the Statute does not give Juſtices of Peace any Juriſdiction to proceed in this Matter at their Seſſions, for they are not ſo much as named in the Act. 5 Mod. 149. Hill. 7 W. 3. the King v Clough & al'.

Provided, that this do not extend to any ſuch Wares to be ſold by Wholeſale.

Provided alſo, that every Freeman in ſuch Town Corporate, or Market-Towns, dwelling within the ſame, may ſell the ſaid Wares by Retail as heretofore.

Provided alſo, that all Perſons may ſell by Retail, or otherwiſe, all Manner of Cloth, Linnen or Woollen, of their own making, in every ſuch Town Corporate or Market-Town as heretofore.

This Act ſhall not be prejudicial to the Privileges of the Univerſities of Cambridge and Oxford.

2. Upon a Return, that the *Cuſtom of London* was, *That no Perſon not* being *free* of the City, *ſhall, directly or indirectly*, either by himſelf or any other, *keep any Shop inward or outward, for putting to Sale any Wares* &c. *by Way of Retail, or uſe any Art, Trade, Myſtery, or Handicraft, for Hire, Gain, or Sale, within the City*, upon Pain of Forfeiture of 5 l. it was reſolved this was good by Way of Cuſtom, but not by Way of Charter or Grant to the City; and therefore no Corporations made within Time of Memory can have ſuch Privilege, unleſs by Act of Parliament. 8 Rep. 124. b. 125. a. Hill. 7 Jac. The City of London's Caſe.

3. One found guilty of having us'd the Trade of a *working Goldſmith*, and a *working Jeweller*, not having ſerv'd as an Apprentice to the Trade, was committed in London; and being brought into B. R. it was ſhewn for Cauſe why a Procedendo ſhould not be granted, That the Declaration is founded on a By-Law founded on a Cuſtom; and that if either be not in all Parts good, the Declaration is naught; and here the *Cuſtom* is *certified in the Negative*, and is contradictory, and that the By-Law certified is uncertain and unreaſonable; for every Stroke the Defendant ſtrikes is uſing his Trade, and to pay 5 l. for every Stroke is unreaſonable. 2dly, That the Declaration is not applied to the By-Law, becauſe *doing a Thing one Day is not a Uſing to do it*, and the Words *Diverſis Vicibus* do not help it; *nor* is it *ſaid that he gain'd his Living by the Trade or Sale* of the Commodity wrought, and the Words *pro Lucro & Proficuo* do not help it; for perhaps he uſes it to his private Uſe, which is to his Profit, tho' he ſells it not. And that it is unreaſonable a Stranger be reſtrain'd by a By-Law made 40 Years ago, whereof he had no Notice, and yet puniſh him for doing what the Common Law allows, viz. the getting his own Living. Beſides, it is ſaid *Non exiſtens Liber Homo uſus eſt Arte &c.* which is uncertain; for ſo every Apprentice may be puniſhed, he not being Liber Homo. The other Side cited 5 E. 3. that a Negative with

with an Affirmative implied, is good, and that it is exclusive of Strangers, and inclusive of Citizens, and that the Offence, and not the Time of using the Trade, is the Matter; and as to the Apprentice, he uses not the Trade for himself but his Master's Benefit. The Court desired Books, & adjornatur. Sty 226. Trin. 1650. B. R. London (City) v. De-roy.

4. In Case, the Plaintiff declared of a *Custom in Derby, that every Butcher in Derby having served an Apprenticeship for 7 Years, might use that Trade absque Damno alterius, vel ab altero; but that* the *Defendant not being a Freeman, nor having served an Apprenticeship, sold Flesh in Derby on such a Day, not being a Market-day, by Reason whereof the Plaintiff could not sell so much as otherwise he might, ad Damnum* &c. The Defendant demurr'd, because the Custom is *not laid * positively, but only potentially,* (viz.) that he might use that Trade; Besides, there is no By-Law to restrain Foreigners, and without a By-Law, or a Custom, any Foreigner may sell in Market-Towns, except on the Market-days. And as to the Declaration that he sold Flesh, it is not sufficient; for it may be a Horse or a Dog. And upon these Exceptions Judgment was given for the Defendant. Lev. 262. Hill. 20 & 21 Car. 2. B. R. Wilmot v. Nixon. * See (H) pl. 1.

5. *Custom that none shall trade* in a Town, *besides Persons free of the Gilda Mercatoria* there, Quære if good in any Place, except London? 1 Salk. 203. pl. 2. Pasch. 4 Ann. B. R. Mayor &c. of Winton v. Wilks. See (H) pl. 4. S. C.

6. Restraints of Trades by By-Laws are 3 several Ways. 1st. *To exclude Foreigners*, and this is *good*, if only *to enforce a precedent Custom* by a Penalty; Per Parker Ch. J. in delivering the Opinion of the Court; and cited Cart 68. 114. and 8 Rep. 125. But that where there is no precedent Custom, such By-Law is void; and cited 1 Roll. Abr. 364. Hob. 210. 1 Bulst. 11. and 3 Keb. 808. But said that the Case in 3 Keb. is misreported; for there the Defendants did not plead a Custom to exclude Foreigners, but only to make By-Laws generally, which was the Ground of the Resolution in that Case. 2dly, All By-Laws made *to cramp Trade in general*, are void; and for this he cited Mo. 567. 2 Inst. 47. 1 Bulst. 11. 3dly, By Laws made *to restrain Trade, in order to the better Government and Regulation of it*, are good in some Cases, viz. If they are for the Benefit of the Place, and to avoid Publick Inconveniences, Nusances &c. or for the Advantage of the Trade and Improvement of the Commodity; and for this cited Sid. 284. Raym. 288. 2 Keb. 27, 873. and 5 Rep. 62. b. Wms's Rep. 184. Hill. 1711. B. R. Mitchel v. Reynolds. 10 Mod. 131. S. C. & P.

(H) Proceedings and *Pleadings*. See (D) pl. 3.

1. INformation for using the Trade of a Goldsmith, not having been Apprentice to that Trade; the Defendant *pleaded the Custom of London, that one having been an Apprentice there for 7 Years, and made a Freeman* of London *of any Trade, may use any other Trade in that City*; and then pleads that he serv'd an Apprenticeship 7 Years in the Art of a Cordwainer, and was made a Freeman of London, and so justified. Upon Demurrer it was objected to the Plea, because it was *Quod uti possit any other Trade, and not Quod usus fuit. It was answered, That this being alleg'd by Way of Custom in the City, and not a particular Prescription, it was well enough; and to that Opinion the Court inclined. Cro. C. 347. pl. 9. Hill. 9 Car. B. R. The King v. Bagshaw. S. C. cited Sty. 479. as 9 Car. Fletcher v. Bagnall, that Licitum fuit for a Londoner to use any Trade by the Custom of London, was adjudg'd to be ill pleaded;

and tho' it may be good in Evidence, yet it is not so in a Return. And he said that all Customs ought to be alleg'd in Facto. ——— See (D) pl. 2.

* See (G) pl 4.

2. In Action ſur Statute 5 Eliz. for uſing the Trade of a Grocer, the Defendant pleads a *former Act depending* in the Exchequer *in Bar*, which ſhould be in Abatement; Et per Curiam no Reſpondeas outter, but abſolute Judgment for the Plaintiff as on Plea in Bar. 2 Keb. 716. pl. 102. Mich. 22 Car. 2. B. R. Smith v. Poyner.

3. Debt upon the Stat. of *5 Eliz. for uſing the Trade* of making Chartas Pictas, Anglice, Playing Cards, *from the 23d of February till the 23d of January following, viz. Per duodecim menſes integras*, not having ſerv'd his Time for 7 Years. After Verdict it was moved in Arreſt of Judgment, that the Computation here is by *Kalendar Months*, whereas by the Statute it muſt be by *Lunar* Months; and for this was cited the Caſe of the **King v. Stowbridge**, Mich. 6 W. 3. And if this ſhould be conſtrued, that if he uſed it for the Time mentioned here, he muſt have uſed it for 11 Lunar Months of Neceſſity, then it will be uncertain when they will begin the Computation, and the Defendant may be again charg'd for Part of the Time for which this Recovery now is, and cannot plead this Recovery in Bar; and the right Way had been to ſay, that from ſuch a Day Per undecim menſes prox' ſequent' he uſed it. And per Cur. it would be fatal, but is *help'd by the Verdict's finding him guilty of* 2 [12] *Lunar Months* next after the 23d of February. And if a Man uſe a Trade 14 *Days in one Month, and then ceaſes, and* uſes again 14 *Days in the next Month*, he is not puniſhable by the Statute. 12 Mod. 641. Hill. 13 W. 3. B. R. Stretchpoint v. Savage.

It was agreed that ſuch Cuſtom in London might be good, becauſe their Cuſtoms are confirmed by many Acts of Parliament; but it was doubted if ſuch Cuſtom was good in any other City or Borough. But it was agreed per tot. Cur. That the Declaration was naught; for Non conſtat that the Corporation has any Guilda Mercatoria; nor does it appear who the Homines Liberi de Guilda Mercatoria are, ſo as they may be the whole Corporation, or ſome Part of them; and anciently the King's Grant to have Guildam Mercatoriam, made them all a Corporation, viz. all the whole Vill. 3 Salk. 349. S. C.——2 Ld. Raym. Rep. 1129. S. C. argued by Counſel, and ſpoke to by the Court; And Holt Ch. J. ſaid, he would give Judgment for the Plaintiff if he could tell why; but Judgment was entered Quod querentes nil capiant per Billam, upon the Exceptions to the Declaration.——6 Mod. 21. Mich. 22 Ann. S. C. ſays, Note this Action was not grounded on any By-Law, nor for any Penalty. And Holt Ch. J. ſaid, It was a *Point not determined whether ſuch a Cuſtom was good*, tho' many Corporations did pretend to it; and that ſome Corporations pretended a Right by Cuſtom to exclude Foreigners, but he thought they could not ſupport it. And the Reporter ſays, that in Paſch. 4 Ann. Judgment was ſtay'd upon Faults in the Declaration; and the Court declined ſaying any Thing upon the Merits, which, they ſaid, was a Queſtion of great Conſequence.

4. In Caſe, the Corporation of Wincheſter declared, that Winton was an ancient City &c. and that there was a *Cuſtom, that none but Perſons* free *de Gilda Mercatoria of the ſaid City, ſhould exerciſe a Trade* there, *unleſs brought up Apprentice to it within the ſaid City*; That the Defendant nevertheleſs did exerciſe &c. Holt Ch. J. ſaid that all People are at Liberty to live in Wincheſter, and ask'd how they could be reſtrain'd from uſing the lawful Means of living in a Place where they had a lawful Liberty to live? That this was the Cauſe of making the Stat. 5 Eliz. That ſuch Cuſtom is an Injury to the Party, and Prejudice to the Publick; That the *Caſe of London differs*, becauſe they have by Cuſtom the bringing up the Youth of that City; and therefore they have Power by Cuſtom to make Infants Apprentices, and to aſſign Apprentices, and after ſuch Apprenticeſhips they are free, but other Cities have no ſuch Cuſtom: But this Declaration is ill, becauſe the *Action ought to be brought by the Gilda Mercatoria.* 1 Salk. 203. pl. 2. Paſch. 4 Ann. B.R. Mayor &c. of Winton v. Wilks.

(I) For-

(I) Forfeitures for uſing a Trade by 5 *Eliz.* 4.

1. 5 *Eliz.* cap. 4. S. 39. ENacts, That *the Forfeitures mentioned in this Statute (excepting thoſe otherwiſe limited) ſhall be divided betwixt the Queen and the Proſecutor; and all Juſtices of Peace, or any two of them, (1 Quor.) and every Head-Officer, ſhall have Power to hear and determine the Breach of this Statute, upon Indictment or otherwiſe, and to award Proceſs and Execution accordingly, and ſhall yearly in Michaelmas Term by Eſtreat certify into the Exchequer the Fines which accrue upon this Statute, in Manner as they ought to do in other Caſes.*

S. 45. *Provided that all Manner of Amerciaments, Fines, Iſſues, and Forfeitures which ſhall ariſe &c. by Reaſon of any Offences or Defaults mentioned in this Act, within any City or Town Corporate, ſhall be levied, gathered, and received by ſuch Perſon or Perſons of the ſame City or Town Corporate, as ſhall be appointed by the Mayor or other Head-Officers mentioned in this Act, to the Uſe and Maintenance of the ſame City or Town Corporate, in ſuch Caſe and Condition as any Manner of other Amerciaments, Fines, Iſſues, or Forfeitures, have been uſed to be levied and employed within the ſame City or Town Corporate, by Reaſon of any Grant or Charter Party from the Queen's Majeſty that now is, or of any of her Grace's noble Progenitors, made and granted to the ſame City, Burrough, or Town Corporate, any Thing or Clauſe in this Act to the contrary notwithſtanding.*

In an Information for uſing the Trade of a Baker within the City of Norwich, not having ſerv'd as Apprentice for 7 Years, it was ſaid that it ſeems no Action accrues to the Informer for a Penalty ariſing upon this Act within the City of Norwich; and upon this Act the Juſtices varied in Opinion. Et ſic adhuc pendet. Mo. 856. pl. 1245. Hill. 14 Jac. Daviſon v. Barker.——Hob. 183. pl. 220. S. C. And Hobart Ch. J. ſaid, That if the Clauſe is to be underſtood ſo as that they are given thereby to the Uſe of the City or Town Corporate, the Conſequence will be that, this Information cannot ſtand, it being for the King and the Informer; And he was of Opinion that the Word (Forfeiture) in this latter Clauſe was not to be underſtood of the main Penalty of the Law for 2 Reaſons, 1ſt. Becauſe it was penn'd beginning with Amercements &c. which imports the Forfeitures of the like, or leſs Nature. Again, that it appoints them to be levied in ſuch Sort as other Amercements &c. granted to ſuch Cities are to be levied, which are of Record, and due, as ſoon as they are impoſed, and want nothing but the Levying. Now Fines, Iſſues, and Amerciaments are often granted to Cities; and yet that could not extend to the like, growing upon Suits, upon Offences made by new Statutes. Note, Thoſe are not due till there be a Conviction, ſo the Queſtion is of the Suit, and not of the Levying. But no City has, or can have Grant by Charter of any Penal Law. And where it was urged, that the former Clauſe did except from the Queen the Penalties otherwiſe appointed, which muſt needs be underſtood of theſe, there is in the Statute 5 l. Forfeiture given againſt him that departs without Licence out of a Work undertaken to him from whom he departs; at Coventry the Summer Aſſizes 17 Jac. Hobart Juſtice of Aſſiſe there, adviſed Stapleton to give Judgment for the Informer in the Sheriff's Court there

(K) *Indictments, or Informations,* as to uſing Trades.

1. INformation Qui tam on 5 Eliz. 4. becauſe the Defendant at S. the 1ſt December 3 Jac. and continually after till 12 Nov. 4 Jac. (which was until the Day of the Information) for the Space of 11 Months, and more, *exerciſed* and occupied *the Art* and Occupation *of a Brewer*, being an Occupation uſed within the Realm 12 Jan. 5 Eliz. ubi revera, he did not exerciſe the ſaid Trade the 12 Jan. 5 Eliz. nor was ever brought up for 7 Years, as an Apprentice in the ſaid Art, contra formam Statuti &c. The Defendant pleaded Not guilty, and found againſt him; and after Verdict moved in Arreſt of Judgment, firſt, that the Art of a Brewer is not ſuch a Trade, the uſing whereof is prohibited by the Statute; Sed non Allocatur; for *by the expreſs Words of the Statute, it*

8 Rep. 129. b. S.C. cited accordingly, in the Caſe of the City of London. ——13 Rep. 11. S. C —— ——2 Bulſt. 189. Hill. 11 Jac. in Caſe of The King

and Allen v. Tooley, it is ſaid by Coke Ch. J. that the Barons of the Exchequer held a Brewer to be out of the Statute; for if they are divided into 10 Parts, there are not 9 of them that have been Apprentices; and that it was therefore adjudg'd for them, and affirm'd.——Roll. Rep. 10. Paſch. 12 Jac. B. R. in Caſe of **The King v. Tollin**, Coke Ch. J. cited S. P. to have been adjudg'd within the Statute, becauſe it is for the Suſtenance of Man; and ſaid it was affirm'd in Error.

it is reckoned as a Trade or Occupation. And the Words in the Statute whereupon this Information is founded, refers to the Trade aforeſaid. Cro. J. 178. pl. 17. Trin. 5 Jac. in the Exchequer, Shoyle v. Taylor.

A * *Publick Brewer* ought to ſerve Apprentice 7 Years; otherwiſe he is within the Statute of 5 Eliz. but not ſo of a Private Brewer in private Houſes. Upon an Information againſt a Publick Brewer upon the Statute of 5 Eliz. it is *ſufficient* in the Count *to declare that he was not a Brewer at the Time of making the ſaid Statute*; and there is *no Occaſion to ſay, that he did not then uſe any other Trade*; for altho' the Statute is obſcurely penn'd, this is the true Senſe of it; If he had uſed the Trade of a Barber at the Time of making the ſaid Statute, it would not ſerve to excuſe him for being a Brewer. Panis & Potus ſunt duo Vitæ ſuſtentacula; and therefore the Law provides, that the Brewer and Baker ſhall be Apprentices for 7 Years. Theſe Trades alſo concern the Health of the Bodies of Men; and the Law does not ſuppoſe that unexperienced Perſons can direct, or work at them; and the Law judges that 7 Years are a convenient and neceſſary Time for Inſtruction before ſuch Publick Imployment. Jenk. 284. pl. 15.

* Cro. C. 499. pl. 4. S. P. agreed, in Caſe of The King &c. v. Fredland.

S. P. Keb. 473. pl. 83. Hill. 14 & 15 Car. 2. B. R. The King v. Hubbard.

2. An Indictment on the Statute, for uſing a Trade not being Apprentice to it for 7 Years; but it was quaſh'd, becauſe it did *not ſet forth that it was a Trade us'd at the Time of the Statute*; for the Court as Judges cannot take Cognizance that it was, and the Statute ſays (Trade at this Time lawfully uſed.) Palm. 528. Paſch. 4 Car. B. R. Anne Stafford's Caſe.

T. was indicted for exerciſing the Trade of a *Mercer*, not having been an Apprentice; Exception was taken, that it is ſaid that it was a Trade 13 Feb. 5 Eliz. whereas the Parliament began 12 Feb. But the Court held it well enough, and it might have been * *omitted that it was a Trade 5 Eliz.* for that Exception is worn out. Comb. 288. Trin. 6 W. & M. in B. R. The King and Queen v. Taff.

* But 2 Salk. 611. pl. 3. ſays, It is a good Exception that it is *not averr'd* in the Indictment, *That the Trade* therein mentioned *was a Trade at the Time of making the Statute.* Trin. 4 Ann. B. R. The Queen v. Harper.———And the ſame Term between The **Queen and Corniſh**, it was moved to quaſh an Indictment for uſing the Trade of a *Seamſtreſs*, not having ſerved as Apprentice; and the Court refuſed, becauſe it was *ſet forth* in the Indictment *to be a Trade* in England *at the Time of making the Act*; wherein the Words are, Any *Craft, Myſtery, or Occupation now uſed.* So that if this Trade of a Seamſtreſs be not within the Act, the Defendant would have the Advantage of it upon the Trial. Ibid.——2 Ld. Raym. Rep. 1188. 1189. in Caſe of The **Queen v. Harper**, cites S. C. accordingly; and the Court refuſed to quaſh the Indictment, becauſe they ſaid they could not take Notice what was, or what was not, a Trade within the Statute.

It was moved to quaſh an Indictment, for exerciſing the Trade of a *Baker*, the Defendant not having ſerved a legal Apprenticeſhip. The Exception took to it was, that the Trade was † *not laid to be uſed infra Regnum Angliæ at the Time of the Act*, The Court ſaid the Trade of a Baker was within the Words of the Act; and no Averment of the Trade's being uſed at the Time of the Act is neceſſary, but where the Trade only falls within the general Concluſion of the Clauſe at laſt. Barnard. Rep. in B. R. 277. Hill. 3 Geo. 2. The King v. Munroe.

† So in Indictment for uſing the Trade of a Grocer. 2 Keb. 226. pl. 83. Paſch. 19 Car. 2. B. R. the King v. Hopkins, the Indictment was quaſh'd for that Reaſon.———See 2 Barnard. Rep. 147. The Caſe of The **King v. Windgrove**, cited in the Caſe of The King v. Britton.

Indictment for uſing the Trade of a Baker, not having ſerved 7

3. Information for uſing the Trade of a *Draper* in Norwich, was quaſh'd, becauſe it was *not averr'd that he did not uſe the ſame Trade at the Time when the Statute was made*, Hard. 54. Arg. in the Caſe of **Hayes v. Harding**, cites it as adjudg'd Mich. 22 Car. Johnſon v. Wilnerford.

Years Apprenticeſhip, contrary to 5 Eliz. and does *not ſay he did not uſe the Trade at the Time of making the Act*; and it was quaſh'd, but agreed and *declared by all the Court, that this Exception ſhould never be allowed for the future*; and now they would intend that no Man did uſe that Trade at that Time. 2 Show. 210, 211. pl. 218. Trin. 34 Car. 2. B. R. The King v. Green.

4. An Alien was *indicted* for uſing a Trade *upon the Statute* 22 H. 8. *cap.* 13. But the Indictment was quaſh'd, becauſe it was *not ſet forth that he was born out of the Power of the Commonwealth, but only* that he was born *out of England*; but Roll Ch. J. ſaid, if it ſays that he is *Alienigenus*, it *implies all.* 2dly, The Indictment did *not ſay that he is an Alien born out of*

of England; and this was held a good Exception. Sty. 256. Paſch. 1651. Harman v. Jacob.

5. An Indictment upon the Statute 5 Eliz. for uſing the Trade of a *Draper*, not having ſerved as an Apprentice &c. was quaſh'd, becauſe it was *ſaid, that he uſed the Trade in the Year* 1653. and did *not ſay, in the Year of our Lord.* Style 448. Paſch. 1655. B. R. Anon.

6. Indictment on 5 Eliz. 4. for uſing the Trade of a Currier, *not ſaying that he had not ſerved in any Art, Myſtery, or manual Occupation; but only* that he had *not ſerved as a Currier* for 7 Years; which the Court conceived ill, and quaſh'd. Keb. 473. pl. 88. Hill. 14 & 15 Car. 2. B. R. the King v. Hubbard.

S. P. per Cur. Keb. 558. pl. 80. Trin. 15 Car. 2. B. R. the King v. Harlow.

7. It was moved to quaſh an Indictment on 5 Eliz. for *uſing the Trade* of a Hoſier, *in which he had not been educated, according to the Form of the Statute, (not ſaying, ut Apprentitius)* and a good Exception; per Cur. And the Indictment was quaſh'd. Keb. 558. pl. 80. Trin. 15 Car. 2. B. R. the King v. Harlow.

8. Exception was taken to an Information by Common Informer, for exerciſing the Trade of a Barber, *not ſaying he ſet up publickly*; Sed non allocatur, the Statute being in the Disjunctive. 2. It is not ſaid * *contra pacem*; Sed per Curiam, that is never done in Suit by common Informer; and if the Defendant did not ſet up publickly, he may be found Not Guilty. Keb. 860. pl. 70. Hill. 16 & 17 Car. 2. B. R. ..... v. Luſamoor.

* To an Indictment for uſing the Trade of a *Barber*, without Service of 7 Years, Exception was taken, becauſe *not laid Contra pacem*. Holt Ch. J. thought it well enough, becauſe it was laid *Contra formam Statuti*. But by the other 3 Judges it was quaſh'd; for every Breach of a Law is againſt the Peace, and ought to be ſo laid. 6 Mod. 128. Paſch. 3 Ann. B. R. the Queen v. Lane. ——S. P. Keb. 292. Paſch. 14 Car. 2. B. R. pl. 115. in Caſe of the King v. Grove.——Ibid. 501. pl. 58. Paſch. 15 Car. 2. B. R. Indictment quaſh'd on S. P. the King v. Leverington.——Ibid. 789. pl. 43. Mich. 16 Car. 2. B. R. the King v. Farris, S. P.——Ibid. 848. pl. 48. S. P. and the Indictment was quaſh'd. Hill. 16 & 17 Car. 2. B. R. the King v. Houſeden.——S. P. And the Indictment quaſh'd. 3 Keb. 646. pl. 63. Paſch. 28 Car. 2. B. R. the King v. Eeds.

9. Exception was taken to an Indictment on 5 Eliz. 4. being *before Juſtices ad pacem conſervand'*, and do *not ſay* * *Domini Regis*, Sed non allocatur. 2. It was for *uſing the Trade of Mercator, Angl'. a Merchant*, Sed non allocatur. 3. It was *not ſaid where they were Juſtices*, for which Cauſe it was quaſh'd. Per Twiſden, the reſt being abſent. 2 Keb. 385. pl. 58. Trin. 20 Car. 2. B. R. the King v. Lambe.

* Indictment for uſing the Trade of a *Butcher* was excepted to, becauſe it was *Ad Generalem Seſſionem pacis*, not ſaying *Domini Regis*. And per Cur. it was quaſh'd. 2 Keb. 391. pl. 75. Trin. 20 Car. 2. B. R. the King v. Jackſon.

10. Moved to quaſh an Indictment upon 5 Eliz. cap. 2. for exerciſing a Trade *in Cheſhunt* in Hertfordſhire, not having been an Apprentice to it for 7 Years, becauſe the Statute ſays, they ſhall proceed at the Quarter Seſſions, and the Word Quarter is not in the Indictment, Twiſden, that Word ought to be in; and I believe the uſing of a Trade in a *Country Village*, as this is, is not within the Statute. Moreton accorded. Rainsford ſaid, It will be very prejudicial to Corporations not to extend the Statute to Villages. Twiſden ſaid he had heard all the Judges ſay, that they will never extend that Statute further than they needs muſt. Obj. further; that there *wanted theſe Words*, viz. * *Ad tunc & ibidem onerati & jurati*; for which all the 3 Judges, Keeling being abſent, conceived it ought to be quaſh'd. 1 Mod. 26. pl. 69. Mich. 21 Car. 2. B. R. the King v. Turnith.

Vent. 51. Anon. S. C. mentions it to be ſaid, That to keep a Shop within a Country Village is not within the Statute; and that it were very inconvenient that the Inhabitants muſt go to ſome great Town upon every Occaſion.——2 Keb 583. pl. 121. Mich. 21 Car. 2 B. R. The King v. French. ſeems to be S. C. for uſing the Trade of a *Grocer* in Cheſton in Hartfordſhire, being a Country Vill, and not a Market Town, and ſays the Court agreed that it was not within the Statute, and that the Statute is not to be extended by Equity; And it was quaſh'd.——S. C. cited 2 Barnard. Rep. in B. R. 225. Hill. 6 Geo. 2. in Caſe of The King v. Langley; and there Page J. ſaid, That he had often known theſe Indictments quaſh'd upon ſuch Exception.

3 Keb. 790. pl. 45. Trin. 29 Car. 2. B. R. **The King v. Bonnel**, the Court conceived the Uſing the Trade of ſelling Grocery Wares in ſmall Parcels 2 Miles out of any Corporation, and among many Poor to be within the Statute 5 Eliz. But Judgment was given for the Defendant, becauſe the Indictment wanted the Words contra Pacem.——See 3 Keb. 782. pl. 28. The King v. Burnivil, S C. but adjornatur.

* S P 2 Keb. 610. pl. 47. Hill. 21 & 22 Car. 2. B. R. The King v. Greenway.——See pl. 20. The King v. Morris.

11. Upon a Motion for quaſhing an Indictment againſt a Baker, theſe Exceptions were taken. 1. He is indicted for *uſing Facultatem Piſtoris*, and does *not ſay Panis humani.* 2dly, It is for *baking Panis tritici, Anglice, Houſhold Bread*; whereas it ſignifies only Bread made of Wheat, and not Houſhold Bread, for that may be made of other Corn. 3dly, For baking Panis Aſſis, without a Daſh for Panis Aſſiſæ. Upon theſe Exceptions it was quaſh'd. Styl. 24. Paſch. 23 Car. Anon.

12. B. was indicted for uſing the Art of a *Brazier*, contra 5 Eliz. cap. 4. *not averring it a Trade then*, and *ubi revera he had not ſerved 7 Years, according to the ancient Cuſtom in the Town of Nottingham.* After Verdict this was excepted to in Arreſt of Judgment; and per Curiam, it is ill both in the Averment, and alſo in drawing the Neceſſity of Service to a particular Town; whereas it ſhould be, that he had not ſerved generally any where. 3 Keb. 550. pl. 55. Mich. 27 Car. 2. B. R. the King v. Boot.

An Indictment for exerciſing a Trade, not having ſerved to it the Space of 7 Years, *infra Regnum Angliæ aut Walliæ* was quaſh'd for this Exception, for it ſhould be *aut Walliam.*

13. Indictment for uſing a Trade, *not having ſerved* 7 Years Apprenticeſhip *in England, or Dominion of Wales*, was held naught; becauſe limited to England or Wales, when the Statute is general. 2 Show. 155. pl. 141. Hill. 32 & 33 Car. 2. B. R. Anon. 12 Mod. 251. Mich. 10 W. 3. B. R. King v. Fox.

S C. & S. P. cited Ld. Raym. Rep. 1189. accordingly, that they could not underſtand what a Merchant-Taylor is, and that there was no ſuch Trade. And the Reporter ſays, Note, Mr. Eyre ſaid he had known many Indictments on this Statute quaſh'd for that Exception. And the Reporter ſays further, that it ſeems to him that what a Craft, Miſtery, or Occupation is, is Matter of Law.

14. In the Caſe of an Indictment for uſing the Trade of a *Merchant-Taylor*, the Court ſeemed to think a Merchant-Taylor was Nonſenſe, and unintelligible; they did not know what a Merchant-Taylor meant. 2 Salk. 611. pl. 3. Trin. 4 Ann. B. R. the Queen v. Harper.

15. Two cannot be *indicted jointly for exerciſing a Trade, not having been Apprentices*, becauſe the not being Apprentices is that which makes the Crime and Forfeiture, and that muſt of neceſſity be ſeveral. 1 Salk. 382. pl. 32. Paſch. 5 Annæ, in Caſe of the **Queen v. Atkinſon**, cited and admitted the Caſe in 2 Roll. 81. [Indictment (N) pl. 6. Brooke's Caſe.]

16. *Baron and Feme* could not be *indicted* for exerciſing a Trade, not being qualified, becauſe it is the Exerciſe of the Husband. If the Wife be qualified, that qualifies the Husband, but ſtill it is the Exerciſe of the Husband. 2 Ld. Raym. 1248. Eaſt. 5 Ann. Per Holt Ch. J. in the Caſe of the Queen v. Atkinſon, & al'.

17. It was moved to quaſh an Indictment againſt a *Serge-maker for dying his own Serges*, he *not having ſerved* as an Apprentice *to the Dying Trade*; for that it was not ſaid in the Indictment, that he was a common Dyer, and that he might lawfully dye his own Wool. And it was ſaid to be ſo adjudged in a Caſe where, becauſe it was not laid a Common Baker, it was held ill; for any Man may bake for himſelf, and ſo he may dye &c. But the Court held the Indictment well enough, being not like the Caſe of a Baker, for many People bake their own Bread; but a Dyer is a ſeparate Trade. 11 Mod. 189, 190. pl. 4. Mich. 7 Ann. B. R. the Queen v. Prew.

18. An

18. An Indictment for using the Trade of a *Salter* was excepted to, because it said that the Trade *was infra hoc Regnum uſitat' at the Time of the Act made.* Now they said (*hoc Regnum*) would as well *extend to Scotland* as England; and the averring that this Trade was uſed in Scotland at the Time of the Act, would ſignify nothing. Upon this Exception the Court quaſh'd the Indictment. Barnard. Rep. in B. R. 30. Mich. 1 Geo. 2. 1727. the King v. Lyſter.

See (A)—An Exception was taken to an Indictment for uſing the Trade of a *Cutler*, becauſe it was ſaid to be us'd *infra hoc Regnum Angliæ at the Time of the Act*; whereas there is now no ſuch Kingdom. It was anſwered on the other Side, that this being a Trade expreſsly declared within the Act to be us'd at the Time of the Act, the Clauſe of Infra hoc Regnum ſhall be rejected as Surpluſage; but adjornatur. 2 Barnard. Rep. in B. R. 147. Paſch. 5 Geo. 2. 1732. The King v. Britton.—Ibid. 172. Trin. 5 Geo. 2. S. C. The Court thought it ſo clear a Point againſt the Proſecutor, that they immediately gave Judgment for the Defendant. And Lee J. ſaid that the Caſe of the **Queen v. Robinſon**, Trin. 13 Ann. was the firſt determined on this Point after the Union.——In arguing this Caſe Ibid. 147 for the Defendant were cited the Caſes of The Queen v. Robinſon, Eaſter 1714. and The **King v. Hog**, Trin. 9 Geo. 1 and **The King v. Paris**, determined on the Caſe of The King v. Hog, and the Caſe of the King v. Windgrove, Hill. 3 Geo. 2.

19. An Exception taken was, That the *Indictment* was *in the Borough of Colcheſter*, and *no County laid* wherein that Borough is. And 2dly, that the Indictment only charges in general, that the Defendant *exerciſed this Trade the firſt Year of the preſent King, without ſaying in what Month* of the Year it was. Now he ſaid, the Act of Parliament gives ſo much a Month Forfeiture for the Time the Offence is committed, and therefore it was material for the Indictment to have charged how many Months the Defendant exerciſed it. The Court ſaid the firſt Exception was clearly fatal, and therefore made the Rule abſolute. Barnard. Rep. in B. R. 285. Hill. 3 Geo. 2. the King v. Kendal.

20. Indictment on the 5 Eliz. for exerciſing a Trade &c. It was moved in Arreſt of Judgment, that it does *not appear when or where the Jury were ſworn*; For the *Caption* of the Indictment is *Juratores pro Domino Rege jurat' pro* &c. *omitting* the Words *adtunc & ibid.* Hereupon Judgment was arreſted. Gibb. 266. pl. 11. Paſch. 4 Geo. 2 B. R. The King v. Morris.

See the King v. Turnith, pl. 10.

For more of Trade in General, ſee **Actions tam quam &c. Apprentices By-Laws, Trade and Navigation,** and the References there, and other proper Titles.

Trade and Navigation.

(A) Caſes relating to Trade and Navigation.

See major Part. (A)

1. IF a *Ship freighted* for a Voyage be *made Uſe of for a longer Voyage, or for ſeveral* Voyages in Caſe there be *no Proteſt againſt it*, and the Ship ſuffers any *Damage in the Voyage not allowed of*, the Damage ſhall be equally paid. Miege's Laws of Wisby 15. S. 11.

Four Joint-owners of a Ship, 3 *will navigate the Ship, the 4th will* not, the *Courſe is* to go into the Admiralty, and there give Security to anſwer for the Ship if ſhe be loſt,

loſt, and they ſhall be diſcharged againſt the other. If one diſlike the Voyage and doth *not expreſsly prohibit* navigating the Ship, and the Ship goes the Voyage and is loſt, in ſuch Caſe he ſhall not be anſwered his Part; But if the Ship return, he ſhall have an Account for what is earned, and it ſhall be intended a Voyage with his Conſent, without any expreſs Prohibition proved As if 4 are Tenants in Common of Land, and one or more ſtock the Land and manage it, the reſt ſhall have an Account of the Profits; But if a Loſs come, as if the Sheep &c. die, they ſhall bear a Part. Per North Ld. Keeper. Skin. 230. Hill. 36 & 37 Car. 2. in Chancery. Anon. —— Vern. 297. pl. 291. Strelly v. Winſon. S. C. accordingly. For Qui ſentit Commodum ſentire debet & Onus.

2. If there be ſeveral *Owners* of a Ship and they *fall out*, the *Ship* notwithſtanding this Variance *may make one Voyage upon their common Charge* and Adventure before they ſhall be ſo much as heard to diſſolve the Partnerſhip; but if *after* that they cannot agree, *he who deſires to be free is to offer to the Reſt his Part at a Price as he will either give or take*, which *if he* will not do, *and yet refuſes* to ſell the Ship forthwith, *the Reſt may rig the Ship at their own Charge* and upon the Adventure of the Refuſer ſo far as his Part extends, *without any Account* to be made to him of any Part of the Profit at her Return. *But* they *muſt bring her home ſafe or anſwer him the Value of his Part.* Molloy, lib. 3. S. 14. cites Lex Mercatoria, 120, 121.

3. *But* if the *Partners who have the greateſt Share* of the Ship *refuſe to continue the Partnerſhip with one who hath but one Part* or a ſmall Share therein, and *who cannot without great Loſs ſell or part* therewith *at the Price ſet nor is able to buy their Parts*, then they muſt all put the Ship to an Appraiſement, and ſo diſpoſe of her by Sale or ſetting her forth on the Voyage according to ſuch Appraiſement. Molloy, lib. 3. S. 14 cites Lex Mercatoria, 120, 121.

4. No Subject ought to trade within any Realm of *Infidels* without Licence of the King, becauſe he may turn Infidel. Per Coke Ch. J. and ſays, he had ſeen a Licence in E. 3's Time, reciting that he having ſpecial Truſt and Confidence that his Subject will not decline from his Faith and Religion, did *Licence* him &c. 2 Brownl. 296. Hill. 7 Jac. C. B. Michelborn v. Michelborn.

5. In an Information the Caſe was that the *Ruſſia Company* was incorporated in 1 and 2 Ph. and Mar. and it was granted to them, *that no Perſon not being of their Company ſhould trade thither without their Leave, under the Penalty of forfeiting Ship and Goods*: Afterwards *by Act of Parliament* 8 Eliz. *theſe Letters Patents were confirmed, and* it was *enacted, that no Perſon Subject or other, ſhould trade thither without their Leave.* The Queſtion was, Whether a Perſon free of their Company might trade thither without their Leave. The Court inclined to be of Opinion that he could not; For the great Inconvenience was the ſingle and ſeparate Trade of thoſe of the Company, and not of Foreigners who could not trade without Leave of the Company, and *the Act is a mere Act of Creation and to regulate thoſe of the Company who trade ſeparately to the Prejudice of the Joint-Stock*; And if it was an Act of Confirmation, it would be void becauſe the Letters Patents themſelves are void, being to appropriate a Trade, which the King cannot do by Law. Hard. 108. Hill. 1657. in the Exchequer. The Attorney General v. Alum.

6. In *Caſe* the Plaintiff declared that he was *Owner of one 16th Part* and the Defendant of another 16th Part of the ſame Ship, and that the Defendant fraudulently and *deceitfully carried the* ſaid *Ship ad loca tranſmarina, and diſpoſed of her to his own Uſe*, by which the Plaintiff loſt his 16th Part to his Damage; on Not Guilty pleaded and Verdict for the Plaintiff, it was moved in Arreſt of Judgment that the Action did not lie; for tho' it be found deceptive, yet this did not help it, if the Action did not lie on the Subject Matter. And here *they are Tenants in Common* of the Ship; and by Littleton, between Tenants in Common there is not any Remedy, and there cannot be any Fraud between them, becauſe the Law ſuppoſes a Truſt and Confidence betwixt them; and upon theſe Reaſons Judgment was given Quod Querens nil capiat per billam. Raym. 15. Paſch. 13 Car. 2. B. R. Graves v. Sawcer.

Keb. 38. pl. 102. S. C accordingly, and that it was the Folly of the Tenant in Common, that he did not take Collateral Security for his 16th Part. —— Lev. 29. S. C. cites Litt. S. 222. but it ſeems miſprinted for S. 323. —— But ſee now the Statute 4 & 5 Anne, cap. 16. as to Tenants in Common.

7. Mr.

7. Mr. Skinner's Caſe preferr'd to the Judges from the Council-Board. After a Petition preſented by him to the Lords of the Council he ſtated his Caſe as follows, viz. That in the Year 1657, *when Trade was open to the Eaſt-Indies* and free for all, he *ſet forth a Ship* of his own from London *and arrived at Jamby* in 1658, *and poſſeſſed himſelf of a Warehouſe on the Riverſide on which his Ship rode* wherein he put great Part of his Goods; he alſo had poſſeſſed a Houſe at Jamby and Goods therein, and purchaſed of the King of Great Jamby to him and his Heirs the Iſlands of Baretha, and built a Houſe and had contracted for the Planting of Pepper; That in the Year 1657, *the Agents of the Eaſt-India Company* with above 30 Men armed with Muskets, Swords, and half Pikes, *ſet upon his Ship, boarded her and took her*; they aſſaulted and took *his Warehouſe and all his Goods on Shore, and* with above 20 Men armed as aforeſaid, they *aſſaulted his Perſon at Jamby and wounded him* and took him, *broke open his Houſe, ſpoiled him of his Goods and Papers*, and the ſaid Agents with Men armed as aforeſaid, did aſſault the Iſlands of Baretha and and poſſeſſed themſelves of the ſame, built a Houſe, cut down Timber, and do ſtill (as he believes) poſſeſs the ſame; and upon this Caſe he propounded theſe Queſtions,

This Caſe was communicated to me as taken from a MS. Copy of the Lord Ch. J. Keyling.

1ſt. Whether Mr. Skinner is not relievable properly in the Conſtable and Marſhall's Court? 2dly, Whether he can have a full Relief in any ordinary Court of Law? Upon which by an Order dated the ſaid 12th of April 1665, the King's Majeſty being preſent, the State of his Caſe was ſent to the 2 Lord Ch. Juſtices, and the Lord Ch. Baron and the reſt of the Judges then in Town to conſider of the ſaid Queſtions and make a Report of their Judgment thereupon, upon which we met accordingly, and after Advice made the Report following.

1ſt. That we are of Opinion that Thomas Skinner in the Order mention'd, is not relievable for any of the Matters in his Caſe propoſed in the Conſtable or Marſhall's Court, they having no Juriſdiction in Matters of this Nature.

2dly. That his Majeſty's ordinary Courts of Juſtice at Weſtminſter can give Relief for the taking away and ſpoiling his Ship Goods and Papers, and aſſaulting and wounding his Perſon, notwithſtanding the ſame was done beyond the Seas.

3dly. That as to the poſſeſſing and detaining of the Houſe and Iſlands in the Caſe mention'd, he is not relievable either in the Conſtable and Marſhall's Court, or in any ordinary Court of Juſtice.

8. Upon an *Information tam quam*, grounded upon the Act of Navigation, *for importing Goods in a foreign Ship* contrary to that Act, the Queſtion was, whether or not, if a *foreign Ship naturalized* by the new Act, being a Prize taken in the late War with Holland, be *afterwards ſold to a Foreigner, who ſells her again to an Engliſhman*, whether or no the Oath now muſt be taken again according to the new Act. And adjudged that it need not, becauſe that the Ship was once lawfully naturalized. Hard. 511. Trin. 21 Car. 2. in the Exchequer, Martin v. Verdew.

9. A Bill was brought to be *relieved againſt Actions of Treſpaſs, for ſeiſing* their *Goods in the Iſland of* &c. *on* the *Pretence of breaking an Inhibition of the King of Denmark*, whereas by Articles of Alliance between the Crown of England and Denmark, free Trade was allowed to all Engliſh in all Ports of the Kingdom of Denmark, whereof the Iſland was a Port; But in Regard *Sentence* was *given in the Court there* for the Plaintiff on the Seiſure, the Bill was diſmiſt. Chan. Caſe 237. Mich. 26 Car. 2. Bluet v. Bampfield.

10. In Evidence, Hales Ch. J. ſaid an *Indebitatus* by one Joint Part-Owner of a Ship for his Share of Freight was *joint or ſeveral at the Plaintiff's Election*; and Evidence of the *Cuſtom of Merchants* to bring it alone was ſufficient, and one can't releaſe the other's Part. Alſo if one takes

but a Moiety or leſs of what belongs to his Share for Freight, yet the other may ſue for his whole Share of it, and ſo 'twas ſaid to be held in the Caſe of Coal-Merchants; but the Matter ended by Reference. 3 Keb. 444. pl. 63. Hill. 26 and 27 Car. 2. B. R. Stanley v. Ayles.

5 Mod. 193. S. C. adjudg'd accordingly by the whole Court. —— 12 Mod. 92. S. C. adjudged —— And by Rookby J. the very Offence deveſts the Property, tho' not then in the Plaintiff, yet when the Action is brought it is in him by Relation. And Judgment for the Plaintiff. Comb. 361. S. C.

11. By the Act of Navigation 12 Car. 2. c. 18. *certain Goods are prohibited to be imported* here *under Pain of forfeiting* them, *one Part to the King, another to him* or them *that will inform, ſeiſe, or ſue for the ſame*; and it was adjudged in this Caſe, that the Subject may bring Detinue for ſuch Goods as the Lord may Replevin for the Goods of his Villein diſtrained; For the bringing the Action veſts a Property in the Plaintiff. Salk. 223. Paſch. 8 Will. 3. B. R. Roberts v. Wetherall.

So where there were 37 Conſenters and but 2 or 3 Refuſers, the Court denied a Prohibition to a Suit in the Admiralty upon the Stipulation; for per Curiam, tho' by the Law of England, 2 or 3 Part-Owners may hinder the others from ſending the Ship a Voyage without their Conſent, yet the Law of the Admiralty is otherwiſe. For there, for the Encouragement of Navigation the Court of Admiralty will permit the Ship to make the Voyage, upon Security given to bring her back ſafe. For it is reaſonable that the others who oppoſe the Voyage, ſhould have ſome Security for their Ship. Then if the *Ship* be *loſt* it *is at the Peril of the Adventurers*, and they ſhall be ſuable upon their Stipulation by the others in the Admiralty; for now it is not doubted, but the Admiralty may take Stipulations. Ld. Raym. Rep. 235. Trin. 9 Will. 3. Blacket v. Anſley.

12. *Some Part-Owners* of a Ship *were deſirous that ſhe ſhould go to Sea*, and *others would not conſent*, upon which they procure the Ship to be arreſted by Proceſs out of the Admiralty, *and compelled thoſe who intended to ſend the Ship* a Voyage *to enter into Recognizance* there, *condition'd for her ſafe Return*. After which *the Ship* began a Voyage and *was loſt*, and upon this *the Perſons bound were ſued in the Admiralty*. Prohibition was moved for. 1. Becauſe the Recognizance not being in Nature of a Stipulation, the Admiralty had not Power to compel the Party to enter in it. 2. Becauſe this Suit being in Nature of Debt upon a Recognizance, that Court had not Cognizance of it. But the Prohibition was denied by the Court (abſent Holt Ch. J.) becauſe this Suit is between the Part-Owners of the Ship, and the Property is admitted; and therefore it is properly conuſable there. 3. If the Admiralty had not Power to take ſuch Recognizances all Navigation muſt be obſtructed if one obſtinate Part-Owner would not conſent that the Ship ſhould make a Voyage; And e contra it is very reaſonable that he have Security that the Ship return in Safety, ſince he does not conſent to the Voyage. Ex relatione m'ri Shelley. Ld. Raym. Rep. 223. Eaſt. 9 W. 3. Lambert v. Aeretree.

But where there were 8 Owners of the Ship called the Upton Galley, 6 *were deſirous that the Ship* then lying in the Thames, *ſhould go on a Voyage to* &c. the other 2 *oppoſed it*, thereupon *the 6 libelled in the Admiralty* againſt the others in order *to obtain a Decree* of that Court, *that the Ship ſhould make the Voyage*, and the ſame was *decreed accordingly*; *and that the 6 ſhould enter into a Stipulation to the other* 2 for the ſafe Return of the Ship, which they did. The *Ship* ſailed and *was loſt* in the Voyage. The 2 ſue the other 6, viz. Degrave, and 5 others, on this Stipulation in the Admiralty. D. *moved for a Prohibition* to ſtay this Suit, *upon* Suggeſtion of the *Statute of* 13 *R.* 2. *cap.* 5, *and* 15 *R.* 2. *cap.* 3. *and of the Facts before alleged.* But the Court thinking this Point not fit to be determined on a Motion, ordered the Plaintiff to take a Prohibition, and declare upon it, and then on the Defendant's Demurrer, the Point would come judicially before them, and receive a more ſolemn Determination. But Holt Ch. Juſtice ſaid, that the Court of Admiralty might take Stipulations for Bail, and that they might proceed upon them, and it was conſtantly allowed, tho' Co. 4 Inſt. 135. is of another Opinion; and yet ſuch Stipulations are as much within the Words of the Statute of Rich. 2. as the Recognizance in this Caſe. But the Queſtion in this Caſe is, if by the Cuſtom of England the Admiralty has not ſuch a Juriſdiction, if it has, neither the Statute nor common Law will reſtrain them. 2 Ld. Raym. Rep. 1285. Eaſt. 6 Ann. Degrave v. Hedges.

For more of Trade and Navigation in General, ſee **Court of Admiralty, Factor, Fraight, Hypothecation, Mariner's Wages,** and other Proper Titles.

Traverſe.

(A) *Notes* and *Rules*.

1. A Traverſe *ſignifies* in Pleading the denying of ſome Point, Matter, or Thing alleged on the other Side, with an Abſque hoc, that ſuch a Thing was done or not. Heath's Maxims. 103. cap. 5.

2. When the *Matter of a Plea* is *not good*, there a Traverſe is not good; by the Juſtices of both Benches. Br. Appeal. pl. 122. cites 37 H. 8.

3. Where a *perfect Bar is pleaded*, a *Traverſe makes the Plea double*; for it requires a double Anſwer. Arg. Litt. Rep. 15. cites 6 Rep. 24. **Pellier's Caſe**, and 33 H. 6. 18. 22 H. 6. 42. 1 E. 5. 3. Co. Ent. Quare Impedit 505.

4. If a Man *pleads in Bar*, and the Plaintiff *replies Matter in Law*, he ſhall never traverſe the Bar. Arg. Litt. Rep. 15. in Caſe of **Fenner v. the Biſhop of London, Paſvil and Michelſon**, cites 5 H. 7. 14. Per Huſſey.

5. No Traverſe ought to be taken, but where the *Thing traverſed is iſſuable*. Cro. J. 221. pl. 3. Paſch. 7 Jac. B. R. in Caſe of Bedel v. Lull.

6. When the Defendant traverſes any Part of the Plaintiff's Count or Declaration *in* a *Quare Impedit*, it *ought to be ſuch Part* as is both *inconſiſtent with the Defendant's Title, and being found againſt the Plaintiff does abſolutely deſtroy his Title*; for if it does not ſo, however inconſiſtent it be with the Defendant's Title, the Traverſe is not well taken; Per Vaughan Ch. J. Vaugh. 8. Hill. 17 & 18 Car. 2. C. B. in Caſe of Tufton v. Temple & al. Ld. Raym. Rep. 41. in Caſe of **Waltham v. Sparkes**, Arg. cites Vaugh. 8. For if a Man will traverſe, he ought to traverſe *that which will reduce the Point in Debate to a Concluſion*; and therefore the traverſing an immaterial Averment was ill, and it was ſo held.

7. If one will take a Traverſe to a Declaration, he ought to *traverſe that* Part of it, the doing whereof will make an End of the Matter *for which the Plaintiff declares*, and then is the Traverſe good. Paſch. 24 Car. 2. B. R. elſe not; for then it is to no Purpoſe. 2 L. P. R. 589. Tit. Traverſe.

8. The *Eſſential Part* of a Traverſe *is but the Denial of a material Matter alleg'd* by the Plaintiff or Defendant reſpectively; the formal Part is Abſque hoc. But that a Traverſe is good without the Words Abſque hoc, is expreſsly reſolved 1 Saund. 22. **Bennet v. Filkins.** Arg. Ld. Raym. Rep. 356. in Caſe of Pullein v. Benſon.

(B) Of

See (G)

(B) Of the *Inducement* to a Traverſe.

1. A Traverſe *ought to have an Inducement to make it relate to the foregoing Matter*, or elſe it is not good and formal. Mich. 22 Car. B. R. For elſe it cannot be known what is traverſed thereby. 2 L. P. R. 587. Tit. Traverſe.

2. Where the *Inducement* to the Traverſe *is ill, and the Traverſe is well taken*, this is good upon a general Demurrer; but upon a *ſpecial Demurrer* ſhewing this for Cauſe, it is naught. 2 L. P. R. 588. Tit. Traverſe, cites Mich. 5 W. & M.

3. The *Inducement* to a Traverſe *ought always to contain ſufficient Title, but* it is *not material whether* the Matter is *true or falſe*. 3 Salk. 353. pl. 5. Paſch. 9 W. 3. Anon. cites Cro. C. 265, 266.

S. P. 3 Salk. 353. pl. 5. Paſch. 9 W. 3. Anon.

4. Per Holt Ch. J. A Man *ought to induce his Traverſe*, and the Reaſon is, *becauſe he ought not to deny the Title of another, till he ſhew ſome colourable Title in himſelf*; for if the Title traverſed be found naught, and no Colour or Right appears for him who traverſed, it would happen that no Judgment could be given. 3 Salk. 357. pl. 12. Paſch. 9 W. 3. Anon.

5. Where a *Traverſe goes to the Matter* of a Plea &c. *all* that went *before becomes Inducement*, and is waived by the Traverſe; *but* where a Traverſe goes *to the Time* only, what was ſet out in the Plea before does not become bare Matter of Inducement, nor is it waived by the Traverſe; Per Holt Ch. Juſtice. 2 Salk. 642. pl. 12. . . . Ann. B. R. Green v. Goddard.

6. Inducement to a Traverſe *is inſufficient where the Traverſe is* a Thing *immaterial*. See Comyns's Rep. 302. pl. 155. Mich. 5 Geo. 1. C. B. Newland v. Collins.

See (S)

(C) *Traverſable, What. Cauſe*; In what Caſes.

1. IN Aſſiſe, if the *Warranty of the Uncle, whoſe Heir* &c. *is pleaded*, it is a good Plea that he *never had ſuch Uncle*. Br. Traverſe per &c. pl. 329. cites 44 Aſſ. 1.

2. A Vill was indicted of the *Death of a Murderer, and that A. and B. had* 100 *l. of the Money of the Offender*, who was ſued; and he who was ſuppoſed to have the Money, came and *traverſed the Cauſe*, inaſmuch *as it was only an Inqueſt of Office*. Br. Traverſe per &c. pl. 321. cites 47 E. 3. 26.

Br. Contract, pl. 8. cites S. C.

3. Iſſue was taken *whether Bond was taken for* 10 *l. Parcel of a Contract of* 20 *l.* or for other Cauſe. Br. Traverſe per &c. pl. 46. cites 3 H. 4. 17.

4. If a Man *removes Plaint of Replevin out of the King's Court for Cauſe*, and the *Defendant tenders to traverſe the Cauſe*, and *the other Party demurs*, and it is adjudg'd againſt him who traverſes, this *is Peremptory*, and the Plaintiff ſhall recover; but the *Court will not ſuffer* the *Traverſe of the Cauſe, unleſs in Ancient Demeſne*, as they ſaid there. Br. Peremptory, pl. 79. cites 27 H. 6. 4.

5. In *Præcipe quod reddat*, a Man *prayed to be received*, and the *other travers'd the Cauſe*; And this was held Jeofail; for he ought to traverſe the Reverſion, and becauſe he did not, therefore it is Jeofail, as it was held. Br. Repleader, pl. 42. cites 33 H. 6. 39.

6. Treſ-

6. Treſpaſs by W. Babington againſt N. B. *Quare M. P. Priſoner in the Fleet, in Cuſtodia querentis apud W. cepit* &c. The Defendant *ſaid that E. Venor was Warden of the Fleet at the Time* of the Treſpaſs, *and that the Priſoner was bound in a Recognizance, and* that *the Juſtices commanded E. Venor the ſame Day to have the Priſoner before them, by which the Defendant as Servant of the ſaid E. Venor, brought him* to the Juſtices to the Court, *and carried him back to the Fleet by Command of the ſame Juſtices, and as he was carrying him in Weſtminſter, the Plaintiff took him out of his Poſſeſſion, and he retook him abſque hoc that he was Warden at the Time of the Treſpaſs.* And by the Opinion of the Court it is a good Plea; for if he was not Warden he cannot have Action of the Taking. Br. Treſpaſs, pl. 305. cites 4 E. 4. 6. 9.

7. The Cauſe ſhall be travers'd in ſeveral Caſes; as to cleaſe the Land by Reaſon of Tenure, he may ſay *that he has not the Land per quam* &c. *or* that the Way *is not a Highway*, or in Battery of his Servant, to ſay that he is *not his Servant* &c. Br. Traverſe per &c. pl 182. cites 5 H. 7. 3. Br. Preſentment in Courts, pl. 14 cites S. C.

8. Where the *Cauſe of Voucher is ſhewn*, the Cauſe is traverſable. Jenk. 12. pl. 20.

9. *The Cauſe why the College of Phyſicians fine and impriſon* ought to be certain, for it is traverſable; for tho' they have Letters Patents and Act of Parliament, yet inaſmuch as the Party griev'd has no other Remedy, neither by Writ of Error nor otherwiſe, and they are not made Judges, nor Court given to them, but have Authority barely to do it, the Cauſe of their Commitment is traverſable in Action of Falſe Impriſonment brought againſt them. 8 Rep. 121. Hill. 7 Jac. Per Coke Ch. J. in the Concluſion of his Argument in Dr. Bonham's Caſe. In Aſſault &c. and Falſe Impriſonment againſt the Cenſors of the College of Phyſicians for *Fining and Impriſoning pro mala Praxi*, they ſet forth their Authority, and ſhew'd the Perſon and Fact to be within their Juriſdiction as Cenſors; And Per Holt Ch. J. This is not *traverſable in this Collateral Action*, becauſe they are made Judges to hear and determine; and therefore not liable to an Action for what they do by Virtue of their Judicial Power; and wherever a Statute gives a *Power to fine and impriſon*, the Perſons to whom ſuch Power is given, are Judges of Record, and their Court is a Court of Record. Carth. 494. Paſch. 11 W. 3. B. R. Dr. Groenvelt v. Dr. Burnel.——And per Holt, As to that Point in Dr. Bonham's Caſe, it is only an Opinion delivered, and not a Reſolution, and is not Law. Ibid Marg.——Ld. Raym. Rep. 467, 468. S. C. and ſame Points accordingly.——12 Mod. 389. S. C. and ſame Points.——*And* tho' the Plaintiffs had *no Remedy in any other Court*, it does not follow that the Fact upon which ſuch Conviction is grounded is traverſable in a collateral Action, becauſe the Power which the Cenſors have is given to them by the Statute by which *they are, as it were, a Jury to try the Fact whether the Praxis is good or not.* And if a Jury *find contrary to Evidence*, yet no Action lies againſt them, becauſe they are on their Oaths; therefore what they find cannot be travers'd. Carth. 494. Dr. Groenvelt v. Dr Burnel & al'.

10. An Action upon the *Caſe* brought *upon a Bargain for Corn and Graſs* &c. The Defendant *pleads another Action* depending for the ſame Thing. The Plaintiff *replies that the Bargains were ſeveral*, abſque hoc that the other Action was brought for the ſame Cauſe. The Defendant demurs ſpecially; for that he ought to have concluded to the Country. It was inſiſted that when there is an Affirmative, they ought to make the next an Iſſue, or otherwiſe they will plead in infinitum; and accordingly Judgment was given for the Defendant. 1 Mod. 72. pl. 26. Mich. 22 Car. 2. in B. R. Haman v. Truant. Raym. 199. S. C. and by Twiſden J. the pleading is well, and ſo is the conſtant Practice.—Vent. 101. Hayman v. Trevant, S. C. and the Traverſe was held good, and allow'd for putting the Matter more ſingly in Iſſue.

11. If a Sentence of *Deprivation* be pleaded, you need not ſhew the *Cauſe*; it is not traverſable, even in a Viſitation, when it is by the viſitatorial Power. Skin. 485. Trin. 6 W. & M. B. R. in Caſe of Philips v. Bury, cites Raſtall's Ent. fol. 1. 11 H. 7. 27. and 7 Co. Kenn's Caſe.

12. In Caſe for a *Pound-Breach*, and taking thence a Mare impounded by the Plaintiff for Damage feaſant, the Defendant *pleaded* that he gave the Plaintiff 6 d. in *Satisfaction* of the Treſpaſs, and that Plaintiff accepted 1 Salk. 247. pl 2. S. C. but S. P. does not appear.

cepted it, *and* gave *Leave to Defendant to take the Mare out of the Pound*; and that he took her accordingly the Gate being open &c. Plaintiff *replied De Injuria ſua propria abſque tali Cauſa.* After Verdict for the Plaintiff, it was mov'd in Arreſt of Judgment, that the Replication was ill, becauſe the Plaintiff ſhould not have travers'd the *Cauſe* generally, but the *Acceptance in Satisfaction.* Sed non Allocatur; for tho' ſuch Iſſue is improper, and had been ill on Demurrer, yet it is aided by the Verdict. Ld. Raym. Rep. 104. Mich. 8 W. 3. Cotſworth v. Betiſon.

13. *Cauſe for which a Fine is ſet*, is never traverſable. 1 Salk. 397. Trin. 12 W. 3. B. R. Groenvelt v. Burwell.

(D) *Command.*

See Treſpaſs.

1. THE Command is not traverſable unleſs *in Special Caſe, where the Command determines the Intereſt of the other Party.* Arg. 2 Le. 215. in Caſe of **Fuller v. Trimwell,** cites 13 H. 7. 12, 13.

2. In *Replevin*, the Defendant *juſtifies*, for *that J. S. was ſeiſed in Fee* of the Place &c. where; and that he as his Servant, and by his Command did take the Cattle there *Damage feaſant*, and ſo juſtifies. The Plaintiff *replies*, and confeſſes it, but ſays *that J. D. was ſeiſed in Fee* long before, *and leaſed to him at Will, abſque hoc that J. S. did command* him for to enter, and to take the Cattle. Upon Demurrer the only Queſtion was touching the Validity of the Traverſe. And by the whole Court it was ruled good; for the Plaintiff in this Caſe could not traverſe any other Matter but the Command. And ſo Judgment was given for the Plaintiff. 1 Bulſt. 189. Paſch. 19 Jac. Horne v. Harriſon.

See Thorn v. Shering. —Mann. Secundary informed the Court, that if it had been in Caſe of a *Leaſe for Years, or* for *Life*, then in ſuch a Caſe the Seiſin of the other ought to have been travers'd, and not the Command; and ſo it has been here adjudged before, but otherwiſe in Caſe of a Leaſe at Will, as in this Caſe; the Court agreed in this. 1 Bulſt. 189.

3. In Conuſance for *Rent in Replevin* by Bailiff, the Command is not traverſable, becauſe that goes to the Right. But in Conuſance for *Damage feaſant*, the Command is traverſable in Replevin; Per Holt Ch. J. in delivering the Opinion of the Court. Raym. Rep. 310. Hill. 9 W. 3. in Caſe of Britton v. Cole.

(E) *Dates and Delivery* of Deeds.

1. DEbt *againſt the Succeſſor of a Parſon* upon a Grant of his Predeceſſor *of an Annuity with Penalty for Non-payment, and Confirmation of the Patron and Ordinary, which bore Date before the Grant*, and he declared the firſt Delivery to be 4 Days after the Grant; and the *Defendant ſaid that it was delivered the Day that it bore Date.* And the Opinion was, That it is no Plea *without traverſing that it was not delivered after the Grant*; for it ſeems that the Day is not traverſable, but *whether it was delivered after the Grant, or not.* Br. Traverſe per &c. pl. 59. cites 8 H. 6. 6.——And ſo is 37 H. 6. 17, 18.——And ſee Fitzh. Bar 131. the Plea not good for Default of Traverſe. Ibid.

2. Where the Deed is pleaded, *bearing Date ſuch a Day, and the firſt Delivery another Day*, and the *other pleads Releaſe Meſne*, this is no Plea *without traverſing the firſt Delivery* &c. Per Judicium. Br. Traverſe per &c. pl. 186. cites 1 E. 4. 9. and Fitzh. Bar 131. and 18 H. 6. 8.

3. *And*

3. *And*, per Townſend and Brian, if a Man be *bound the firſt Day of May, and the Obligee makes an Acquittance to him bearing Date before the Bond, and delivers it after the Bond*, in Debt, if he pleads this Releaſe bearing Date before, and that it was firſt deliver'd after, he ſhall not traverſe; and yet it ſhall be intended, that the Releaſe was deliver'd as it bears Date, prima facie; but the *Declaration of the Delivery deſtroys the Intent*; quod nota Br. Traverſe, per &c. pl. 186. cites 1 E. 4. 9. and Fitzh. Bar 131. and 18 H. 6. 8.

4. In Quare Impedit the Plaintiff *counted, that W. N. was ſeiſed, and preſented J. S.* his Clerk, who at his Preſentation &c. *and after, by his Deed dated the firſt Day of May*, W. N. *granted the next Preſentation to the Plaintiff; and after J. S. died*, by whoſe Death the Church is now void, *and ſo it belongs to the Plaintiff to preſent, and the Defendant diſturb'd him.* And the *Defendant ſaid, that true it is, that W. N. granted to* the Plaintiff *by Deed, dated the Firſt of May &c. but this was firſt deliver'd the fourth Day &c. before which Day the ſaid W. N. granted to the Defendant the next Preſentation* &c. And no Plea, per Rede, Fineux, and Vaviſor, becauſe he *did not traverſe the Plea, that the Deed was not deliver'd the firſt Day of May*; for it ſhall be *intended*, that it was deliver'd the Day that it bore Date, if other Matter is not ſhewn to the contrary, As to allege primo Deliberatum alio die &c. But Keble, Bryan, and Townſend contra; for the *Writ is but Suppoſal*, and therefore the Bar, which is the Matter in Fact, is good without Traverſe; for he has *confeſs'd and avoided* it. Br. Traverſe, per &c. pl. 186. cites 5 H. 7. 26.

5. In *Debt on Bond* the *Plaintiff declared, that* the *Defendant*, 20 *Die Novemb. acknowledged himſelf indebted* &c. The Defendant *pleaded*, that the Bond was *firſt deliver'd* 30 *Novemb. & non Antea; and ſhews, the Writ on which* he was in Cuſtody *was returnable quind' Martini, ſo that the Bond was taken after the Return*; and then relies on the Stat. H. 6. The Plaintiff demurr'd, and had Judgment. The Court agreed, that mere Matter of Suppoſal, Matter alleged out of due Time, or immaterially alleged, is not traverſable; but they *held the* 20 *Novemb.* to be *an expreſs Allegation*, and that the Defendant's Plea had made it material; for the Validity of this Bond turn'd wholly on the Day of the Delivery, ſo the Defendant ſhould have traverſed the Delivery on the 20th. And the Court held the Non Antea no Traverſe, becauſe it is what cannot be reſted upon; but the Party muſt diſcloſe further Matter before he comes to conclude. 2 Salk. 628. pl. 2. Mich. 10 W. 3. B. R. Pullen v. Benſon.

Ld. Raym. Rep. 349. S. C. and it was Debt on a Bail Bond. And ibid. 356. Holt Ch. J. ſaid, that *non antea* would be a Traverſe in ſome Caſes, but not here; and that Judgment was given for the Plaintiff by the whole Court, for want of the Traverſe. —— Ibid. 356. is a Note at the Bottom of the Page, that Mr. Jacob ſaid, the Reaſon Holt Ch. J. gave was, that in this Caſe one cannot conclude to the Country, becauſe there ought to be other Matter alleg'd to make the Date material; otherwiſe where that is the ſingle Matter of the Plea. —— 12 Mod. 204, 205. S. C. and per tot. Cur. the Plea was held ill; for here the Date was material; for ſuppoſe the Arreſt was before the Return of the Writ, and after the Return of the Writ he took an ante-dated Bond, this Bond is void; and therefore the Date is material, and ought to be traverſed; wherefore the Plaintiff had Judgment. —— 3 Salk. 352. pl. 2. S. C. by the Name of Buller v. Benſon accordingly.

(F) *Day or Time.*

1. IN Treſpaſs the Defendant juſtified for Common, and the Plaintiff would have traverſed whether he had Common the Day of the Taking or not. But per Curiam, the Day is not traverſable *in Writ of* * *Treſpaſs, nor in* † *Replevin, without ſpecial Matter ſhewn.* Contra, if he has

* Br. Treſpaſs, pl. 106. cites 5 H. 5. 1. S. P. —— Br. Tra-

verſe, per &c. pl. 54. cites S. C. has Common there once in the Year, and not all the Year. Br. Traverſe, per &c. pl. 44. cites 2 H. 4. 24.

† In Replevin the Defendant *avow'd for Rent-Service* &c. The Plaintiff *replied, that the Taking was Nocte ejuſdem Diei.* The Defendant *rejoin'd*, that it was *tempore Diurno abſque hoc, that it was Nocte ejuſdem Diei* The Plaintiff demurr'd, pretending that the Traverſe ought to be abſque hoc quod cepit modo & forma &c. generally; for that the Day is not material in this Action, nor in Treſpaſs. But reſolved, abſente Haughton, that the Traverſe is good; for where the *Parties* are *agreed on the Day*, as in this Caſe, it is not ſufficient, if found to be done at [another] Day; but where they do not agree upon the Day, if it be found or proved on any other Day, it is ſufficient; and there the Traverſe ought to be general, Modo & Forma. And in this Caſe the Defendant has not made the Day material by his Plea, that the Diſtreſs was made in the Night; and for Rent-Service he cannot diſtrain in the Night, as he may for Damage feaſant, and therefore ought to have averr'd in tempore Diurno. And ſo Judgment was affirm'd. Palm. 280. Paſch. 20 Jac. B. R. Heyden v. Godſale. ——— Palm. 150. S. C. but not S. P.——Hob. 265. S. C. but not S. P.——Godb. 247. pl. 345. S. C but not S. P.——2 Bulſt. 159. S. C. but not S. P.———Cro. J. 334. S. C. but not S. P.

2. *Debt againſt a Feme*, the Plaintiff *counted of* 10*l. that the Defendant bought of him a Bond of* 20*l. in which N. her Baron was bound*; *and* counted, *that ſhe* for 10 l. *bought* of him the Bond *the* 2*d of July, ſuch a Year*; and *ſhe ſaid, that ſhe bought it of him the firſt Day of July in the Year aforeſaid, at which Time ſhe was Covert* of Baron of the ſame N. *abſque hoc, that ſhe bought it the Day in the Count*; and held a good Plea. Quod nota. Br. Traverſe, per &c. pl. 69. cites 19 H. 6. 9.

3. Where a *Man is bound to enter into ſuch Land peaceably before Michaelmas, ſo that the Plaintiff may bring Aſſiſe againſt him*, and he *ſays, that ſuch a Day before the Feaſt he enter'd peaceably*; this is a good Plea. But if the *other ſays, that ſuch a Day the Defendant enter'd by Force, abſque hoc, that he enter'd peaceably the Day in the Bar*, this is not a good Replication, for the Day is not traverſable; but *ſhall ſay, that he enter'd with Force abſque hoc, that he enter'd peaceably*; quod nota. And per Priſot, it is ſufficient for the Defendant to ſay that he enter'd peaceably before Michaelmas, without expreſſing any Day; and the other may ſay that he enter'd with Force abſque hoc, that he enter'd peaceably, Prout &c. Br. Traverſe, per &c. pl. 140. cites 37 H. 6. 17.

4. *Where the Juſtification* of the Defendant *lies in a ſpecial Matter*, there the Plaintiff has *Election to maintain the Traverſe of the Time, or to traverſe the ſpecial Matter*; *as* in Treſpaſs Anno 7. the Defendant pleads a Releaſe Anno 6. abſque hoc, that he was guilty after the Releaſe; there the Plaintiff may ſay Non eſt factum, without maintaining the Day or Time; for if it be not his Deed, he is not guilty any Day. Br. Traverſe, per &c. pl. 230. cites 10 E. 4. 2.

Yelv. 122. S. C. and a *Diverſity* was taken by Yelverton, Arg. that *where the Act done may indifferently be intended at the one Day or the other*, there the Day is not traverſable. As in Caſe of *Feoffment by Deed ſuch a Day*, there the *Day of the Feoffment* is not traverſable, becauſe it paſſes by the Livery, and not by the Deed; and the Livery is the Subſtance, and the Day only Surpluſage. *But where a Man makes his Title by a ſpecial kind of Conveyance*, as in this Caſe by a Copy, there all contain'd in the Copy is material, and the Party cannot depart from it; for he cannot claim by any other Copy than that which is pleaded. As 18 H. 6. 14. in *Action* againſt J. S. *for taking his Servant*, and *counts by Deed on Monday in ſuch a Week*; it is no good Plea to ſay, *that the Retainer was the Friday after, abſque hoc*, that the Plaintiff retain'd him the Monday. And ſo of *Letters Patents*, the Day and Place are traverſable, becauſe they are the eſpecial Conveyance of the Party, from which he cannot depart. But per tot. Cur. the Day is not traverſable; but whether the Queen granted a Copy to the Leſſor of the Plaintiff before the Copy granted to the Defendant, and ſo the Traverſe ſhould be abſque hoc, that the Queen granted Modo & Forma to the Leſſor of the Plaintiff; and that the Law is the ſame as to Letters Patents. But Fenner J. contra, for the Reaſon render'd by Yelverton.

5. In *Ejectment* the *Defendant intitled himſelf by a Copy granted* 44 *Eliz.* The *Plaintiff intitled himſelf by Copy granted* 1 *June* 43 *Eliz.* The *Defendant maintain'd his Bar*, and traverſed *abſque hoc, that the Queen* 1 *June* 43 *Eliz. granted* the Land *by Copy, Modo & Forma* &c. The Court held, that the Day ought not to be made material, unleſs the Queen had granted by Copy before the Grant to the Defendant; and the Traverſing the Day, where it ought not, is Matter of Subſtance; becauſe thereby he makes it Parcel of the Iſſue, which ſhould not be. And ſo adjudg'd for the Plaintiff. Cro. J. 202. pl. 2. Hill. 5 Jac. B. R. Lane v. Alexander.

Yelverton And by him and the Ch. J. it is aided by Statute 18 Eliz. becauſe it is only Form; for if the Jury find a prior Grant to the Leſſor of the Plaintiff, tho' at another Court, it ſuffices, and conſequently the Day is not material in Subſtance. But Williams J. contra; and adjudg'd by all but Fenner, that the Traverſe is ill; for thereby the Jurors will be bound to find a Copy at ſuch a Day, which ought not to be; and alſo it is Matter of Subſtance * not aided by the Statute of 18 Eliz.——Brownl. 140. S. C. but ſeems a Tranſlation of Yelv. 122.——S. C. cited 2 Mod. 145. Arg. in Caſe of Brown v. Johnſon.

* See Holbech v. Bennet, at Tit. Time (G) pl. 1.

6. Where a Traverſe makes a Day *Parcel of the Iſſue*, it is ill; as where Plaintiff declared of a Judgment obtain'd in ſuch Court on 1ſt May, and Defendant traverſes ſuch Judgment obtain'd on 1ſt May. Lev. 193. Mich. 18 Car. B. R. Dring v. Reſpaſs.

(G) *Inducement.*

See (P) pl. 13. & 22.

1. THE *Inducement to a Traverſe can never be traverſed*, becauſe that would be a Traverſe after a Traverſe, which would be not only infinite but abſurd; becauſe it would be to quit his own Title, and fall upon the Title of another. 3 Salk. 353. pl. 5. Paſch. 9 W. 3. B. R. Anon.

S. P. 3 Salk. 357. pl. 12. Anon.

2. Debt againſt an *Executor*, who *pleaded ſeveral Judgments* in Bar &c. The Plaintiff *replied*, that the Judgments were *ſatisfied, and kept on Foot by Covin* to deceive the Plaintiff. The Defendant traverſed the Satisfaction of the Judgments. The Plaintiff demurr'd, becauſe the Satisfaction was but an Inducement to the Fraud and Covin, and Matter of Inducement ſhall never be traverſed; and Judgment was given accordingly for the Plaintiff. Latch. 111. Hill. 1 Car. Beaumont's Caſe.

Jo. 92. pl. 5. Hill. 1 Car. S P. in the 5th Reſolution, in Caſe of Veale v. Gateſdon.—For the Covin is the material Thing. Arg. Hard 70. in Caſe of the Protector v. Holt, cites it as adjudg'd Hill. 1 Car. B. R. [and ſeems to intend Beaumont's Caſe.]

3. The *King may not traverſe the Inducement to a Traverſe* more than a Subject; and tho' it is ſaid in the *old Books* that the King may traverſe the Inducement, this is *to be underſtood upon an Office found*; for heretofore the Subject could not traverſe the King's Title found by Office, without inducing his Traverſe with a Title on his Part; in which Caſe the King might traverſe the Inducement of the Subject's Title, but in no other, and ſo are the Books to be underſtood. *But if the Traverſe be ill*, there the King may traverſe the Inducement, and ſo may a Subject. Per Holt Ch. J. Skin. 657. Mich. 8 W. 3. B. R. The King v. the Biſhop of Cheſter.

See Show. Parl. Caſes, 219, 220. S. C.

(H) *Intention.*

1. THE *taking inſufficient Bail, with Intent to defraud the Plaintiff of his juſt Debt*, is not a Matter traverſable, and therefore ought not to be anſwer'd. Sid. 96. pl. 24. Mich. 14 Car. 2. B. R. Bentley v. Hore.

Lev. 86. S. C. but S. P. does not appear.

2. Treſpaſs &c. for breaking his Cloſe call'd the Balk and the Hade, and cutting and carrying away his Graſs. The Defendant diſclaim'd any Title in the Plaintiff's Land; but ſaid, that he had a Balk and Hade next the Plaintiff's; and in mowing his own, he *involuntarily, and by Miſtake, mow'd ſome Graſs growing on the Plaintiff's Balk and Hade, intending*

intending only to mow the Graſs on his own Balk and Hade, and carry it away, Quæ eſt eadem &c. and that, before the Writ ſued out, he tender'd 2 s. in Satisfaction &c. And upon Demurrer the Plaintiff had Judgment, becauſe it appears the Fact was voluntary; and *Intentions* are not traverſable, nor can they be known. 3 Lev. 37. Mich. 33 Car. 2. C. B. Baſely v. Clerkſon.

3. *Intention of an Indenture* is not traverſable, becauſe the Court cannot know it but only by the Words in the Indenture. 3 Lev. 167. Trin. 36 Car. 2. Kidder v. Weſt.

4. Intention in ſome Caſes is traverſeable, As if *A.* be *indebted* to B. *by Bond and* by *ſimple Contract*, and *pays Money* to B. the Intention to which Debt it ſhall be *applied*, is traverſable. 1 Salk. 196. Mich. 5 W. and M. B. R. Griffith v. Harriſon.

(I) *Matter or Thing Alleged*, Or Matter or Thing *not* alleged.

It is a Rule in Law, that A Man ſhall never traverſe that which is not alleged in the Plaintiff's Declaration. Per Holt Ch. Juſtice. Ld. Raym. Rep. 64. Mich. 7 W. 3. in Caſe of Powers and Cook.

Where a Traverſe is taken of a Matter not alleged it is but Form. Ld. Raym. Rep. 238. in Caſe of Lambert v. Cook.

1. AN *Abſque hoc ought to be taken to a Thing expreſsly alleged before*, and is *induced with a former Plea*, viz. *ut prius dicit*, where he has ſhewn a croſs Matter contrary to the Plea of the Plaintiff. D. 355. b. pl. 33. Mich. 21 and 22 Eliz. in Sir Fra. Leak's Caſe.

2. A Man cannot traverſe *Diſſeiſin with Force, and Detainer with Force, where the Plaintiff alleges Diſſeiſin with Force only*; the Reaſon ſeems to be that he ſhall not traverſe that which is *not alleged*. Br. Traverſe, per &c. pl. 146. cites S. C.

3. In Treſpaſs upon 5 R. 2. the *Defendant ſaid that W. was ſeiſed and infeoffed him* and gave *Colour* to the Plaintiff, and the *Plaintiff ſaid that W. was ſeiſed and infeoffed him* Abſque hoc, *that he infeoffed the Defendant before* that he infeoffed him, Et non Allocatur; for he traverſes that which *is not alleged in the Bar*, by the Opinion; by which he ſaid that W. infeoffed him, and after diſſeiſed him contrary to his own Feoffment, and infeoffed the Defendant, upon whom he entered, and was ſeiſed till the Treſpaſs; And there it is ſaid that a *Que Eſtate* is traverſable if both Parties claim by one and the ſame Man. Br. Traverſe, per &c. pl. 231. cites 10 E. 4. 6.

4. *Aſſumpſit*, the *Defendant granted to the Plaintiff* 1000 *Trees to be cut within* 3 *Years*, and *afterwards they agreed that when the Plaintiff had cut* 800 *no more ſhould be cut within the* 3 *Years, and that Defendant promiſed, after the Expiration* thereof, *in Conſideration of Forbearance* till after the 3 Years, *to give the Plaintiff Licence to cut them then*, which he refuſing, the Plaintiff brought this Action. The Defendant *pleaded, that before the Promiſe ſuppoſed* to be made, the *Plaintiff had cut down* 1000 *Trees, Abſque hoc, that at the Time of the Promiſe he had cut down* 800 *Trees only* &c. Upon Demurrer it was objected, that the Traverſe was idle, and the Plea had been good without any; for his ſaying that he had cut 1000 Trees was a full Anſwer, and would make an Iſſue. But per tot. Cur. the Traverſe is good; for the Plaintiff by alleging the cutting 800 Trees only, which is a Matter iſſuable, has given Advantage to the Defendant to traverſe as he has done; for *every Matter in Fact alleged by the Plaintiff may be traverſed and Defendant by Way of Traverſe may anſwer the Matter alleged*

alleged in the ſame Words as the Plaintiff alleged them; and then the Plaintiff by Demurrer upon the Bar has confeſſed the cutting 1000 Trees which was his full Bargain, and ſo no Conſideration to ground the Aſſumpſit upon. Yelv. 195. Mich. 8 Jac. B. R. Tatem and Poulter v. Perient.

5. The *Matter alleged* by the King *in a* Writ of *Ne exeas Regnum* is not traverſable. Comb. 53. in Caſe of Merchant Adventurers v. Rebow. Arg. cites 3 Inſt. 179. D. 176.

6. *Eſcape*, The Defendant *pleads Recaption upon freſh Purſuit.* The Plaintiff *replies, De Injuria ſua propria abſque hoc that he retook* &c. *upon freſh Purſuit, Et adhuc detinet.* The Defendant demurs, and ſhews for Cauſe, that the Plaintiff had traverſed *Matter not alleged in the Plea*, viz. Quod adhuc detinet, which ought not to be; For if the Defendant has ſuffered J. S. to eſcape a Month after the Recaption, yet the Plaintiff ſhall be barred by the Recaption for the old Eſcape, and ſhall have a new Action for the new Eſcape; Quod Holt Ch. Juſt. negavit, for both are but one Eſcape. Judgment for the Plaintiff. Mr. Nott. 1 Ld. Raym. Rep. 39. Eaſt. 7 W. 3. Meriton v. Briggs.

7. But in *Debt upon an Obligation againſt the Defendant as Executrix of J. S.* the Defendant *pleaded that J. S. died inteſtate, and that Adminiſtration was committed to her*, and petit *judicium* ſi ipſa ad billam prædict. reſpondere debeat &c. Upon this the *Plaintiff* demurred, and *inſiſted that the Defendant ſhould have traverſed* Abſque hoc, *that ſhe intermeddled before Adminiſtration* committed to her; for if ſhe did ſhe made herſelf liable as a tort Executrix; and cited 3 Cro. 566. 810. 102. 3 Leon. 197. Yelv. 115. Brownl. 97. Holt Ch. J. and Cur. ſuch a Traverſe had been ill; for ſuch intermedling is *not alleged*, and the Defendant ought not to traverſe that which the Plaintiff does not allege *in his Declaration.* 1 Salk. 298. pl. 9. Trin. 9 Will. 3. B. R. Powers v. Coot.

5 Mod. 136. Bowers v. Cook S. C. adjudged, that the Defendant need not traverſe that ſhe was Executrix or ever adminiſtred as ſuch. ——— Carth. 363. Mich. 7 W. 3. B. R.

S. C. and per Cur. the Plea is better without ſuch Traverſe. ——— Ld. Raym. Rep. 63. Powers v. Cook, accordingly per Holt Ch. J. ——— 1 Salk. 297. pl. 8. Mich. 7 W. 3. in B. R. Fowler v. Cooke S. P. and ſeems to be S. C.

(K) *Names* &c.

1. IN *Præcipe* quod reddat *R. G. came and tendered his Law of Non-Summons, and at the Day came one R. G. ready to have made his Law*, and the *Demandant ſaid, that he is Son of the Tenant and of the ſame Name*, and a good Averment and the Demandant had Judgment to recover, for the Father ſhall not Change his Name for the Son; *But* per Herle *if the Son be Tenant and* be *ouſted by this Judgment he ſhall have Aſſize.* Br. Traverſe, per &c. pl. 349. cites 9 E. 3. 20.

2. If a Man brings *Action, as Warden of a Priſon, Parſon of a Church, Abbot*, or the like, and the Action is founded by this Name; it is a good *Plea that he is not Warden nor Parſon, or* is not *Abbot*; but he makes Title Pro forma, abſque hoc that the Plaintiff is Warden, Parſon or Abbot &c. Br. Traverſe, per &c. pl. 334. cites 4 E. 4. 6. 9.

Br. Treſpaſs, pl. 305. cites S. C. ——— S. C. cited Arg. Lane 18 in Caſe of Richards v. Williams.

3. A Man was *outlaw'd* and taken *as Mainpernor*, and ſaid that he was dwelling at another Vill Abſque hoc, that he was ever Mainpernor, and per Cur. he ſhall not have ſuch Traverſe; but *may ſay that there were 2 of the Name and the other was Mainpernor* and not he. Br. Traverſe, per &c. pl. 317. cites 21 E. 4. 71.

4. In *Trover* and Converſion of Barley, Defendant *pleaded that the Dean, Archdeacon, Preſident and Chapter of L. were ſeiſed of a Parſonage in Fee, and by the ſaid Name leaſed it to him.* Plaintiff *replied that the Arch-*

Archdeacon and Chapter of L. were ſeiſed in Fee, and leaſed it to him, Abſque hoc, that there was any ſuch Corporation as Dean, Archdeacon, Preſident and Chapter; the Defendant demurred. The Point was argued. Tanfield Ch. B. ſeem'd to think the Traverſe was not good; but Baron Hern ſeemed that it was; but he was once of Counſel with the Plaintiff; and it was moved that the Caſe ſhould be compounded. Lane 18. Paſch. 4 Jac. in the Exchequer. Richards v. Williams.

5. The Defendant was *ſued by the Name of John*, and he *pleaded*, that he was *baptized by the Name of Benjamin*; and *traverſed, that ipſe idem Johannes was ever known by the Name of John*; and upon a General Demurrer Holt Ch. J. ſaid, This Traverſe is *repugnant* in itſelf, and very immaterial, for it had waived the Precedent Matter of Baptiſm, which was well pleaded, and was now become the Subſtance of the Plea itſelf, for now the Iſſue muſt be by what Name the Defendant was called or known, and not by what Name he was baptized, whereas he *he ought to have relied on his Name of Baptiſm, and concluded with it without a Traverſe*; for a Man can have but one Name, therefore it implies a Negative in itſelf, without ſaying he was never known by the Name of John &c. 3 Salk. 351, 352. pl. 1. Hill. 1 Ann. Anon.

(L) *Offices, Preſentments* &c.

Br. Foreſt, pl. 3. cites S. C. —— *But Preſentment before Juſtices of the Foreſt in Swanimote* by Foreſters, Verderors, Regarders, and Agiſters is not traverſable before Juſtices in Eyre. Br. Preſentments in Courts. pl. 4. cites 45 E. 3. 7. —Br. De ſon Tort. pl. 7. cites S. C.

1. FALSE *Preſentment* taken *before Juſtices in a Foreſt was traverſed in B. R.* and Scire Facias thereupon againſt the Party who made the Claim before the Juſtices of the Foreſt. Br. Scire facias, pl. 105. cites 21 E. 3. 48.

Preſentment *before a Steward of a Foreſt and Verderors, or in a * Leet* is not traverſable, per Thorpe, if it does not *touch Franktenement* or Inheritance, and then he *ought to make Title*, and not to traverſe it generally. And ſo it ſeems always that he who will traverſe *againſt the King* ſhall make Title. Br. Aſſiſe pl. 459. cites 50 E. 3. and Fitzh. Aſſiſe 442.

* See pl. 6.

Br Traverſe de Office, pl. 36. cites S. C. —— The Coroner's Inquiſition finds a Man Felo de ſe. The Queſtion was, Whether or no this was traverſable? And the Court inclined that it was; for (per Hale) the Reaſon why an Inquiſition, that finds a *fugam fecit*, is not traverſable is, becauſe all the Parties that were preſent at the Death of the Party are bound to attend the Coroner's Inqueſt, and their not appearing there is a Flying in Law, and cannot be contradicted; but that Reaſon does not hold in *Felo de ſe*. Freem. Rep. 419. pl. 556. Mich. 1675. Anon. —— 2 Lev. 152. Mich. 27 Car. 2. B. R. The King v. Aldenham, ſuch Traverſe was granted by Hale, Twiſden and Wild, ſilente Rainsford; But it was ſaid that a Fugam fecit found before the Coroner is not traverſable.

2. If a Man *flies for Felony* which is *found before the Coroner*, this ſhall not be traverſed; for this is an ancient Law of the Coroner; *Contra* to ſay that he was *not Felo de ſe*, this may be traverſed. Br. Corone, pl. 150. cites 8 E. 4. 4.

3. *The Statute* which gives Traverſe *is only of Ward, and of Fine for Alienation*, which are only Chattels, and of thoſe there was no Traverſe at Common Law; but *of Franktenement Traverſe was at Common Law*. Br. Petition, pl. 15. cites 9 Ed. 4. 51.

Viz. That it was not before the Statutes of 34 [E. 3. Stat. 1. cap. 14.] and 36 E. 3. [Stat. 1. cap. 13.]

4. Note, It was touch'd that Traverſe *of a Thing real* was not at Common Law, but Petition or Monſtrans de Droit. Contra of Chattle. Br. Petition, pl. 30. cites 13 E. 4. 8.

5. The

5. The Attorney of the King, when a Man traverſes an Office, may *maintain the Office, or traverſe the Title* of the Plaintiff, *tho' the Plaintiff after his Title travers'd the Office.* Br. Traverſe per &c. pl. 246. cites 13 E. 4. 7.

6. Preſentments of *Nuſance, or in Leets &c. which touch the Perſon, and do not* touch *any Franktenement*, ſhall not be travers'd. Br. Traverſe per &c. pl. 183. cites 5 H. 7. 3. Br. Preſentment in Courts, pl. 15. cites S. C.——

But if they *touch Franktenement*, there a Traverſe lies. Br. Traverſe per &c. pl. 183. cites 5 H. 7. 3. *And* in Caſes *where Proceſs ſhall be made*, there lies a Traverſe thereof; which Brooke ſays ſeems to be good Reaſon; for it is in vain to make Proceſs, if the Party ſhall not have Anſwer when he comes. Br. Traverſe, per &c. pl. 183. cites 5 H. 7. 3.——Br. Preſentment in Courts, pl. 15. cites S. C.

It was ſaid by Hale Ch. J. That if there be a Preſentment in *a Leet for a Perſonal Miſdemeanor*, or in a *Swanimote concerning Vert or Veniſon*, if it paſs that Day it is a Conviction, and concluſive; but *if* it be for a *Nuſance*, or any Matter *that concerns Freehold*, the Party may come afterwards and traverſe. Freem. Rep. 339. pl. 422. Trin. 1673. Anon.

Per Wild: The *Preſentment in Leet* is not traverſable, unleſs the *ſame Day*, becauſe every Reſiant is preſumed preſent. Twiſden J. contra; where *Freehold is in Queſtion*, Preſentment may be traverſed at any Time; and ſo where *Remedy* is *given in Leet by Statute*. 3 Keb. 646. pl. 62. Paſch. 28 Car. 2. B. R. Elliot v. Bluck.—See the Note to pl. 1.

7. An *Office* is *found, that A. died ſeiſed of the Manor of B. and held the ſame in Capite by Knight Service, his Heir within Age*; this Office is *travers'd that A. infeoff'd him, who traverſes, in Fee, and traverſes the dying ſeiſed:* Whereupon the *King takes Iſſue*, and hanging the Traverſe it is *found by another Office, that the ſaid Feoffment was by Colluſion*, and after the *Iſſue was found againſt the King:* Whereupon, by the Rule of the Court, the Party had Judgment, and an Amoveas manum; for the *Office found depending the Traverſe ſhall not grieve the Party*, for ſo he might be infinitely vex'd; *but in a Sci. fa. by the King upon the latter Office he ſhall anſwer* &c. (An excellent Caſe for the Benefit and Speed of them that are given to Traverſe.) 2 Inſt. 693. cites 11 H. 4. f. 8. 13 H. 4. Tit. Traverſe 16. and 13 H. 4. Tit. Livery 21. 13 H. 4, 6, 7. Tit. Traverſe.

8. It was found by *Office*, that *A. died ſeiſed of Eſtate Tail, which deſcended to B. his Son and Heir.* This Office was *travers'd, abſque hoc that he died ſeiſed of Eſtate Tail*; and found for the King in B. R. It was moved in Arreſt of Judgment, that the Dying ſeiſed of Eſtate Tail is not traverſable, but the Gift according to 15 E. 4. 2. 14 H. 7. 22. 15 H. 6. by which it was an ill Iſſue; and this is not aided by the Statute of Jeofails, it being in Caſe of the King, and not between Party and Party. But it was reſolved per tot. Cur. That the Traverſe here is good; for it is the Office intitles the King to the Wardſhip, and not the Gift; and the Effect of the Office ought to be travers'd, becauſe it is not the Right of the Party that gives Wardſhip to the King, but his Dying in Poſſeſſion; for were it not for the Statute 32 H. 8. which gives to the King the 3d Part after Alienation, there ought to be a Dying ſeiſed of the Tenant to intitle the King to the Ward: But *in an Action, which queſtions the Right of the Tail*, as *Formedon*, there the Gift only is traverſable. And Judgment for the King. Palm. 330. Hill. 20 Jac. B. R. Young's Caſe.

9. It was found by Office, that A. was *ſeiſed of Bl. Acre in M. and Wh. Acre in N.* held *in Socage; and alſo of a Piece of Ground incloſed out of the Manor of O.* and *that A. had 5 Daughters*, and *that J. S. married one* of them, and *found the Deſcent of the Lands* &c. J. S. travers'd the Office in 3 Points. 1ſt, He *pleaded* Demiſe [*Deviſe*] *to him by A. abſque hoc that the Lands deſcended.* Several *Exceptions* were taken to it: 1ſt, *Becauſe the Heir ſhall not* be received to *traverſe his own Title found for him*; and cites * 27 Aſſ. 1. that the Heir may traverſe the Tenure, but not his Title; and that this is often put for a Rule in Staund. Prerog. and Dyer 366. [Vernon's Caſe] accordingly. 2dly, That the Traverſe is *repugnant*, becauſe he did *not plead Entry after the* Demiſe [*Deviſe*] *and ſo it deſcends*; and that therefore he ſhould have pleaded the Demiſe [Deviſe] with-

2 Roll. Rep. 351. The King v. Summers, S. C. and is almoſt the ſame with this of Palm. but ſo much miſprinted, that in ſome Places it would be difficult to find out the

without taking Traverſe. 3dly, That *as to the Lands inclos'd, it is not good* to ſay Abſque hoc, that they deſcended, *without making Title to himſelf.* 4thly, That *all the Coheirs ought to join* by the Common Law, and the Statutes which give Traverſe, give it to all that are griev'd, and they ought to join; and cites 42 Aſſ. 23. of Jointenants. 5thly, That the *Venire fac. was from M. N. and the Manor of O. whereas it ought not to be from the Manor of O.* becauſe the Parcel of Ground is ſever'd from it by the Diſſeiſin. But it was reſolved by Lea Ch. J. and Dodderidge and Haughton J. for the Plaintiff as to all, and they ſaid, 1ſt. That the † *Venire is good*; for the Poſſeſſion only is ſever'd from the Manor, but this Parcel is not ſever'd in Right by the Diſſeiſin, nor is the Situation alter'd thereby. 2dly. That ‡ *Deſcent may be travers'd*, and cited 5 Eliz. D. 221. that this prevents Remitter; and ſo 49 E. 3. **Cooch**'s Caſe of Eſcheat. 3dly, That he may traverſe the Deſcent in this Caſe, || *without making Title*, and that for the Miſchief which otherwiſe might happen; for the Office here found a Seiſin of the Socage Land, and of Parcel held in Capite, whereas in Truth he did not die ſeiſed of this Parcel; ſo that if the Diſſeiſee [Deviſee] cannot traverſe it, his Deviſe ſhall be deſtroyed for 2 Parts; and therefore he ſhall not be conſtrained to make Title. 4thly, The *Coheirs need not all join in the Traverſe, it being to their Diſadvantage*, and J. S. claims as Purchaſor to their Diſinheritance. But had he claim'd as Heir all ſhould join, becauſe they claim by the ſame Title. Palm. 372. Trin. 21 Jac. B. R. Sumner's Caſe.

Meaning without the Help of Palm. But in Roll it is (Deviſe) throughout, as Palmer is (Demiſe.)

* 2 Roll. Rep. cites 37 Aſſ. pl. 1. but both the Books ſeem to be miſprinted, and that it ſhould be 37 Aſſ pl. 11.——

† And 2 Roll's Rep. 351. Haughton J. ſaid, there is no Certainty, but only that the Parcel was (incloſed out of the Waſte of the Manor) and therefore when Iſſue is join'd thereupon, the Venue ought to come De Manerio, ſince it cannot be from any other Place, to try this Part of the Iſſue.

‡ Godb. 410. pl. 489. **Sommers's Caſe**, S. C. and by Doderidge J. regularly you ſhall not traverſe the Diſcent, but the dying ſeiſed But in this Caſe it ought to be of Neceſſity, viz. in Caſe of a Deviſe the Traverſe muſt be of the Diſcent; for here they cannot traverſe the Dying ſeiſed, for if they traverſe the Dying ſeiſed, then they overthrow their own Title, viz. the Deviſe. But here in Caſe of a Will, the Party ſhall traverſe the Diſcent; for he cannot ſay, that it is true that the Lands did diſcend, and that he deviſed it &c. The Heir cannot traverſe that which entitles him by Diſcent; but here his Title is by the Deviſe, and not as Heir.

|| Tho' the Rule is generally true, yet here it does not hold by reaſon of the Miſchief; for the Caſe is not that the Father died ſeiſed of Socage Lands, and deviſed them to J. S. or to his eldeſt Daughter, having 5 Daughters, and died; but the Office finds that A. was ſeiſed of this and other Lands in Capite, when in Truth he did not die ſeiſed. 2 Roll. Rep. 351, 352.

10. *Quare Impedit*; the Plaintiff *ſhew'd that A. was ſeiſed in Fee* of the Advowſon, as *in groſs, and preſented M. and died ſeiſed, which deſcended to B. the Plaintiff's Husband, who* 9 Mar. 8 Jac. by a Deed *granted it to D. and E. in Fee to the Uſe of the Plaintiff for her Jointure, and after of himſelf in Tail, and died ſeiſed, and* that the *Church became void* by the Death of M. and ſo ſhe ought to preſent. The *Defendant ſaid* he was *Parſon Imparſonee of the Preſentation of the King*, and ſhew'd, *That the Plaintiff's Husband died ſeiſed in Fee, as of an Advowſon in groſs, and of the Manor of P. his Son and Heir within Age, holden of the King by Knights Service in Capite*, and *that an Office found the Tenure and Deſcent; whereupon the King was ſeiſed, and preſented the Defendant, who was Inſtituted and Inducted, abſque hoc that the Husband granted the Advowſon to D. and E.* The *Plaintiff travers'd the Inquiſition.* It was holden by the Court in this Caſe, That inaſmuch as 2 Titles are comprized in the Bar for the King, viz. The dying ſeiſed within Age, and the Tenure by Knight's Service, whereby the Wardſhip is veſted in the King, and a Title to preſent without Office; therefore in the Replication they both ought to be anſwered, and it was not ſufficient to traverſe the Inquiſition, but the Plaintiff ought to have anſwered to the Tenure, and to the Deſcent alledged of the Manor, if the Defendant had relied upon them; but becauſe the Defendant did not rely upon them, but made them Inducements to the Traverſe of the Grant, which is the Plaintiff's Title, that Title ought to be maintained, and not to traverſe the Inducements to that Traverſe;

Het. 71. S. C. **Chichesley v. the Biſhop of Ely**, but S. P. does not appear.——

Hutt. 96. S. C. adjudged that the Title of the Plaintiff being travers'd, it ought to have been maintained; and that it appears fully that the King is intitled to this Preſentation, tho' no Office had been; and ſo the Denial of the Office

verſe; And therefore adjudged for the Defendant. Cro. C. 164. pl. 6. Hill. 3 Car. in C. B. The Lady Chicheſley v. Thompſon and the Biſhop of Ely.

not material. And the Defendant had Judgment.

(M) *Of* the *Place. Neceſſary.* In what Caſes.

1. APpeal of *Mayhem* in the Ward de Cheap, the *Defendant ſaid that the ſaid Day and Year the Plaintiff aſſaulted him in Cornhill Ward*, and the Ill which he had was De ſon Aſſault Demeſne, and in Defence of the Defendant; and a good Plea *without traverſing the Mayhem in the other Ward*, by Award; for the Treſpaſs is the Effect, and not the Place. Br. Traverſe per &c. pl. 173. cites 41 Aſſ. 21.

So in *Treſpaſs*; Per Fitzjohn; quære inde; for it ſeems to be local. Br. Ibid.

2. In Dower it was ſaid, that in *Præcipe* quod reddat *in D.* it is no *Plea that the Land is in S.* if he does not traverſe Abſque hoc that it is in D. For it is alleg'd in the Writ, and *that which is contrary to the Writ ought to be travers'd.* Br. Traverſe per &c. pl. 124. cites 9 E. 4. 16.

3. Replevin *of taking in White-Acre in D.* Pigot ſaid that *White-Acre is in S.* and made Avowry for Damage feaſant to have Return. Per Cur. You ſhall ſay *Abſque hoc that W. is in D.* and ſo he did; quod nota. Br. Traverſe per &c. pl. 308. cites 20 E. 4. 2.

4. *In Debt upon a Bond made at B.* it is a good *Plea that it was made at S. without ſaying* Abſque hoc *that it was made at B.* Br. Traverſe per &c. pl. 279. cites 22 E. 4. 39.

And in Action upon *Retainer in one County*, the Defendant may *ſay that he was retained in another County*, without traverſing the firſt County. Br. Traverſe per &c. pl. 279. cites 22 E. 4. 39.

5. There is a *Diverſity* between *Treſpaſs* and *Replevin*; for in Replevin the Place is traverſable; for where he declares in one Place, and the Defendant avows in another Place, there he ought to traverſe the taking in the Place in the Declaration. Contrary in Treſpaſs; Per Brian and Starkey. Br. Treſpaſs, pl. 369. cites 22 E. 4. 50.

6. In *Replevin of Goods taken in the Pariſh of St. M.* the Defendant avow'd the Taking in the Pariſh of St. P. and therefore was held ill, becauſe he ought to have travers'd the Taking in the Place alleg'd in the Count. 2 Lutw. 1147. Mich. 2 Jac. 2. Petree v. Duke.

(N) Of the Place. *Good*; In what Caſes.

1. IN *Debt*, the *Plaintiff counted that the Defendant retain'd him at B. in the County of K. to ſerve him in the War in France*, where *B. was in France*, and yet good; for the Place is not traverſable. Br. Count, pl. 94. cites 48 E. 3. 2, 3.

2. In *Debt upon a Duty due by the King, aſſign'd to him by Tally* deliver'd, he *counted, that he ſuch a Day, Place, and County, ſhew'd to the Cuſtomer the Tally, at which Time he had enough to pay, and would not.* To which the *Defendant ſaid, that ſuch a Day in April he ſhew'd to him the Tally, at which Time he had nothing, nor ever after*; abſque hoc, *that he ſhew'd the Tally before this Day*, and well. Br. Traverſe, per &c. pl. 18. cites 27 H. 6. 9.

But contra, *where he juſtifies in another County, and traverſes the firſt County*; for the firſt County is *Parcel of the Iſſue.*

Therefore there the Place and County ſhall be ſhewn in the Bar in this Caſe; but in the other Caſe he need

need not to ſhew the Place nor County in the Bar, and then it ſhall be intended to be where the Plaintiff has counted by his Count; per Cur. quod miror. Br. Traverſe, per &c. pl. 18. cites 27 H. 6. 9.——S. P. Heath's Max. 108. cap. 5. cites 27 H. 6. 1. 43 E. 3. 29. 7 H. 6. 35. 9 H. 6. 50. 71. 21 H. 6. 8. 9.

Contra of Battery, or Goods carry'd away, which may be continued, and are *tranſitory*, there he ſhall traverſe all the County. Br. ibid.

3. Nuſance, *that he levied a Mill in D. in the County of K. to the Nuſance of his Frank-tenement in the ſame Vill.* The *Defendant ſaid, that he and all his Anceſtors* &c. *have been ſeiſed of a Mill in D. in the County of E. and the Mill fell by Tempeſt, and he re-edified it*, as lawfully he might; abſque hoc, *that he is guilty of any Nuſance in D. in the County of K.* and *did not traverſe all the County.* And yet well, per tot. Cur. becauſe *the Thing is local, and annex'd to the Frank-tenement.* Br. Traverſe, per &c. pl. 252. cites 18 E. 4. 1.

——And accordingly in Treſpaſs for Damage feaſant; the ſame Year, fol. 11. ibid.

Heath's Max. 109. cap. 5. cites S. C. and ſays, that always in Replevin the Place of the Taking is traverſable.

4. In Replevin *of taking at W. in the County of O. in a Place call'd P.* the *Plaintiff ſaid, that the Taking was in P. in the Vill of O.* Abſque hoc, *that he took them in W.* Keeble ſaid, the Traverſe is not good; for it extends to the Vill, and not to the Place. But by the Opinion of the Court, the *Traverſe is as well to the Vill as to the Place*; but a Man cannot plead Miſnoſmer of the Place, but he may well traverſe the Place. Br. Traverſe, per &c. pl. 386. cites 16 H. 7. 7.

Heath's Max. 108. cap. 5. cites S. C.

5. Action for *making falſe Cloths in Bartholomew-Fair* againſt *the Statute.* The *other ſaid, that he made them well and truly at D. in the County of F.* Abſque hoc, *that he made them in Bartholomew-Fair* in L. Prout &c. and a good Plea. Br. Traverſe, per &c. pl. 368. cites 34 H. 8.

4 Le. 4. pl. 14. and 106. pl. 17. S C. accordingly, and in much the ſame Words.

6. *Trover* &c. *for Goods in Ipſwich.* The *Defendant pleaded*, that the Goods *came to his Hands at Dunwich in the ſame County; and that the Plaintiff gave him the Goods, which came to his Hands at Dunwich; abſque hoc, that he was guilty of any* Trover &c. *at Ipſwich.* And by the Opinion of the Court the Pleading is good, by reaſon of the ſpecial Juſtification. But where the *Juſtification* is *general*, the County is not traverſable at this Day. Godb. 137. pl. 163. Mich. 27 & 28 Eliz. B. R. Strangden v. Barnell.

7. If a Man *juſtifies in a Place in Suffolk, abſque hoc, that he is guilty out of the County of Suffolk*, this is not a good Traverſe. Roll's Rep. 265. pl. 37. Mich. 13 Jac. B. R. in Caſe of **Eveley v. Sloley**, it was ſaid by Hele to have been adjudged in the Exchequer the ſame Term, between Taylor and Downe.

As in Trover &c. of ſo many Hogſheads of Cyder in London, the

8. When a *Juſtification is local*, as where a Man juſtifies by Warrant of a Juſtice of Peace, or ſuch particular Matter, the Place where &c. may be traverſed; *but where* the Matter is *tranſitory*, and not local, it is otherwiſe. 3 Bulſt. 209. Trin. 14 Jac. Phillips v. Weeks.

Defendant pleads Bailment of them unto him, to re-deliver to another in the County of Oxon, to ſpend in his Houſe; the which accordingly he had done, and takes a Traverſe, abſque hoc, that he converted the ſame at London, aut alibi extra Com. Oxon. Upon this Plea the Plaintiff demurr'd in Law. Dodderidge J. ſaid, The Plea here, in Effect, is no more than Non culp. the general Iſſue, and ſo not good. The Court agreed with him herein; and therefore, by the Rule of the Court, Judgment was given for the Plaintiff. 3 Bulſt. 209. Phillips v. Weeks.——S. C. Roll Rep. 395. pl. 19. accordingly.——And Ibid. 396. pl. 20. in Caſe of **Buſh v. Luxburrough**, S. P. adjudged.

So where an Action againſt a Carrier was brought in London for Goods deliver'd in Yorkſhire, to redeliver at London, the Defendant pleaded a Robbery at Lincoln, abque hoc, that he loſt them at London. The Court held the Traverſe ill, becauſe the Juſtification was not local; tho' Scroggs J. was of a contrary Opinion. And Judgment was given for the Plaintiff. 2 Mod. 270. Mich. 29 Car. 2. C. B. Barker v. Warren.

(O) *Things doubtful to the Jurors.*

1. WHERE *Preſcription of Villeinage* is *alleg'd in the Plaintiff*, and in his Blood, the Plaintiff *may ſay, that his Father was a Baſtard*; and a good Plea without Traverſe, becauſe the Matter is doubtful to the Jurors; and yet *both are in the Affirmative.* Br. Traverſe, per &c. pl. 185. cites 5 H. 7. 11. 12.

2. *And* in *Raviſhment of Ward*, if the *Defendant ſays that he holds in Socage, and not in Chivalry, and he as Prochein Amy took the Infant*, this is not a good Plea; for the Jurors do not know what is Socage, nor what is Service in Chivalry; and therefore he *ſhall ſay*, that he *holds by Fealty and ſuch Rent*, or the like &c. which is Socage, *and traverſe the Chivalry*; quod nota. Br. Traverſe, per &c. pl. 185. cites 5 H. 7. 11. 12.

(P) Traverſable. *What* other Things, *in General.*

1. NOTE, that it was put in Iſſue in *Treſpaſs* brought *by the Maſter of Saint L. if He was Maſter, or the Plaintiff*; quod nota, that this traverſable. Br. Traverſe, per &c. pl. 39. cites 43 E. 3. 29.

2. Theſe *Words* in a Writ, *Maſter*, Moſt *Reverend*, *Nephew*, *Doctor*, or the like, are not traverſable. Contrary of *Knight*, *Taylor*, *Carpenter*, &c. Br. Traverſe, per &c. pl. 32. cites 35 H. 6. 55.

3. That which is *alleg'd in Proteſtation, and not by Matter in Fact*, is not traverſable. Br. Traverſe, per &c. pl. 162. cites 39 H. 6. 5.

4. *Matters in Fact* ought to be confeſs'd, and avoided by Traverſe. Br. Brief, pl. 339. cites 1 E. 4. 9. Traverſe ſhall be only to *Matter of Fact.* Pl. C. 231. Willion v. Barkley.——Every *Matter in Fact alleged* by the Plaintiff may be traverſed by the Defendant; Per tot. Cur. Yelv. 195. Mich. 8 Jac. B. R. in Caſe of Tatem and Poulter v. Perient.

5. The *Diſtreſs* in the *Ne injuſte Vexes* is not traverſable. Br. Petition, pl. 26. cites 5 E. 4. 118.

6. *Arreſting of a Man for Suſpicion* is good Cauſe, and the *Suſpicion is* traverſable; quod nota; and it ſeems to be Law. Br. Peremptory, pl. 39. cites 4 H. 7. 2. Br. Treſpaſs, pl. 268. cites S. C.

7. *Every Thing which is material* is traverſable. Br. Traverſe, per &c. pl. 238. The Traverſe *muſt always be of the material Matter* of the Plea *only.* This was laid down as a Rule. Arg. Lat. 12. in Caſe of Conſtable v. Clobery, and cites 15 E 4. 2. 19 H. 8. 7. 32 H. 6. 16. 2 H. 5. 2. 3 H. 6. 33. 7 Rep. Ughtred's Caſe. ——Noy. 75. S. C.

8. *Surmiſes* never ſhall be traverſed. Pl. C. 76. a Arg. in Caſe of Wimbiſh v. Ld. Willoughby. *As* if Writ comes to receive a Feme in the Reverſion, upon Default of the Tenant for Life, by Attorney, becauſe ſhe is groſly Enſeint, this Surmiſe is not traverſable tho' it be falſe. Quod fuit conceſſum. Pl. C. 76. a.—*So* the Surmiſe of Damages in a Curia Claudenda is not traverſable. Br. Petition, pl. 26. cites 5 E. 4. 119. ——— *So* of a *Recital that the Defendant has made an Attorney, becauſe he is ſick, the being ſick is not traverſable &c. F. N. B. 25. (D). ——— *But* where Suggeſtions are *in Caſe of the Spiritual Court or Admiralty*, they are traverſable. L. P. R. tit, Suggeſtion.—— * See pl. 29.

9. *Sciens*, As the knowing of a Deed to be forged, or of a Dog being accuſtomed to bite Sheep is not traverſable, but muſt be proved in Evidence Br. Traverſe, per &c. pl. 20.

cites 28 H. 6. 7. dence upon the General Iſſue; For Sciens &c. is not a direct Allegation. 4 Rep. 18. b. pl. 14. 32 & 33 Eliz. Gerard v. Dickenſon.

10. *Condition precedent* is traverſable. Noy. 75. in Caſe of Conſtable v. Cloberry, cites 48 E. 3. 34. 9 E. 4. 3. b. 3 H. 6. 33.

S. P. Pl. C. 231. a. per Cur. 4 Eliz. in Caſe of Willion v. Berkley.

11. *Matter in Law* ſhall never be traverſed; Per Cur. Yelv. 200. Hill. 8 Jac. B. R. in Caſe of Kenicot v. Bogan.

12. The *Point of the Suggeſtion in a Prohibition* is always traverſable.

13. *As in a Prohibition* againſt Churchwardens, the *Plaintiff declared that his Lands were charged with the Payment of 15ths and 5 s. yearly to the Poor, and that the Surplus of the Profits were for his own Uſe*; the *Defendant* maintained his Libel, and *averred that the Surplus of the Profits were to go to repair the Church, and the Reſidue to charitable Uſes Abſque hoc, that the Surplus &c. was for the Uſe of the Plaintiff*; And upon Demurrer it was objected that the Traverſe was ill, becauſe that which was traverſed was only an Inducement to the Plea, and Inducements muſt not be traverſed. Fleming and Williams agreed that the Traverſe was good becauſe it is the ſole Negative and the Point of the Libel, and no other Iſſue could be taken; And per tot. Cur. Judgment againſt the Plaintiff. 2 Bulſt. 20. Mich. 10 Jac. Auſtin v. Cliſton.

14. An *Averment* is in any [ſome] Caſe traverſable and iſſuable; For [as] if an Executor pleads that he has no Goods, nor ever had, whereas he ſhould have pleaded Plene Adminiſtravit, and So Nothing in his Hands; Per Doderidge J. And Mann the Secondary affirmed it with other Caſes. Brownl. 225. Paſch. 11 Jac. in Caſe of Miles v. Jones.

15. *Circumſtances* are not traverſable.

16. *As*, where it was made to *the Date of a Bond*, it was not material; For a Deed bearing an Impoſſible Date is good enough; per Crew Ch. J. Lat. 61. Paſch. 1 Car. in Caſe of the Biſhop of Norwich v. Cornwallis.

Noy. 75. S. C. accordingly; for the Voyage is the Subſtance of the Covenant, and not the going with the next Wind, which is uncertain every Hour. ——— S. C. Palm. 397. held accordingly. ——— Lat. 12. and 49. S. C. and the Traverſe held ill. ——— S. C. cited Arg. Hard. 69. in Caſe of the Protector v. Holt.

17. *So* where in *Covenant* the Plaintiff declared on Indenture of Covenant, *that a Ship ſhould ſail with the next fair Wind*; *and* that *the Merchant ſhould pay ſo much for Freight*, the Defendant traverſed *Abſque hoc, that the Ship did ſail with the next fair Wind.* And upon Demurrer Crew Ch. J. Doderidge and Jones J. held the Traverſe ill; for Crew ſaid a Circumſtance cannot be traverſed, and Wind is alterable. Poph. 161. Paſch. 2 Car. B. R. Conſtable v. Clobery.

18. *But* when the *Party will allege the Circumſtances and need not*, there this is traverſable; quod nota. Br. Traverſe, per &c. pl. 179. cites 4 H. 7. 9.

The Court denied a *Sheriff's Return* to be traverſable, as in Caſes of Devaſtavit returned upon a Fieri Facias, the Party cannot traverſe, but is put to his Action ſur Caſe, which is the Way the Law allows to Remedy the Party upon a falſe Return. Skin. 76. Mich. 34 Car. 2. B. R. in the Lord Grey's Caſe.

19. A *Falſe Return* to a Writ of Reſtitution is not traverſable; but the Plaintiff is put to his Action on the Caſe. per Doderidge J. Lat. 124. Paſch. 2 Car. in Audley's Caſe.

Ld. Raym. Rep. 356. S. C. & S. P.

20. A Man ſhall never traverſe a *Matter alleged out of Time*; Agreed per Cur. 2 Salk. 628. pl. 2. Mich. 10 W. 3. B. R. Pullen v. Benſon.

As where in *Debt on Bond* the *Plaintiff* expreſsly *avers that the Defendant was of full Age when he delivered the Bond*, yet the Defendant may plead Infancy and ſhall not traverſe that he was of full Age, and that for this Reaſon, becauſe it was alleged out of Time. Per Holt Ch. J.

21. *Matter*

21. *Matter immaterially alleged* is not traverſable; Agreed per Cur. 2 Salk. 628. pl. 2. Mich. 10 W. 3. B. R. in Caſe of Pullen v. Benſon.

22. A *Record* may be pleaded by Way of *Inducement*, which is not traverſable, and thereto Nul tiel Record is no Plea. So if Record *of an Inferior Court* be pleaded, it is not traverſable, becauſe not a good Plea; Per Holt. 12 Mod. 351. Paſch. 12 W. 3. B. R. in Caſe of Creamer v. Wickett. See pl. 28.

23. There is a Diverſity between a Fine and an Amerciament; if a *Fine* be impoſed it is not traverſable, but *Amerciament* is. 12 Mod. 391. Paſch. 12 W. 3. B. R. in Caſe of Dr. Grenville v. College of Phyſicians.

24. Where H. *acts as a Judge*, his Act is not traverſable; Otherwiſe of a *Conſtable* or Officer committing for the Peace. 1 Salk. 397. Trin. 12 W. 3. B. R. Groenvelt v. Burwell.

25. *Fraud* is traverſable. See 12 Mod. 528. Trin. 13 W. 3. B. R. Parker v. Atfield.—See Lat. 111. Beaumont's Caſe. The keeping Judgments on

Foot by Fraud muſt be travers'd, and whether they are paid or not, is but Evidence. Keb. 762. pl. 72. Trin. 16 Car. 2. Woodley v. Haydon.

26. A Man's being the *King's Creditor in a Quo Minus* is traverſable, if the Party comes in due Time to do it; Per Holt Ch. J. 12 Mod. 535. Trin. 13 W. 3. B. R. Wilbraham v. Lownds.

27. *Whatever is neceſſarily underſtood, intended, and implied* in a Plea, may as well be travers'd as what is expreſs'd. 2 Salk. 629. pl. 6. Paſch. 3 Ann. in Caſe of Gilbert v. Parker. 6 Mod. 158. S. C. and S. P.——S. P. and C. cited Arg. 10 Mod. 302. in Caſe of Muſton v. Yateman.

28. *Matters of Record* are not traverſable. 2 Salk. 521. pl. 22. Paſch. 4 Ann. B. R. Fanſhaw v. Morriſon. 2 Ld. Raym. Rep. 1140. S. C. & P.

——*As* in *Debt*, the Plaintiff declared *on a Judgment* obtained 1ſt May &c. *before the Mayor and Bailiff of Norwich*, at a Court then held there according to the Cuſtom &c. the *Defendant pleaded that the Court* there held according to the Cuſtom, *is held before the Mayor; and travers'd that the Plaintiff obtained a Judgment* at the Court held 1ſt May *before the Mayor and Bailiffs*; and upon a Demurrer it was objected that the Plea was ill, becauſe the Defendant had travers'd Matter of Record, which is not to be tried by a Jury; And this was adjudged ill upon a Demurrer, but it had been otherwiſe after a Verdict. Lev. 193. Mich. 18 Car. 2. B. R. Dring v. Reſpaſs.

29. *What is ſet forth only by Way of Recital*, may be travers'd; for the Pleas of *Non Aſſumpſit* and *Non eſt Factum* are both of them Pleas which traverſe Matters in thoſe reſpective Actions that are pleaded by Way of Recital; Per Parker Ch. J. 10 Mod. 191. Mich. 12 Ann. B. R. Seſtern v. Cibber.

(Q) *In what Caſes. Abatement, Entry, or Gift in Tail.*

1. IN *Aſſiſe, the Tenant pleaded Bar that his Father was ſeiſed in Fee, and by Proteſtation died ſeiſed, and he entered as Heir*, and gave *Colour*; and the *Plaintiff ſaid that J. N. was ſeiſed in Fee, and infeoff'd him, by which he was ſeiſed till* by the Defendant diſſeiſed; to which the *Tenant ſaid that his Father was ſeiſed, and by Proteſtation died ſeiſed, and after J. N. abated and infeoff'd the Plaintiff, upon whom the Tenant as Son and Heir entered, and was ſeiſed, till* by the Plaintiff diſſeiſed, *upon whom D. entered, upon whom the Tenant re-enter'd*; and the *Plaintiff ſaid that the Father of the Tenant infeoff'd the ſaid J. N. who infeoff'd the Plaintiff* as above &c. *abſque hoc that J. N. entered after the Death of the Father of the*

the Tenant; and the *Tenant ſaid that he enter'd as above* &c. and ſo to Iſſue, and found for the Plaintiff. And per Forſcu, The Iſſue is Jeofail; for the Traverſe is to no Purpoſe, the Reaſon ſeems to be inaſmuch as he *ought to have traverſed the Abatement*, and *not the Entry*; Quære for adjornatur. Br. Repleader, pl. 25. cites 37 H. 6. 5.

Br. Pleadings, pl. 56. cites S. C.— Heath's Max. 113. cap. 5. cites S. C.

2. Entry; the *Tenant intitled himſelf by Gift in Tail made by T. to his Anceſtor* &c. the *Demandant made Title, becauſe W. was ſeiſed and gave in Tail to the Father and Mother of the Demandant*; the *Father died*, the *Mother ſurvived him*, and died ſeiſed, and the ſaid *T. abated and gave in Tail to the Anceſtor of the Tenant upon whom the Demandant re-enter'd*, there, Per Priſot clearly, The Tenant may maintain his Bar, and traverſe the Abatement, and ſhall not be compell'd to traverſe the Gift in Tail to the Anceſtor of the Demandant. Br. Traverſe per &c. pl. 159. cites 38 H. 6. 18.

(R) *Abatement, or Dying ſeiſed &c.*

1. IN Treſpaſs the Abatement *is not material*, nor to the Purpoſe; but where he who *pleads it intitles himſelf by him who died ſeiſed*, there it is material and anſwerable *for the moſt Part*, and otherwiſe not; Per Cur. Br. Traverſe per &c. pl. 163. cites 39 H. 6 26, 27.

But otherwiſe it is *in* Aſſiſe of *Mortdanceſtor, Ayel, Coſinage*, and the like, *when he ſhews Dying ſeiſed in Writ and Declaration*; for there *it is ſufficient to allege Jointenancy and Survivor without traverſing the Dying ſeiſed*

2. *Treſpaſs* upon 5 R. 2. the *Defendant pleaded Feoffment of J. N.* and gave *Colour* to the Plaintiff; and the *Plaintiff ſaid that L. was ſeiſed, and died ſeiſed, and after J. N. abated and infeoff'd the Defendant, and* [*that*] *one H. as Couſin and Heir of L.* and ſhew'd how, *entered and infeoff'd the Plaintiff, who was ſeiſed quouſque* &c. Catesby ſaid, *before that L. any thing had S. was ſeiſed, and infeoff'd L. and J. and after L. died, and J. ſurvived, and was ſole ſeiſed, and infeoff'd the Defendant as above*, abſque hoc *that J. abated*; and the Traverſe of the *Abatement* was not held good; for it is confeſs'd and avoided, by which the Party relinquiſh'd the Traverſe, and held him to the reſt; But per Markham, Yelverton, and all of the Common Pleas, he ought to traverſe the *ſole dying ſeiſed of L.* for it ſhall be intended that L died ſole ſeiſed by all ſuch Pleadings as above. Br. Traverſe per &c. pl. 205. cites 1 E. 4. 9.

; Per Markham Ch. J. The Cauſe ſeems to be, becauſe *Writ is only Suppoſal*, and ſo the Count or Declaration ought to be according to it; *but* where it is alleg'd in a Plea *in Bar, Title, Replication, or other Pleading*, there it ought to be travers'd; Note the Diverſity; by which he travers'd the ſole Dying ſeiſed; quod nota. Br. Traverſe per &c. pl. 205. cites 1 E. 4. 9.

Heath's Max. 113. cap. 5. cites S. C.

3. Entry in Nature of Aſſiſe, the *Tenant ſaid that E. was ſeiſed in Fee, and infeoff'd him*, and gave *Colour* to the Plaintiff; the *Plaintiff ſaid that before E. any thing had, T. was ſeiſed in Fee, and gave to J. and K. his Feme in Tail, who died ſeiſed, and had Iſſue C. and the ſaid E. abated and infeoff'd the Tenant, and the Iſſue enter'd and infeoff'd the Demandant, who was ſeiſed till* by the Tenant diſſeiſed; the *Tenant maintain'd his Bar that E. was ſeiſed* &c. *and infeoff'd the Tenant*, abſque hoc *that E. abated after the Death of J. and K.* prout &c. and the Rejoinder was challenged, becauſe he ought to anſwer to the former Poſſeſſion. And by the Opinion of the Court, the Plea is good; for the Demandant *avoided the Feoffment made to the Tenant by the Abatement, and ſo the Abatement is traverſable* well enough. Quod nota. Br. Traverſe per &c. pl. 202. cites 5 E. 4. 137.

4. In Treſpaſs, the *Defendant ſaid that D. was ſeiſed in Fee, and infeoff'd E. and the Defendant as Servant of E. did the Treſpaſs*, and gave

Colour

Colour to the Plaintiff. Catesby replied, that *a long Time before D. any thing had J. H. was ſeiſed, and had Iſſue two Daughters A. and K. Femes of the Plaintiffs, and died ſeiſed, and D. abated and infeoff'd the ſaid E. and the Plaintiffs in Right of their Wives enter'd, and were ſeiſed till the Treſpaſs.* Jenney ſaid, *a long Time after the Death of the ſaid J. H. W. D. was ſeiſed, and died ſeiſed, and D. entered as Son and Heir of W. D. and infeoff'd E.* as above. Per Littleton, This is no Plea; for it may *ſtand with* [*the Allegation*] that W. D. died ſeiſed after the Death of J. H. and yet D. ſhall not have thereof Advantage; for if D. abated after the Death of J. H. and infeoff'd W. his Father, and W. died ſeiſed and D. enter'd, the Entry of the Parties is lawful, becauſe D. the *Abator infeoff'd his Father, of which Deſcent to himſelf he ſhall not take Advantage.* And tot. Cur. accordingly, by which Jenney *ſaid that after the Death of J. H. W. Father of D. died ſeiſed* &c. as above, *abſque hoc that D. abated after the Death of J. H. and before the Death of W. his Father.* Catesby ſaid theſe Words, *Before the Death of his Father,* is more than is alleg'd, therefore you ought to traverſe the Abatement *generally*; And yet by the Opinion of the Court the Traverſe of Jenny is good, by which Catesby maintained his Replication as above, *abſque hoc that W. D. died ſeiſed of the ſame Land.* And this was held a good Plea per tot. Cur. quod nota, one Sans ceo taken upon another Sans ceo. Br. Traverſe per &c. pl. 109. cites 15 E. 4. 22.

5. In Treſpaſs the *Defendant pleaded Feoffment of one A.* and gave *Colour* to the Plaintiff; and the *Plaintiff ſaid that before A. any Thing had, his Father was ſeiſed, and died ſeiſed, and A. abated and infeoff'd the Defendant, and the Plaintiff entered and was ſeiſed, and the Defendant did the Treſpaſs.* And by all the Juſtices, the Defendant may maintain his Bar, and traverſe the Abatement, or the Dying ſeiſed at his Pleaſure; for it is the Title of the Plaintiff, and *if the one Point or the other be falſe, the Title is not good.* Br. Traverſe per &c. pl. 251. cites 18 E. 4. 1. & 26.

Br. Titles, pl 40. cites S. C —— Heath's Max. 113. cites S. C.

6. In Treſpaſs upon the 8 H. 6. the *Defendant ſaid that J. N. was ſeiſed in Fee, and leaſed to the Defendant for one Year,* and gave *Colour* to the Plaintiff; and the *Plaintiff replied that A. was ſeiſed in Fee, and gave to the Anceſtor of the Plaintiff in Tail who died ſeiſed; and the ſaid J. N. abated and made the Leaſe as in the Bar; and the Plaintiff entered and was ſeiſed till diſſeiſed by the Defendant, who did the Treſpaſs*; and the *Defendant maintained his Bar, abſque hoc that J. N. abated.* And by the Reporter, this is no good Iſſue; for the Gift and the Dying ſeiſed is not denied, which tolls Entry. But *contra upon Dying ſeiſed for Life and Intruſion,* there the Intruſion may be travers'd; for the Dying ſeiſed for Life does not toll Entry, and in Intruſion *the Intruſion is traverſable.* Br. Traverſe per &c. pl. 178. cites 3 H. 7. 7.

Heath's Max. 113. cap. 5. cites S. C.

7. In Treſpaſs Ubi ingreſſus non datur per Legem, the *Defendant ſaid, that J. S. was ſeiſed in Fee, and leaſed to the Defendant for Life,* and gave *Colour* to the Plaintiff. And the *Plaintiff ſhew'd Deſcent to him, and that J. S. abated and leaſed, upon whom he enter'd, and was ſeiſed till the Treſpaſs.* The *Defendant ſaid, that the Father of J. S. after the Death of the Anceſtor of the Plaintiff, was ſeiſed, and died ſeiſed; and the ſaid J. S. enter'd and made the Leaſe, and did not traverſe the Abatement*; and good, per tot. Cur. except Davers, *without Traverſe*; for *Traverſe will waive the Matter in Law*; that is to ſay, if J. S. abated, and infeoff'd his Father who died ſeiſed, and J. S. is Heir to him, if he ſhall be in by Deſcent, or only as Abator, becauſe he is Party to the Tort. Br. Traverſe, per &c. pl. 184. cites 5 H. 7. 6.

See (C)

(S) Of the *Conveyance.*

1. THE meſne Conveyance may be traverſed, as *Ne leſſa pas in Writ of Entry in Conſimili Caſu*, viz. that he who is ſuppoſed to leaſe to the Tenant for Life, did not leaſe to him Prout &c. Br. Traverſe, per &c. pl. 343. cites 7 E. 3. 54. and Fitzh. Brief, 947.

Heath's Max 121. cap 5. cites S. C.

2. In *Quare Impedit* by the *King*, who *made Title by the Heir in his Ward, becauſe J. S. was ſeiſed of 4 Acres of Land in D. with the Advowſon appendant and preſented, and it deſcended to the Heir as Son of N. Son of W. Son of M. Son of the ſaid J. S.* There it is no Plea, that *no ſuch W. in rerum Natura*; for *W. is in the meſne Conveyance*, which is *not traverſable.* Br. Traverſe, per &c. pl. 353. cites 43 E. 3. 7.

3. Treſpaſs of *beating his Servant*, the *Defendant ſaid, that it was his Servant, and not the Servant of the Plaintiff*; and the others econtra. And ſo ſee the meſne Conveyance traverſed here, and yet it amounts to Not Guilty; quod nota. Br. Treſpaſs, pl. 13. cites 3 H. 6. 54.

The Defendant in *Debt* &c. ſhall not be permitted to traverſe the *meſne Conveyance where he may wage his Law*, unleſs in Special Caſes.

4. *Debt for Salary* by one, who was *retain'd in Husbandry*, the *Defendant ſaid, that he did not retain him in Husbandry*; and a good Plea, to traverſe the Contract, or the meſne Conveyance, *where he cannot wage his Law*; quod nota, per Cur. and here he cannot wage his Law. Br. Traverſe, per &c. pl. 160. cites 38 H. 6. 22.

Br. Ley Gager, pl. 94. cites 21 E. 4. 55.

S. P. Br. Iſſues joines, pl. 40. cites 13 E. 4. 4

5. Where a Man may *wage his Law*, he *ſhall not be ſuffer'd to traverſe the meſne Conveyance.* Br. Pleadings, pl. 119. cites 2 E. 4. 13.

——*But* in every Action, *where Wager of Law lies not*, the Conveyance to the Action being a Thing material, is traverſable; per Gawdy J. Cro. E. 201. pl. 27. Mich. 32 & 33 Eliz. B. R. in Caſe of Smith v. Hitchcock.

As where a Man *pleads Feoffment by Deed*, it is ſufficient *to ſay that Nothing paſs'd by the Deed*

6. When the *Defendant intitles himſelf by a Gift*, or the like, *it ſhall not be intended, that he has other Title than he himſelf claims*, and ſo it is ſufficient to traverſe it. Br. Traverſe, per &c. pl. 200. cites 5 E. 4. 133.

; and yet it may be that he was infeoff'd without Deed; but the Court ſhall not intend his Title to be other than he himſelf ſhews. Quod nota. Br. ibid.

So in Appeal by a Feme of the Death of her Huſband, the *Defendant pleaded Not Guilty.*

7. In Replevin the *Defendant challeng'd J. S. becauſe he was Couſin to a Nun of the Houſe, who avow'd, and ſhew'd How* he was Couſin; and it was ſaid, that the Conveyance is not traverſable, but *if he was Couſin or not.* Br. Traverſe, per &c. pl. 344. cites 7 E. 4. 4. 5.

The *Plaintiff pray'd Proceſs to the Coroners, becauſe he is Couſin to the Feme of the Sheriff.* And per Yelverton, in this Action the Party ſhall not have *Traverſe to the Conveyance of the Coſinage*, but to the Coſinage itſelf, *if ſhe be Couſin or not by any Way*; for this is not like to Action Auncestrell, where he makes himſelf Couſin and Heir &c. Quære. Br. Traverſe, per &c. pl. 123. cites 9 E. 4. 6.——Heath's Max. 121. cap. 5. cites S. C.

So it is of a Goſſip; it is no Matter if he was Godfather to a

8. *So where a Juror is challeng'd becauſe he holds 2 Acres of the Party*, it ſhall not be traverſed *How he holds of him*, but *if he holds of him or not.* Br. Traverſe, per &c. pl. 344. cites 7 E. 4. 4. 5.

Son, or to a Daughter, nor to what Daughter. Br. Traverſe, per &c. pl. 344. cites 7 E. 4. 4. 5.

Br. Repleader, pl.

9. Where *a Releaſe and ſeveral meſne Conveyances are alleged againſt the Plaintiff, or him by whom he claims*, the Releaſe ſhall be traverſed, and

and not the meſne Conveyance; for the Defendant has Poſſeſſion, and therefore *the Plaintiff ought to make good Title, becauſe he demands the Poſſeſſion.* Br. Traverſe, per &c. pl. 116. cites 15 H. 7. 2, 3. 24. cites S. C.

10. *But*, per Fineux & Keble, *where ſeveral Conveyances are alleg'd in one Title, or* in one *Replication*, which are on the Part of the Plaintiff, there the *Defendant may traverſe which* of them *he pleaſes, and* may traverſe *any of the meſne Conveyances.* Br. Traverſe, per &c. pl. 116. cites 15 H. 7. 2. 3. Br. Repleader, pl. 24. cites S. C.—— Heath's Max. 119. cap. 5. cites

S. C.——Br. Double Plea, pl. 143. cites S. C.——*Contra* where it is *in a Bar*, and ſo ſee a Difference between Bar and Title or Replication; and no Difference is taken there as to thoſe Pleadings, be they in Aſſize or in Treſpaſs. Quod nota. Br. Traverſe, per &c. pl. 116. cites 15 H. 7. 2, 3.——Br. Repleader, pl. 24. cites S. C.——Br. Double Plea, pl. 143. cites S. C.

11. The Defendant may traverſe *any Part of the Plaintiff's Conveyance* of his Action, and not be forced to the General Iſſue. Brown's Anal. 10.

12. Where the *Conveyance to the Action* is that which doth *entitle* the Plaintiff *to the Action*, it may well be traverſed, *if* the *Defendant cannot wage his Law*; otherwiſe where he may wage his Law. Per Gawdy J. Cro. E. 169. Mich. 32 Eliz. B. R. in Caſe of Kinnerſly v. Cooper.——Cites 8 H. 6. 5. 22 Ed. 4. 29. 7 Ed. 3. 54. 31 H. 6. 10. 26 H. 8. Br. Traverſe, 5 H. 7. 3.

13. *When both Parties claim by one and the ſame Perſon*, there always the meſne Conveyance is traverſable. Cro. E. 798. pl. 46. Mich. 42 Eliz. C. B. in Caſe of Fawkner v. Powel.

14. In Treſpaſs Vi & Armis for *cancelling a Deed*, and ſet forth, that J. S. the *Defendant* being ſeiſed of Land in Fee, *infeoff'd A. and his Heirs with Warranty, reſerving Rent* with Clauſe of Diſtreſs; *and afterwards by Deed* bargain'd *and ſold the Rent to the Plaintiff, who* caſually *loſt the ſaid Deed, and the Defendant found and cancell'd it*; but did *not expreſsly ſhew that he was*, at any Time before the Action brought, *poſſeſs'd* of this Deed, but only by Implication argumentatively. The *Defendant traverſed the Bargain and Sale* of the Rent. It was inſiſted for the Plaintiff, that this is only Matter of Conveyance to his Action, and ſo not traverſable. But it was anſwer'd, that the Plaintiff by ſhewing his Title gives the Defendant Advantage to traverſe it. And per tot. Cur. clearly the Grant is not traverſable in this Caſe; and ſo the Traverſe is not good. Bulſt. 214. Trin. 10 Jac. Suckfield v. Conſtable.

(T) *Deſcent, or Gift in Tail.*

1. IN *Formedon* the Gift only is traverſable, and not the Deſcents. Br. Double Plea, pl. 16. cites 33 H. 6. 32.

2. If a Man *conveys to himſelf Deſcent of Eſtate Tail, it* is ſufficient to traverſe the *Gift*, without anſwering to the *Deſcent*; quod fuit conceſſum. Br. Traverſe per &c. pl. 210. cites 2 E. 4. 15. *As* in Treſpaſs the *Defendant ſaid* that *His Franktenement*, the *Plaintiff ſaid that before that the Defendant any thing had W. was ſeiſed in Fee, and leas'd to S. for Term of Life*, the *Remainder to the Father of the Plaintiff in Tail*, and after *S. ſurrendered* &c. *by which* &c. *ſeiſed in Tail* &c. *and died ſeiſed*, and the *Land deſcended to the Plaintiff as Son and Heir*, and he *entered, and was ſeiſed in Tail*, and after *leaſed to N. at Will, who infeoff'd the Defendant for Life, and the Plaintiff enter'd*; the *Defendant ſaid that before W. leaſed for Life, the Remainder over, he infeoff'd L. in Fee, and contrary to his own Feoffment ouſted him, and made the ſaid Leaſe*; *and after the ſaid L. before the Surrender, and in the Life of the Father ouſted the Tenant for Life, and infeoff'd us*, by which &c. And a good Plea per Cur. by which the other ſaid that L. ouſted S. Tenant for Term of Life [in the Life] of the Father in the Manor &c. and the others econtra. Br. Confeſs and Avoid, pl. 42. cites S. C.——Br. Dette, pl. 148. cites S. C. Brooke ſays, And therefore ſee that Tail and Deſcent is not double.

(U) *Diſſeiſin or Conveyance*, as Releaſe &c.

Br. Confeſs and Avoid, pl. 46. cites S. C.——*As* in Treſpaſs the *Defendant ſaid that* he was *ſeiſed till by B. diſſeiſed, which B. was ſeiſed till by the Plaintiff diſſeiſed, upon whom the Defendant at the Time of the Treſpaſs enter'd*; to which the *Plaintiff ſaid that before the Defendant or B. any thing had, H was ſeiſed, and leaſed to the Plaintiff for Term of Life, by which he was ſeiſed till by the Defendant diſſeiſed, and after B. diſſeiſed the Defendant, and the Plaintiff entered, and was ſeiſed, till the Defendant did the Treſpaſs*; and it was mov'd if he ought to traverſe the Diſſeiſin, and the Defendant imparl'd. Br. Confeſs and Avoid, pl. 46. cites 10 E. 4. 7. 8.

1. WHERE the *Diſſeiſin* is the *Effect of the Bar*, it ought to be travers'd by the Plaintiff; *but where it is only Colour for the Plaintiff to bring his Action*, there the *other Matter, which is the Effect of the Bar*, ſhall be travers'd, and not the Diſſeiſin. Br. Traverſe per &c. pl. 232. cites 10 E. 4. 7.

2. In Aſſiſe, the *Tenant ſaid that J. B. was ſeiſed and diſſeiſed by W. to whom T. B. made a Releaſe, and contrary to his own Deed diſſeiſed W. and infeoff'd 5 Perſons, who infeoff'd the Plaintiff upon whom W. re-enter'd, whoſe Eſtate the Tenant has*; and the *Plaintiff for Title ſaid that T. B. was ſeiſed, and infeoff'd the 5 Perſons who infeoff'd the Plaintiff who was ſeiſed, till by the Tenant and the others diſſeiſed*, abſque hoc *that T. B. diſſeiſed W.* And per Priſot and Pole, This is not traverſable; for it is only a Conveyance; and becauſe the Plaintiff claims by the ſame Perſon by whom the Defendant claims, whoſe Title is bound by the Releaſe, therefore he ſhall traverſe the *Releaſe*; and ſo he did at laſt. Br. Traverſe per &c. pl. 377. cites 30 H. 6. 7.

3. In Ejectment the Defendant *pleaded, That before B. the Leſſor* of the Plaintiff *had any Thing* &c. A. *the Father of the Leſſor* of the Plaintiff *was ſeiſed in Fee, and let to the Defendant for Life, and died ſeiſed of the Reverſion, which deſcended to B. who entered and diſſeiſed the Defendant*, and let to the Plaintiff. The *Plaintiff ſays that A. was ſeiſed in Fee, and died ſeiſed*; and it deſcended to B. who entered and leaſed to the Plaintiff &c. and traverſes *abſque hoc, that A. leas'd to the Defendant prout* &c. And it was thereupon demurr'd, becauſe he traverſes the Diſſeiſin, and not the Leaſe, which is but a Conveyance. But after Argument it was adjudged for the Plaintiff that the Traverſe was good, and that he might traverſe the one or other at his Election; for when both Parties make their Conveyance from one and the ſame Perſon, there always the mean Conveyance is traverſable; Wherefore it was adjudged accordingly. Cro. Eliz. 798. pl. 46. Mich. 42 Eliz. in C. B. Fawkner v. Powel, cites 4 H. 7. 9.

(W) *Diſſeiſin or Deſcent.*

1. DEbt *for Rent* reſerved *upon a Leaſe for Years*; the *Defendant pleaded that before the Plaintiff any Thing had* in the Lands &c. *one J. S. was ſeiſed, and died ſeiſed, and his Heir entered, and the Plaintiff* entered upon him and *diſſeiſed him, and made this Leaſe, and before the Rent-day the Son entered*; the *Plaintiff by Proteſtation ſaid that J. S. was not ſeiſed, nor died ſeiſed, and pro Placito that he did not diſſeiſe the Son.* The Defendant demurr'd, the Queſtion was whether Diſcent or Diſſeiſin was traverſable. And adjudged that the Diſſeiſin was. Moor 539. pl. 708. Paſch. 39 Eliz. Baniſter v. Lilley.

2. In

2. In Treſpaſs and Ejectment; the Defendant *pleads that the Plaintiff did diſſeiſe J. S.* of the Land, *and then made a Leaſe of it to him, and that afterwards the Land did deſcend to the Plaintiff.* The Plaintiff *replies that he was ſeiſed of the Lands, and traverſed the Diſſeiſin* ſuppoſed to be made to J. S. And to this the Defendant demurs, and for Cauſe ſhews that he ought to have travers'd the Deſcent, and not the Diſſeiſin. But Roll Ch. J. ſaid, That the traverſing of the Diſſeiſin makes an End of all, and therefore it is well taken, as being the moſt material Matter, altho' the Deſcent might have well enough been travers'd; and therefore let the Plaintiff have Judgment Niſi. Sty. 344. Mich. 1652. Wood v. Holland.

(X) *Diſſeiſin, or Dying ſeiſed.*

1. IN *Treſpaſs*, if the *Defendant ſays that His Franktenement*, and the *Plaintiff ſays that his Father was ſeiſed, and died ſeiſed, and he entered and was ſeiſed, and diſſeiſed by the Defendant upon whom he entered, and the Treſpaſs meſne* &c. in this Action the Diſſeiſin ſhall be travers'd, and not the Dying ſeiſed. Br. Traverſe per &c. pl. 359. cites 30 H. 6. 7. and Fitzh. Treſpaſs 68. Heath's Max. 115. cap. 5. cites S. C.——S. C. cited Arg. Hutt. 124. Trin. 9 Car. in Caſe of Edwards v. Laurence.

2. *Contra in Aſſiſe.* Br. Traverſe per &c. pl. 359. cites 30 H. 6. 7. and Fitzh. Treſpaſs 68. Heath's Max. 115. cap. 5. cites

S. C.——Hutt. 124. in the Caſe of **Edwards v. Laurence**, Arg. cites 33 H. 6. 59. that Wangford put this Caſe; in Aſſiſe, if the Defendant plead that his Father was ſeiſed, and died ſeiſed, and gives Colour to the Plaintiff, the Plaintiff ought to traverſe the dying ſeiſed, and not the Poſſeſſion of the Father, which is the Cauſe of the dying ſeiſed.

(Y) *Dying ſeiſed, or Deſcent.*

See (L) pl. 9.

1. *ENtry in Nature of Aſſiſe*, the *Tenant intitled himſelf by dying ſeiſed of R. S.* Danby ſaid, *After the dying ſeiſed of the ſaid R. one J. was ſeiſed in Fee, and died ſeiſed, and the Land deſcended to the Plaintiff as Couſin and Heir* &c. and ſhew'd how Couſin, by which he entered, and was ſeiſed and diſſeiſed. Arderne ſaid R. was ſeiſed as above, and died ſeiſed, and the Land deſcended to K. who entered, and leaſed to the ſaid J. for Term of Life, of which Eſtate he died ſeiſed, and K. entered and died, and the Land deſcended to C. who infeoff'd us, abſque hoc that J. died ſeiſed in Fee, & ſic ad Patriam. Br. Traverſe per &c. pl. 98. cites 22 H. 6. 23.

2. In Treſpaſs the *Defendant ſaid that his Father was ſeiſed in Fee, and died ſeiſed, and he as Heir entered*, and gave *Colour*; the *Plaintiff ſaid that before the Father any Thing had, he himſelf was ſeiſed in Fee, and gave to the Father and his Feme in Tail, and after the Father died without Iſſue, and the Feme held in, and after ſhe died*, abſque hoc *that the Father died ſeiſed prout* &c. Per Fairfax, This is not a good Plea, by which he ſaid *abſque hoc that the Father died ſole ſeiſed prout* &c. and ſo it was accepted; but it ſeems that he may have Traverſe *abſque hoc that the Father died ſeiſed in Fee, prout* &c. Quære; for per Fairfax, dying ſeiſed in Tail tolls the

Entry, but not as here where he dies without Iſſue of his Body; for then there is no Deſcent. Br. Traverſe per &c. pl. 266. cites 21 E. 4. 65.

Heath's Max. 112. cites S. C.

3. Treſpaſs upon the 8 H. 6. the *Defendant ſaid that T. was ſeiſed and died ſeiſed, and the Land deſcended to him as Son and Heir, and he entered* &c. and the *Plaintiff ſaid that T. was ſeiſed, and married K. and had Iſſue the Plaintiff, and died ſeiſed, and the Land deſcended to the Plaintiff* &c. abſque hoc *that it deſcended to the Defendant* &c. Quære if this be a good Iſſue &c. Br. Traverſe per &c. pl. 152. cites 21 H. 7. 31.

4. Treſpaſs *by M.* the *Defendant ſhew'd Seiſin in Fee in J. N. who gave in Tail to W. N. and conveyed by Deſcent*, and gave *Colour* to the Plaintiff by the Donor, the *Plaintiff ſaid that T. himſelf in the Conveyance of the Tail infeoff'd W. who infeoff'd the Plaintiff, who was ſeiſed till the Treſpaſs*, abſque hoc *that the Land deſcended to the Defendant modo & forma, and did not deny the dying ſeiſed of the Father of the Defendant alleg'd in the Bar:* And therefore by the Juſtices the Plea is not good; for he cannot traverſe the Deſcent but the Dying ſeiſed; for *where the Dying ſeiſed is not denied, there it ſhall be intended that the Land deſcended to the Heir*; Quod nota. Br. Traverſe per &c. pl. 114. cites 14 H. 8. 23, 24.

Heath's Max 112. cap. 5. cites S. C.

5. In Treſpaſs, the *Defendant ſaid that F. was ſeiſed, and died ſeiſed, and he is Couſin and Heir to him, viz. Son of M. Siſter of F.* by which he entered, and gave *Colour* to the Plaintiff; and the *Plaintiff ſaid that F. had a Daughter named E. and conveyed to himſelf by E. and ſo he was ſeiſed till* the Defendant did the Treſpaſs. And a good Plea by the Opinion of the Court, and by all except Shelley; for the *Dying ſeiſed is the Effect of the Bar*, and therefore if F. had a Daughter the Bar is confeſs'd and avoided, and ſo he need not to take Traverſe abſque hoc that the Defendant is *Couſin and Heir*; And ſo note the Dying ſeiſed is traverſable, and not the Deſcent. Br. Traverſe per &c. pl. 1. cites 19 H. 8. 6.

6. In Aſſiſe, the *Defendant pleaded that J. A. was ſeiſed in Fee, and died ſeiſed, and the Land deſcended to him*, and gave *Colour*; and the *Plaintiff ſaid that before that J. A. any Thing had, W. S. was ſeiſed in Fee, and infeoff'd the ſaid J. A. and W. P. in Fee, and J. A. died, and W. P. ſurvived, and infeoff'd the Plaintiff, who was ſeiſed till diſſeiſed* by the Defendant, & hoc &c. and did not traverſe the Deſcent; for the *Dying ſeiſed is the Effect*, and traverſable only, and not the Deſcent, and the Dying ſeiſed here is *confeſs'd and avoided by the Jointenancy*; and the *Defendant ſaid that J. G. was ſeiſed, and infeoff'd the ſaid J. A. in Fee, who was ſeiſed, and died ſeiſed, and all as in the Bar*, abſque hoc *that the aforeſaid J. A. at the Time of his Death, held jointly with the aforeſaid W. P.* & hoc &c. And ſo ſee the *Joint-tenure put in Iſſue*, and *not if W. S. infeoff'd them jointly*, or not. Br. Traverſe per &c. pl. 6. cites 27 H. 8. 22.

S. C. cited Win. 13. in Caſe of Sir George Savil v. Thornton.

7. In Treſpaſs the *Defendant conveyed by* 6 *Deſcents in Tail*; the *Plaintiff confeſs'd the Entail, and conveyed a Feoffment to him by* the Heir of the *Donee*, which was a Diſcontinuance, *and travers'd the Dying ſeiſed of the ſame Feoffor*. This was held ill, and that he ſhould have travers'd the very laſt Deſcent; for otherwiſe it may be intended that one of the Meſne Deſcents came to the Land, and thereof died ſeiſed, and ſo the next Heir remitted. And *at length*, by Advice of the Court, the *Plaintiff confeſs'd the Tail, and took all the Dyings ſeiſed, except the laſt, by Proteſtation*, and for Plea that he which is ſuppoſed to be laſt &c. infeoff'd the Anceſtor of the Plaintiff, from whom it deſcended to him, *abſque hoc that the laſt Anceſtor of the Defendant died ſeiſed Modo & Forma* &c. and altho' the Feoffment be falſe, yet the Defendant ought to maintain his firſt Saying, and if it be falſe he will be trick'd. D. 107. pl. 25. Mich. 1 & 2 P. & M. Vivion v. St. Aubin.

8. In *Ejectment ſuppoſing a Demiſe by the Ld. C.* the *Defendant ſaid that before the Plaintiff or the Ld. C. any Thing had, one B. was ſeiſed* in Fee, *and infeoffed one Andrews who died ſeiſed, and his Son leaſed to him, and that* he was poſſeſſed till ouſted, and that *the Son was diſſeiſed by the ſaid*

ſaid B. who after infeoffed the Ld C. who demiſed to the Plaintiff, upon whom the Defendant re-enter'd &c. the *Plaintiff took* a *Proteſtation to the Feoffment, the dying ſeiſed, the Diſcent and the Demiſe, Prout,* and *for Plea ſays, that* before the Ejectment *B. infeoffed the Ld. C. who demiſed to the Plaintiff, Abſque hoc quod B. diſſeiſed the Son:* But it was holden a good Traverſe to the Diſſeiſin, it being the chief Subſtance of the Bar; for if B. was Diſſeiſor, this deſtroys the Title of the Plaintiff who comes to the Land under the Diſſeiſin, which Title of the Plaintiff in Ejectment muſt neceſſarily be anſwered either by Matter in Fact or in Law, which confeſſes and avoids the Title or traverſes it; for a naked Colour in Ejectment is not ſufficient as it is in Aſſiſe or Treſpaſs &c. which comprehends no Title or Conveyance in Law, Writ or Court, as this Action does in both ſo that the Deſſeiſin here ſhall be intended a Confeſſion and avoiding of the Title, and of Neceſſity it muſt be traverſed; And 9 H. 6 it is a Maxim that a Diſſeiſin alleged in Bar or Replication is always traverſable; yet it may be the Feoffment of B. to Andrews, or the dying ſeiſed, are both traverſable at the Election of the Plaintiff, and given to him by the ſuperfluous Folly of the Defendant &c. D. 365. b. pl. 34. 366. pl. 35. Mich. 21 & 22 Eliz. Ld. Cromwell's Caſe.

9. The *Avowant conveyed a Title* to himſelf *as next Heir of the Lord Powis, who died ſeiſed in Fee without Iſſue, and the Land deſcended to him*; the *Plaintiff confeſſed the dying ſeiſed, but conveyed* a Title to himſelf *by the Deviſe of the Ld. Powis Abſque hoc, that the Land deſcended* &c. And upon producing a Record of the Caſe of **Merings** Paſch. 14 H. 8. it was adjudged according to that Caſe, that the Traverſe was ill becauſe the Title of the Avowant was confeſſed and avoided; and in ſuch Caſe there ought not to be a Traverſe. D. 366. a. b. pl. 36, 37. Mich. 21 & 22 Eliz. Vernon's Caſe Alias, Fowler v. Clayton & al.

Bendl. 319. pl. 320. S. C. accordingly. —— S. C. cited Arg. Le. 310 pl. 429. in Caſe of Maidwell v. Andrews; but ſays, that if the Parties do not claim by one and the ſame Perſon, or the dying ſeiſed be not confeſſed or avoided, there the Dying ſeiſed ſhall be traverſed and not the Deſcent. ——Heath's Max. 110. cap. 5. cites S. C. and ſo is 19 H. 8. 6o. But otherwiſe as it ſeems, if he had claim'd by Survivorſhip, or in Coparcenary.

10. In *Covenant* the Plaintiff ſet *forth, that the Teſtator made a Leaſe for Life rendering Rent, and deviſed the Reverſion to his Wife* and *died*; *ſhe married the Defendant,* and the *Husband and Wife ſold the Reverſion to B. G. for Life and the Rent to the Plaintiff,* and *covenanted that he ſhould quietly enjoy* it without any Diſturbance *from any Perſon, claiming under the ſaid B. G. who died ſeiſed of the Reverſion, and the ſame deſcended to his Heir*; and the Breach aſſigned was, for that the *Heir claimed the Rent by Reaſon of the Grant of the Reverſion to his Anceſtor*; the Defendant *pleaded the Grant* of the Reverſion *to B. G. Abſque hoc, that it deſcended to his Heir*; and upon a general Demurrer this was held an ill Traverſe, becauſe he ought to have traverſed that B. G. died ſeiſed &c. for that is the Subſtance, and the Deſcent is only the Conſequence of the other. 3 Nels. Abr. 343. pl. 1. cites Dyer, 366. 1 Leon. 309. Maidwell v. Andrews.

Le. 309. pl. 429. Paſch. 33 Eliz. C. B. this Caſe is argued, but I do not obſerve that the Court ſaid any Thing as to this Point of the Traverſe. — D. 366. ſeems to mean pl. 36. Vernon's Caſe, Alias, Fowler v. Clayton & al' which ſee at pl. 9 above.

11. If the *Eldeſt Brother pleads Deſcent of Land* to him *in Borough Engliſh*, the youngeſt has no other Plea but to traverſe the Deſcent; per Haughton J. Palm. 372. Trin. 21 Jac. B. R. Sumner's Caſe.

12. *So* of *Deviſee*, if he makes a Title againſt the Heir he muſt traverſe the Deſcent; Per Doderidge J. And Lea Ch. J. ſaid, that it would be repugnant to ſay Verum eſt, that it deſcended Et pro placito; that the Anceſtor deviſed. Palm. 372, 373. Trin. 21 Jac. B. R. in Sumner's Caſe.

(Z). *Dying*

See (L) pl. 8.

(Z) *Dying ſeiſed, Or Gift in Tail.*

1. IN *Aſſiſe* where the *Tenant makes a good Bar*, and the *Plaintiff makes Title after by Gift in Tail, and dying ſeiſed*, there the Gift ſhall be traverſed, and not the dying ſeiſed; for no dying ſeiſed can be * by Gift in Tail without dying ſeiſed. Br. Traverſe per &c. pl. 12. cites 9 H. 6. 22.

But where a Man pleads *Feoffment in Fee*, and dying ſeiſed, there *the dying ſeiſed ſhall be traverſed, and not the Gift*; for a Man may be ſeiſed in Fee by Diſſeiſin without Feoffment; quod nota. Br. Traverſe per &c. pl. 12. cites 9 H. 6. 22.

* All the Editions are as here, but the Year-Book is thus, (viz.) That he cannot die ſeiſed of Eſtate Tail, unleſs there was a Gift &c. 9 H. 6. 22. a pl. 17.

2. Treſpaſs upon the 8 H. 6. by J. N. *againſt 2 Barons and their Femes and another*; the *Defendant ſaid, that N. C. Grandfather of the Femes was ſeiſed in Fee and died ſeiſed, and the Land deſcended to M. as Son and Heir*, who *proteſtando died ſeiſed, and the Land deſcended to P. as Son and Heir of M.* who *died proteſtando ſeiſed without Iſſue, and* the Land *deſcended to the Femes as Siſters and Heirs*, and gave *Colour*, and the *Plaintiff ſaid that before N. C. any thing had, R. was ſeiſed in Fee and gave to the ſaid N. C. in Tail, who had Iſſue as in the Bar, and alſo* had Iſſue *the Plaintiff, and died ſeiſed and all as in the Bar*, and the *Defendant maintain'd the Bar, Abſque hoc, that the Donor gave in Tail Prout* &c. and by the Reporter the *Replication confeſſes and avoids the Bar without traverſing the dying ſeiſed*; For now it ſhall be *intended that the Donee was ſeiſed in Fee after Diſcontinuance, and died ſeiſed*; and then this is a *Remitter: But if* it had been *alleged that N. C. had been ſeiſed in Fee, and died by Proteſtation ſeiſed*, then the Seiſin in Fee ſhall be traverſed; for there is no other Thing to be traverſed; for there can be no Remitter without dying ſeiſed in Fact; and ſo note the Difference by him. Br. Traverſe per &c. 177. cites 3 H. 7. 5.

Br. Confeſs and avoid, pl. 64. cites S. C.

3. Treſpaſs by *T. C. agatnſt E. and S.* his Feme upon the Statute of 5 R. 2. *who pleaded that N. Grandfather of S. the Feme of the Defendant was ſeiſed in Fee and died ſeiſed, and the Land deſcended to J. C. his Son as Son and Heir* &c. who enter'd and was ſeiſed, *and by Proteſtation died ſeiſed, and* the Land *deſcended to S. Feme of the Defendant as Daughter and Heir of the ſaid J. C.* by which E. and S. his Feme as Couſin and Heir of the ſaid N. entered and gave *Colour* to the Plaintiff; the *Plaintiff replied, that before N. any Thing had, Martin and others were ſeiſed in Fee, and gave the Land to the ſaid N. in Tail to the Heirs Males, and N. died ſeiſed of ſuch Eſtate, and had Iſſue the ſaid J. C. and the ſaid T. C. now Plaintiff, and after J. C. died without Iſſue Male and had Iſſue S. Feme of the Defendant, and the ſaid T. C. Plaintiff, as Son and Heir Male of the ſaid N. entered as Brother of J. C. Son of the ſaid N.* and the *Defendant maintained his Bar, and traverſed the Gift in Tail to the ſaid N. and the Iſſue found for the Plaintiff, that they gave* &c. And the beſt Opinion was, that it is *Feoffail*, and that the Replication is not good, becauſe where the *Defendant alleges Seiſin in Fee in N. and that he died ſeiſed*; the *Plaintiff alleges Gift in Tail to this ſame N. and that he died ſeiſed of an Eſtate Tail, and did not traverſe the dying ſeiſed in Fee*; for he cannot die ſeiſed in Fee and die ſeiſed in Tail, and it cannot be intended by this Pleading that he diſcontinued and retook in Fee and died ſeiſed, ſo that the Heir in Tail may be remitted; for tho' he may be remitted, yet N. the Grandfather died ſeiſed in Fee and not in Tail, and therefore the Heir is not confeſs'd nor avoided in Fact nor in Law; and by all he ought to be confeſſed and avoided in Fact or in Law, or traverſed. *For* a Man *ſhall not make Title at large in any Caſe unleſs in Aſſiſe*; Per Cur. Br. Traverſe per &c. pl. 185. cites 5 H. 7. 11. 12.

(Aa) *Dying ſeiſed, Or Meſne Conveyance.*

1. IN Aſſiſe the *Tenant made Bar by a Stranger* and gave *Colour*, the *Plaintiff made Title by the ſame, by whom the Defendant made his Bar*, viz. *that J. S. was ſeiſed and gave in Tail to his Father who infeoffed W. N. who infeoffed the Tenant, upon whom A. B. enter'd and infeoffed the Grandfather of the Plaintiff, whoſe Heir he is in Fee, who died ſeiſed, and the Land deſcended to the Plaintiff*, and ſo he was *in in his Remitter until* by the Defendant diſſeiſed, and *in Truth A. B. never enter'd nor never infeoffed the Grandfather*; and yet it was held clearly, that the Tenant in his Bar to the Title *cannot traverſe the Feoffment of A. B. but* ought to traverſe *the dying ſeiſed of the Grandfather* of the Plaintiff which remitted him; for this binds the Entry of the Tenant, and is the moſt notable Thing in the Title; quod nota. Br. Traverſe per &c. pl. 154. cites 4 E. 6. Cocks v. Green. Br. N. C. pl. 408. cites S. C. —— Heath's Max. 120. cap. 5. cites S. C.

2. Scire Facias upon a *Recognizance* in Chancery, iſſued out of the Petty Bag againſt the Tenants of Yarway; the Sheriff *returned Scire Feci againſt ſeveral, two of whom pleaded in Bar, that Yarway and J. S. were jointly enfeoffed, and ſeiſed in Fee, and ſo ſeiſed the ſaid Yarway died Abſque hoc, that he was ſole ſeiſed at the Time of the Recognizance acknowledged. The Plaintiff* replied, and *confeſſed that Yarway and J. S. were jointly enfeoffed, but that they* being ſo ſeiſed, did *by Bargain and Sale* enroll'd &c. *convey a Moiety* of the Lands *to the ſaid 2 Defendants in Fee, and traverſed that Yarway died ſeiſed Modo & Forma.* Exception was taken to the Traverſe, becauſe when it was ſhewn that Yarway and J. S. had made a Bargain and Sale in Fee, this had ſufficiently confeſſed and avoided the dying ſeiſed, alleged by the Defendants, and then the Plaintiff ought not to traverſe the dying ſeiſed alſo; For tho' the Conuſor had died jointly ſeiſed with J. S. yet by the Bargain and Sale a Moiety of the ſaid Lands was liable to the Execution, notwithſtanding they ſhould have a Reconveyance, or that they had diſſeiſed the Purchaſor, and afterwards Yarway had died ſeiſed, and J. S. had ſurvived; and ſo the dying ſeiſed in this Caſe not material nor traverſable; and of this Opinion were the Court. 2 Saund. 23, 24. 28. Hill. 21 & 22 Car. 2. Jeffreſon v. Morton and Dawſon and al. Mod. 29. Jefferſon v. Dawſon S. C. but S. P. does not appear. —— Lev. 285. S. C. but S. P. does not appear. —— Sid. 436. pl. 1. S. C. ſays, an Exception was taken to the Traverſe in the Replication, which could not well be anſwered, and therefore Leave was prayed to amend inaſmuch as the Money (being an Infant's) might otherwiſe be loſt, and the ſame was granted Niſi Cauſa. —— 2 Saund. 28. ſays, that both Parties conſented to alter the Defendant's Plea, and the Plaintiff to reply what Matter he would, and that ſo it was done.

(B. a) *Feoffment, or Diſſeiſin.*

1. ENTRY in Nature of Aſſiſe, the *Tenant ſaid that J. N. was ſeiſed and infeoffed him, and after diſſeiſed him and enfeoffed the Plaintiff, upon whom he re-enter'd*; the *Demandant ſaid, that J. N. gave it to the Plaintiff by Fine, before which Fine the Tenant had nothing of the Feoffment of J. N.* and no Plea without traverſing the Diſſeiſin or the Feoffment, and ſo only Argument; whereupon he pleaded the Fine as above, by which he was ſeiſed till by the Tenant diſſeiſed *Abſque hoc, that the Tenant* Br. Traverſe, per &c. pl. 86. cites S. C. accordingly, and the Tenant ſaid that J. N. infeoffed him

before the Fine, and ſo to Iſſue.

Tenant any Thing had of the Feoffment of J. N. before the Fine. Br. Traverſe per &c. pl. 294. cites 21 H. 6. 12.

As where *Non-tenure is pleaded by N.* and the *Demandant*

2. The *Feoffment* made *by Diſſeiſor to Perſons unknown* is not traverſable, but the *Diſſeiſin or* the *Pernancy* of the Profits. Br. Traverſe per &c. pl. 203. cites 1 E. 4. 1, 2.

avers that he was ſeiſed and diſſeiſed by N. who infeoffed Perſons unknown, and that he took the Profits; there the Tenant may traverſe the *Diſſeiſin, or* the *taking of the Profits*, but *not the Feoffment* to Perſons unknown; Per Markham and Danby the Ch. Juſtices; and accordingly often elſewhere. Br. Traverſe, per &c. pl. 335. cites 4 E. 4. 30.

3. Treſpaſs upon the 5 R. 2. by J. N. the *Defendant ſaid that R. and W. were ſeiſed in Fee, till* by the Plaintiff diſſeiſed, *and the Defendant as Servant* to them, *by their Command enter'd*; the *Plaintiff ſaid, that T. was ſeiſed and diſſeiſed by the ſaid R. and W. which R. and W. were diſſeiſed by the Plaintiff, upon whom T. re-entered and infeoffed the Plaintiff, and he was ſeiſed till* the Defendant did the Treſpaſs, and the *Defendant maintained his Bar*, Abſque hoc *that the Plaintiff any Thing had of the Feoffment of T. after the Diſſeiſin made by the Plaintiff to the ſaid R. and W.* And the beſt Opinion was that he *ought* not to traverſe the Feoffment; but *maintain what is defeated by the Title*, for otherwiſe it ſhall be a *Departure* from his Bar, and ſo he did gratis after. Br. Traverſe per &c. pl. 239. cites 1 E. 4. 5.

But if he had *pleaded that he himſelf was ſeiſed, till by R. diſſeiſed,*

4. In Treſpaſs the *Defendant ſaid, that he himſelf was ſeiſed and leaſed at Will to R. who infeoffed the Plaintiff, and he entered*; the Plaintiff ſhall not traverſe the *Leaſe at Will*, but the *Feoffment*. Br. Traverſe per &c. pl. 218. cites 5 E. 4. 4.

who infeoffed the Plaintiff, upon whom he entered: now he ſhall traverſe the *Diſſeiſin*; quod nota bene. Br. ibid. —— Heath's Max. 115. cap. 5. cites S. C.

5. In Treſpaſs *of a Cloſe broken*, the *Defendant ſaid that R. was ſeiſed in Fee, and before the Treſpaſs infeoffed the Defendant in Fee*, and gave *Colour by R.* the *Plaintiff ſaid, that the ſaid R. was ſeiſed* &c. *and infeoffed B. in Fee, upon whom R. contrary to his Feoffment entered and diſſeiſed B. and ſo ſeiſed* by Diſſeiſin, *he infeoffed the Defendant as in the Bar, upon whom B. re-enter'd and infeoffed the Plaintiff who was ſeiſed till the Treſpaſs*, and the *Defendant rejoined that R. did not diſſeiſe B. prout* &c. And it was challenged becauſe the Diſſeiſin is not traverſable, but the Feoffment. Per Needham J. the Rejoinder is good; For he may traverſe the Feoffment or the Diſſeiſin at his Pleaſure: And per Danby Ch. J. he may traverſe the Diſſeiſin clearly if he will; for this is material in the Replication. Br. Traverſe per &c. pl. 201. cites 5 E. 4. 136.

6. Entry ſur Diſſeiſin of Diſſeiſin done to himſelf, the *Tenant pleaded Recovery by himſelf in Formedon againſt N. and the Poſſeſſion of the Plaintiff Meſne between the Gift and the Recovery.* Young, *not confeſſing the Gift, nor that the Tenant is Heir* pro Placito, *ſaid, that the Demandant was ſeiſed till by the Tenant diſſeiſed, who infeoff'd N. pending this Writ, and recover'd by Formedon pending this Writ, and ſo the Recovery falſe and void in Law.* And, per Danby, clearly in this Caſe he ſhall not ſay that he Ne infeoffa pas, but ſhall traverſe the *Diſſeiſin*, and not the *Feoffment*. But, per Littleton and Choke, he may traverſe the Feoffment if he will. Br. Traverſe per &c. pl. 224. cites 7 E. 4. 19.

7. In Treſpaſs *of a Cloſe broken*, the *Defendant ſaid*, that the Place was *his Franktenement* &c. The *Plaintiff ſaid, that J. N. was ſeiſed in Fee, and leaſed to the Plaintiff at Will, and was ſo poſſeſs'd till the Defendant ouſted him, and diſſeiſed J. N. and the Plaintiff by Command of J. N. re-enter'd, claiming his firſt Eſtate, and the Treſpaſs meſne between the Diſſeiſin and the Re-entry.* And by ſome he may re-enter without Command. And the

the *Defendant maintain'd his Bar, abſque hoc, that J. N. leaſed Prout* &c. and the Iſſue accepted; for *it is neceſſary to ſhew who made the Leaſe*, as *of Gift in Tail*, or *for Life*, *or* for *Years*, *he ought always to ſhew who was ſeiſed, and gave or leaſed*, and ſo the Gift or Leaſe is traverſable, for it is material. But *in Treſpaſs*, if the *Defendant pleads in Bar*, and the *Plaintiff intitles himſelf, that is to ſay, that J. B. was ſeiſed, and infeoff'd the Plaintiff in Fee, who was ſeiſed till by the* Defendant diſſeiſed; there he ſhall traverſe the *Diſſeiſin, and not the Feoffment*, for the *Feoffment is only a Conveyance there*; for he need not to have alleged the Feoffment in Treſpaſs, and ſo it is not traverſable. *Contrary in Aſſiſe*; for there he ſhall make Title, and there the Feoffment may be traverſed. And all the Court agreed this Caſe of Treſpaſs, and ſo it ſeems, that *every Thing which is material* is traverſable. Br. Traverſe per &c. pl. 238. cites 11 E. 4. 3.

8. In Treſpaſs the *Defendant pleaded his Franktenement.* The *Plaintiff ſaid, that A. Mother of the Defendant, and two others, were ſeiſed in Fee, and infeoff'd the Plaintiff, by which he was ſeiſed till by the Defendant diſſeiſed, upon whom the Plaintiff re-enter'd, and the Treſpaſs meſne.* The *Defendant ſaid, that B. was ſeiſed, and gave to the ſaid D. in Tail, by which the Land deſcended to him as Son and Heir of the Donee, by which he enter'd* &c. Abſque hoc, *that the ſaid A. and the other 2 infeoff'd the Plaintiff*, Prout &c. and the Iſſue found for the Plaintiff. And it was pleaded in Arreſt of Judgment, becauſe the Feoffment was traverſed where the Diſſeiſin ought to have been traverſed. Per Keble: *Where the Plaintiff and Defendant claim by one and the ſame Perſon, the Feoffment ſhall be traverſed, and otherwiſe the Diſſeiſin* ſhall be traverſed, for *that which is not traverſable at the Commencement, may be traverſed by Matter ex poſt facto.* And Daverſe and Brian Ch. J. accordingly; but Hawes and Townſend, Juſtices, contra. And yet Townſend confeſs'd the Ground put by Keeble, and took a *Difference*, becauſe *the one claims by A. only, and the other claims by A. and two others.* Br. Traverſe per &c. pl. 179. cites 4 H. 7. 9.

(C. a) *Feoffment, or Dying Seiſed* &c.

1. WHERE a Man pleads *Feoffment in Fee* and Dying Seiſed, there *the Dying Seiſed ſhall be traverſed, and not the Gift*; for a Man may be ſeiſed in Fee by Diſſeiſin, without Feoffment; quod nota. Br. Traverſe per &c. pl. 12. cites 9 H. 6. 22.

2. In *Treſpaſs* the *Defendant ſaid, that W. was ſeiſed and leaſed at Will to A. and he, as Servant to A. did the Treſpaſs, and gave Colour.* The *Plaintiff ſaid, that S. was ſeiſed, and died ſeiſed, and the Land deſcended to him, and he enter'd, and was ſeiſed till the Defendant did the Treſpaſs.* To which the *Defendant ſaid, that a long Time before S. any thing had, J. and P. were ſeiſed, and infeoff'd W. named in the Bar, who leaſed to the ſaid A. at Will, who infeoff'd the ſaid S. who died ſeiſed, the ſaid W. being within Age, by which W. enter'd for Alienation to his Diſinheritance; and after leaſed again to A. to hold at Will*, as in the Bar. To which the *Plaintiff ſaid, that the ſaid S. was ſeiſed, and died ſeiſed, and the Land deſcended to the Plaintiff, who enter'd* &c. *Abſque hoc, that the ſaid J. and P. infeoff'd the ſaid W. in Life of the ſaid S.* And ill Pleading, per Cur. for 2 Cauſes; one becauſe he held, that J. and P. did not infeoff W. *in the Life of S.* whereas it may be, that they infeoff'd him before S. was born and then the Iſſue is found for the Plaintiff, and yet he ſhall be barr'd; for it ought to be, abſque hoc, that they infeoff'd W. *before the Death of the ſaid S.* Quod nota. Br. Repleader, pl. 5. cites 33 H. 6. 49.

Br. Traverſe, per &c. pl. 26. cites S. C.

3. *Another*

Br. Traverſe, per &c. pl. 26. cites S. C.

3. *Another Cauſe* is, becauſe the *Defendant intitled himſelf by Feoffment of J. and P. made to W. by Leaſe at Will, by W. to A.* And the *Plaintiff intitled himſelf by S. who is a Stranger*; and *traverſed, that J. and P. did not infeoff S. where he does not claim by J. and P.* But contra, if he had claim'd by them; therefore it ſeems if he had ſaid, that the ſaid J. and P. had infeoff'd the ſaid S. who died ſeiſed as above, abſque hoc, that they had infeoff'd W. before the Feoffment made to S. then good. But Quære, if no Feoffment was made by them to S. Br. Repleader, pl. 5. cites 33 H. 6. 49.

4. In Mortdanceſtor, if the *Tenant pleads Matter of Fact*, as *Feoffment* of the ſame Anceſtor, there he ought to traverſe the Dying Seiſed. *Contra* where he pleads *Fine or Recovery*; for there the Heir ſhall be eſtopp'd to ſay that he died ſeiſed, contrary to the Record, *without ſhewing how the Anceſtor came after to the Land in the Aſſiſe*; quod nota. Br. Mortdanceſtor, pl. 52. cites 6 E. 4. 11.

5. Treſpaſs upon 5 R. 2. the *Defendant ſaid, that B. was ſeiſed, and infeoff'd A. who infeoff'd the Defendant*, and gave *Colour* to the Plaintiff. The *Plaintiff ſaid, that R. was ſeiſed before that B. any thing had, and died ſeiſed, and the Land deſcended to the Plaintiff as Heir, and he enter'd*; abſque hoc, *that B. infeoff'd A. Prout* &c. And a good Traverſe by all the Juſtices; for if the Conveyance be falſe, the Bar is not good; and if the Plaintiff in his Replication alleges a Feoffment to B. and Dying Seiſed, the Defendant may traverſe the one or the other. Quære, for it was not denied. Br. Traverſe per &c. pl. 253. cites 18 E. 4. 26.

6. *In Aſſiſe againſt A. who ſays, that the Plaintiff infeoff'd his Father in Fee, who died ſeiſed, and he enter'd as Heir* &c. The *Plaintiff ſays, that he brought Aſſiſe againſt the Father of the ſaid A. and recover'd, and had Execution.* There he ought to traverſe the *Feoffment* made to the Father of the Tenant, and *not the Dying Seiſed*; and yet at the Commencement the Feoffment was not traverſable. Br. Traverſe per &c. pl. 179. cites 4 H. 7. 9.

7. Where *ſeveral Feoffments, with a Dying ſeiſed*, are *alleg'd*, the Dying ſeiſed ſhall be traverſed, and not the meſne Conveyance. Br. Traverſe, per &c. pl. 116. cites 15 H. 7. 2, 3.

(D. a) *Feoffment, or* * *Que Eſtate* &c.

* See Que Eſtate.

1. IF A. brings *Aſſiſe againſt B.* and *B. ſays, that J. N. recover'd againſt A. Que Eſtate B. has, whereas B. is in by Diſſeiſin, A. ſhall ſay, that after the Recovery J. N. infeoff'd him, by which A. was ſeiſed till by B. diſſeiſed*; abſque hoc, *that B. has J. N.'s Eſtate*; per Rogers. But, per Markham, contra; for *A. ſhall ſay, that after the Recovery he enter'd, and infeoff'd A. and, contrary to his own Feoffment, he enter'd and infeoff'd B. the Tenant, upon whom* A. enter'd and was ſeiſed, till by the Tenant diſſeiſed; and ſo confeſs and avoid it, and not traverſe the *Que Eſtate*, and *B. can traverſe nothing but the Feoffment which was made after the Recovery*; quod Billing conceſſit. Br. Traverſe per &c. pl. 226. cites 7 E. 4. 26.

So of a Feoffment pleaded in Aſſiſe, if the Plaintiff claims by another; but if he claims by the ſame Perſon the Feoffment is traverſable. Br. Traverſe per &c. pl. 179. cites 4 H. 7. 9.

2. In Aſſiſe, *Feoffment is pleaded of one J. N. to T. whoſe Eſtate the Tenant has.* The *Que Eſtate is not traverſable, unleſs the Plaintiff claims by the ſame Perſon*, and then the Que Eſtate is traverſable; per Keble. Br. Traverſe per &c. pl. 179 cites 4 H. 7. 9.

3. In

3. In Replevin the Defendant *avow'd* for *Damage feaſant* in his Freehold. The Plaintiff *replied, that* long *before the Defendant had any thing* therein, he *himſelf was ſeiſed of* the Place where &c. *till by A. B. and C. diſſeiſed; againſt whom he brought Aſſiſe, and recover'd; and that the Eſtate of the Plaintiff was meſne between the Aſſiſe and the Recovery* therein. The Defendant rejoin'd, *that before the Plaintiff had any thing* therein, *one G. was ſeiſed, and infeoff'd him, abſque hoc, that A. B. and C. or either of them, had any thing therein at the Time of the Recovery.* Walmſley J. held the Bar not good, becauſe it did not ſay, that A. B. and C. were Tertenants tempore Recuperationis, which ſhould be ſhew'd in every Recovery where it is pleaded. But Windham contra, becauſe the Aſſiſe may be brought againſt others as well as the Tenants, As againſt Diſſeiſors; but other real Actions muſt be againſt the Tertenants only, and therefore need not ſhew they were Tertenants at the Time of the Recovery; and alſo the Traverſe here is well enough. Le. 193. pl. 277. Mich. 31 and 32 Eliz. C. B. Rigden v. Palmer.

4. In *Treſpaſs* the Defendant *pleaded, that A. was ſeiſed, and infeoff'd B. who infeoff'd C. who infeoff'd D. Que Eſtate the Defendant has.* The Plaintiff may traverſe which of them he will. 6 Rep. 24. a. b. by the Reporter in **Read's Caſe**, cites 15 H. 7. 3. and 16 H. 6. Double Plea, 83.

5. In *Treſpaſs* the Defendant *pleaded, that A. was ſeiſed, and infeoff'd the Defendant.* The *Plaintiff ſaid, that J. S. was ſeiſed, and died ſeiſed, and the Land deſcended to him*; and traverſed, *abſque hoc, that A. infeoff'd B.* and adjudg'd a good Traverſe. 6 Rep. 24. b. in **Read's Caſe**, by the Reporter, cites 18 E. 4. 26. and ſays, that ſo is 21 H. 7. 33. and that this is true in all Caſes, where the Defendant does not claim by any of the meſne Conveyances from the Plaintiff himſelf, for then it is traverſable.

(E a) *Leaſe &c. or Meſne Conveyance.*

1. TReſpaſs by the Prior of T. for *entering into a Houſe*, the *Defendant ſaid that the Predeceſſor of the Plaintiff leaſed to J. N. for* 14 *Years, who was poſſeſſed, and granted it to J. N. who made J. his Feme Executrix*, and died, *and A. married J. and* after *A. and J. granted to T. B. to the Uſe of T. T. and* after *T. T. granted* the reſt of the Term *to the Defendant by which he enter'd*, Judgment *ſi Actio*; the *Plaintiff ſaid that he was ſeiſed in Fee in Right of the Houſe till the Defendant did the Treſpaſs*, abſque hoc *that A. and J. granted* &c. *prout* &c. and ſo travers'd the *Meſne Conveyance, and not the Leaſe of his Predeceſſor* under the Common Seal which bound him, and were at Iſſue, and found for the Plaintiff, and this Matter alleg'd in Arreſt of Judgment. And per Fineux, Brian, and Wood Juſtices, it is *Jeofail*; for he *ought to traverſe that which binds him when he makes his Bar from the Plaintiff, or derives his Title by the Plaintiff, and binds him.* Contra Fiſher and Davers; but at the laſt it was agreed in a Manner by all the Court, that it is a Jeofail for the Cauſe aforeſaid. Br. Traverſe per &c. pl. 116. cites 15 H. 7. 2, 3.

Br. Repleader, pl. 24. cites S. C.——Heath's Max. 119. cap. 5. cites S. C.——S. C. cited Winch. 13. in Caſe of Sir George Savil v. Thornton.

2. Note in Treſpaſs, if the *Defendant pleads a Leaſe of the Plaintiff made to J. N. who granted his Eſtate to him*, the Plaintiff cannot traverſe the Grant of the Eſtate but the *Leaſe*; for this is *the Thing which binds him.* Br. Traverſe per &c. pl. 4. cites 27 H. 8. 2, 3.

Heath's Max. 119. cap. 5. cites S. C.——*But* he may *ſay that the Leſſee ſurrendered to him abſque hoc that he granted his Eſtate to the Defendant*, and ſo trick him, tho' it be upon a Lie; quod nota. Br. Traverſe per &c. pl. 4 cites 27 H. 8. 2, 3.——Heath's Max. 121. cites S. C.

3. Replevin; the Defendant *avow'd by* reaſon of a *Copyhold granted to him by C. Biſhop of W.* Lord of the Manor; the *Plaintiff ſaid, that before C. was Biſhop, H. was Biſhop, by whoſe Death the Temporalties came to the Queen, during which the Copyhold eſcheated, and the Queen granted it to the Plaintiff in Fee*, and *travers'd the Grant by C.* The whole Court held, that the Traverſe was good, and that the Grant by the Queen of the Copyhold eſcheated, was good, and that this Traverſe ought to be; for there is not any Confeſſing and Avoiding, becauſe he does not confeſs the Seiſin and Grant by Copy; but if he had confeſs'd that C. had entered and granted it by Copy, then there need not any Traverſe; and it was ruled accordingly. Cro. E. 754. pl. 17. Paſch. 42 Eliz. C. B. Covert's Caſe.

(F a) *Leaſe or Reverſion.*

1. IN *Præcipe* quod reddat, the *Tenant made Default after Default*, and *one prayed to be received by Reverſion, becauſe he leaſed for Life to the Tenant* &c. There the *Reverſion* ſhall be travers'd, and *not the Leaſe*. Br. Traverſe per &c. pl. 364. cites 33 H. 6. 38.

In Treſpaſs, if the *Defendant ſays that J. F. was ſeiſed, and leaſed to F. for Life, and prays Aid of him*, the *Plaintiff ſhall make Title, and ſhall traverſe the Leaſe*.

2. *But upon Aid Prayer*, the *Leaſe* ſhall be travers'd, and *not the Reverſion*; Note the Diverſity. Br. Traverſe per &c. pl. 364. cites 33 H. 6. 38.

Br Traverſe per &c. pl. 316 cites 5 E. 4. 1.

But if the *Defendant pleads that it is the Franktenement of J. F. who leas'd to him* &c. *and prays Aid*, the *Plaintiff ſhall make Title, and ſhall traverſe the Franktenement*, and not the Leaſe, per Heydon. And Brooke ſays it is not much to the Purpoſe. Br. Traverſe per &c. pl. 316. cites 5 E. 4. 1.

Heath's Max. 116. cap. 5. cites S. C.

3. Where the Defendant *in Treſpaſs of Entry into a Cloſe ſays, that J. S. infeoff'd him*, and gives *Colour* to the Plaintiff, and the *Plaintiff ſays that R. was ſeiſed, and leaſed to S. at Will, who infeoff'd the Defendant, and after R. entered and infeoff'd the Plaintiff, abſque hoc that S. any Thing had, unleſs at Will*; this is a good Traverſe, but ſhall not traverſe the Leaſe at Will. Br. Traverſe per &c. pl. 217. cites 5 E. 4. 1.—But in the Time of E. 6. he ought to ſay *abſque hoc that J. S. was ſeiſed in Fee Modo & Forma*, prout &c, Ibid.

(G a) *Matter of Record, or Matter in Fact.*

1. WHERE Matter of *Record and Matter in Fact* are *jointly pleaded together*, as in the *Foreign Attachment in London* of Debt in another's Hand, *ſo that the Matter of Record is not good, but by reaſon of the Matter in Fact*, there the *Matter in Fact* is traverſable, notwithſtanding the Record, As to *ſay that no ſuch Cuſtom*. Br. Traverſe per &c. pl. 276. cites 22 E. 4. 30.

2. *And where Recovery* is *pleaded by Defendant in Aſſiſe or Præcipe* quod reddat, the *Tenant ought to aver that the Tenant was Tenant of the Franktenement at the Time of the Recovery*, and there the *Demandant ſhall have Anſwer to it that he was not Tenant* of the Franktenement at the Time &c. Br. Traverſe per &c. pl. 276. cites 22 E. 4. 30.

3. *And*

3. *And in Formedon*, if the *Tenant pleads a Recovery by Default againſt his Anceſtor in Præcipe* quod reddat, *and avers that he had Aſſets per Deſcent*, as he ought, the *Demandant may ſay Riens per Deſcent*; and ſo *in all* ſuch like *Caſes*, *where the Matter in Fact is material*, as here. *Contra where it is not material*, as of a Que Eſtate &c. Br. Traverſe per &c. pl. 276. cites 22 E. 4. 30

4. Where *Matter in Fact* is *alleg'd by the Defendant*, *As* if the Defendant ſays *that the Plaintiff in Appeal named Heir is a Baſtard*, the *Plaintiff ſhall ſay that Mulier*, *and not Baſtard*. Br. Traverſe per &c. pl. 279. cites 22 E. 4. 39. Heath's Max. 111. cap. 5. cites S. C.

5. Where a *Recovery with ſeveral Meſne Conveyances* are *alleg'd* againſt the Plaintiff, or him by whom he claims, there the Record ſhall be travers'd, and not the Meſne Conveyances. Br. Traverſe per &c. pl. 116. cites 15 H. 7. 2, 3.

(H a) *Que Eſtate, or Confirmation.*

1. AVowry *for* 10 *s.* the *Tenant ſaid that J. late Lord there Que Eſtate the Tenant has in the Seigniory confirmed to D. then Tenant Que Eſtate the Tenant has in the Tenancy, to hold by* 1 *d. pro omnibus Servitiis*, and ſhew'd the Deed &c. And the *Defendant ſaid that the Tenant and his Anceſtors have held of the Defendant and his Anceſtors from ſuch a Time* &c. *by* 10 *s.* &c. abſque hoc *that he had the Eſtate of I.* and the Traverſe was rejected; for he ought to traverſe the *Confirmation, or that J. had nothing in the Seigniory at the Time* &c. *or that D. did not hold of him at the Time* &c. Per Cur. by which he travers'd that J. had nothing in the Seigniory at the Time &c. Br. Traverſe per &c. pl. 376. cites 30 H. 6. 7.

(I a) *Seiſin in Fee, or Conveyance.*

1. MOrtdanceſtor *of the Seiſin in Fee of J. the Anceſtor of the Plaintiff* &c. the *Tenant ſaid that H. Father of the Plaintiff whoſe Heir* &c. *was ſeiſed in Fee, and the Land is deviſable by Cuſtom*, and he *deviſed to A. for Term of Life*, the Remainder *to this J. in Tail*, and the *Remainder in Fee to be ſo'd*, and *that the Tenant for Life, and* the ſaid *J. are dead without Iſſue*, and *conveyed himſelf to the Land by the Sale of the Fee Simple, and ſhew'd the Teſtament* of the Father, Judgment if Aſſiſe &c. And per Cur. in this Caſe the *Plaintiff ſhall not ſay that J. was ſeiſed in Fee, abſque hoc that he had any thing by the Deviſe*, without ſhewing how he came to it after, by reaſon that the *Deviſe binds as a Deed indented*. Br. Titles, pl. 49. cites 35 Aſſ 1.

2. Recordare; *A. was ſeiſed in Tail, and leaſed to B. and C. for* 2 *Years*, and after *A. B. and C. leaſed to F. N. for Term of* 20 *Years rendring Rent*, and *A. died*, and *M. his Son ouſted the Leſſee, before which* Ouſter *nothing Arrear*; and *this was pleaded in Bar of the Avowry, which was that A. B. and C. were ſeiſed in Fee, and all as above*; and a good Bar to the Avowry *without traverſing that A. B. and C. were not ſeiſed in Fee at the Time of the Demiſe*; for if they were ſeiſed of any Eſtate of Franktenement, they may leaſe for Life; for in Aſſiſe if the Tenant ſays that E. was ſeiſed in Fee, and infeoff'd him, and gives Colour, the Plaintiff may ſay that before

So of ſuch Pleading *in Treſpaſs, and then the other Party ſhall take the Traverſe.* Br. Traverſe per &c. pl. 209. cites 2 E. 4. 11.

ſore this he was ſeiſed, and leaſed to E. for Term of Life, who made Feoffment, and he entered for Alienation; and good without traverſing the Seiſin in Fee, Per Littleton and Choke. Br. Traverſe per &c. pl. 209. cites 2 E. 4. 11.

3. In Formedon, the *Tenant ſaid that before the Gift* the *Donee himſelf was ſeiſed, and infeoff'd the Donor in Fee, who gave to the Donee and his Feme, the Baron being within Age, who had Iſſue the Mother of the Demandant*; the *Feme died, the Baron took another Feme, and had Iſſue the Son now Tenant*, Judgment ſi Actio; and the Reaſon of the Bar ſeems to be, that *when the Infant made the Feoffment, and the Feoffee re-gave to him in Tail, he is remitted in Fee* by Reaſon of the Nonage, and ſo confeſs'd and avoided the Gift; for the Entry of the Infant was lawful, by which the *Demandant ſaid that the Donor gave as above, abſque hoc that the Donee infeoff'd the Donor prout* &c. Danby ſaid he ought to *traverſe the Seiſin before the Gift, and not the Feoffment*; but the other Juſtices held the Traverſe good, and Littleton the like. Br. Traverſe per &c. pl. 219. cites 5 E. 4. 5.

4. *In Dum fuit infra ætatem, nothing ſhall be traverſed but the Demiſe*; per Littleton. And by others it was agreed, that the Seiſin may be traverſed, but not *if he had any thing or not*. Br. Traverſe per &c pl. 219. cites 5 E. 4. 5.

5. *In Aſſiſe*, if I *ſay that I leaſed to A. at Will, who infeoff'd the Plaintiff, and I enter'd*; this is ſufficient, and the *Feoffment ſhall not be traverſed*; per Catesby. Br. Traverſe per &c. pl. 219. cites 5 E. 4. 5.

6. In Formedon in Deſcender the *Tenant ſaid, that before the Donors any thing had, he himſelf was ſeiſed in Fee, and infeoff'd the Donors, being within Age in Fee*, by which they were ſeiſed, and gave &c. *and after* the Tenant *within Age re-enter'd, and was ſeiſed in Fee in his Remitter*, & hoc &c. And the *Demandant maintain'd the Gift abſque hoc, that the Tenant infeoff'd the Donors, Prout* &c. And by ſome the Traverſe is not good; for he ought *to traverſe the Seiſin of the Infant*, now Tenant; for the *Feoffment is only a Conveyance*; and if he was diſſeiſed by the Donors, or if they abated and gave, yet the Tenant-Infant may re-enter. And, per Needham and other Juſtices, the Court ſhall not argue nor ſuppoſe other Title than the Tenant himſelf alleges, tho' he was an Infant; and ſo becauſe he alleges Feoffment it has the Force of the Bar, and ſuffices to traverſe it. And yet Danby Ch. J. and others were contra, and that the Seiſin was very material; therefore Quære. Br. Traverſe per &c. pl. 190. cites 5 E. 4. 9.

7. In Treſpaſs the *Defendant ſaid, that M. was ſeiſed in Fee, and leaſed to him for Life*, and gave *Colour* to the Plaintiff; and the *Plaintiff ſaid, that before this, D. was ſeiſed in Fee, and leaſed to E. for Life, and died, and the Reverſion deſcended to A. Feme of the ſaid M. which M. granted the Reverſion to the Defendant for Life*, and the Tenant attorn'd, *and M. died*; and after *A. granted the Reverſion to the Plaintiff*, and E. attorn'd; *and after E. died, and the Plaintiff enter'd, and was ſeiſed till the Treſpaſs*; abſque hoc, *that M. was ſeiſed in Fee, Prout* &c. But, per Choke and Littleton, he ought to traverſe, *abſque hoc, that M. leaſed Modo & Forma.* Quære. But the Grant of M. was void, becauſe he died before his Feme, and before E. Tenant for Life. Br. Traverſe per &c. pl. 233. cites 10 E. 4. 8.

8. In Treſpaſs upon 5 R. 2. the *Defendant ſaid, that the Baron and Feme were ſeiſed in Fee*, and *the Feme died, and after the Baron died, and the Defendant enter'd as Heir of the Baron*, and gave *Colour by the Baron and Feme.* The *Plaintiff ſaid, that before the Baron any thing had, the Feme was ſeiſed in Fee, and married the Baron, who levy'd a Fine to J. S. in Fee, who granted and render'd to the Baron and Feme, and the Heirs of the Feme, and after the Feme died, and the Baron alſo, and the Plaintiff as Heir of the Feme enter'd, and was ſeiſed till* the Defendant ouſted him; *abſque hoc, that the Baron was ſeiſed in Fee Prout &c.* And the beſt Opinion was, that

that the Traverſe is well taken, notwithſtanding the Fine which gave the Right of Baron. Quære. Br. Traverſe per &c. pl. 259. cites 21 E. 4. 17.

9. In Treſpaſs *the Defendant ſaid, that his Father was ſeiſed in Tail of the Gift of N. and died proteſtando ſeiſed* &c. *and he enter'd as Heir* &c. The *Plaintiff ſaid, that the Plaintiff's Father infeoff'd A. in Fee, who leaſed to B. for Life, the Remainder to C. in Fee, whoſe Eſtate the Plaintiff has.* The *Defendant ſaid, that his Father died proteſtando ſeiſed, abſque hoc, that A. leaſed as above.* And the Opinion of the Court was, that it is not a good Traverſe; but *he ought to traverſe the Feoffment made by the Father of the Defendant.* Br. Traverſe per &c. pl. 117. cites 15 H. 7. 11.

But if a Man *in Treſpaſs intitles himſelf by diverſe Feoffments,* as to ſay, *that A. was ſeiſed, and infeoff'd B. who infeoff'd C. who infeoff'd D. whoſe Eſtate the Defendant has,* and gives *Colour* to the Plaintiff *by the firſt Seiſin,* this is not double; and the *Plaintiff may traverſe which of the Feoffments he will,* for now he *conveys by a Stranger*; Per Fineux, & tot. Cur. Br. Traverſe per &c. pl. 117. cites 15 H. 7. 11.——Heath's Max. 119. cap. 5. cites S. C.

But if the *Defendant ſays, that the Plaintiff was ſeiſed, and infeoff'd B. who infeoff'd C. whoſe Eſtate the Defendant has,* now the *Plaintiff cannot traverſe any of the Feoffments but only the firſt,* becauſe he *conveys by the Plaintiff, and deſtroys his Right*; per Fineux. Br. Traverſe per &c. pl. 117. cites 15 H. 7. 11.

10. In Treſpaſs, if the *Defendant ſays, that A. was ſeiſed in Fee, and infeoff'd him, and ſo* he was *ſeiſed till by the Plaintiff diſſeiſed, and he re-enter'd* &c. And the *Plaintiff ſays, that B. infeoff'd him, by which he was ſeiſed till the Defendant did the Treſpaſs.* He ought to ſay, *abſque hoc, that he diſſeiſed the Defendant,* and ſhall not traverſe the Feoffment. Br. Traverſe per &c. pl. 117. cites 15 H. 7. 11.

But if the Defendant *ſays, that A. was ſeiſed, and gave to him in Tail, and ſo was ſeiſed till by the Plaintiff diſſeiſed, and he re-enter'd,* the *Plaintiff may ſay that N. was ſeiſed, and infeoff'd him, and ſo he was ſeiſed till* the Defendant did the Treſpaſs; *abſque hoc, that A. gave in Tail Modo & Forma,* without traverſing the *Diſſeiſin,* which was affirm'd by Fineux and others at the Bar. Br. Traverſe per &c. pl. 117. cites 15 H. 7. 11.——Heath's Max. 120. cap. 5. cites S. C.

11. In Treſpaſs the *Defendant ſays, that T. S. was ſeiſed in Fee, and infeoff'd him,* and gives *Colour*; there if the *Plaintiff ſays, that before this he was ſeiſed of the Manor of D. whereof the Place is Parcel, and held by Copy, and leaſed it to the ſaid T. S. by Copy of Court-Roll, and he infeoff'd the Defendant, upon whom the Plaintiff enter'd,* he need not traverſe the Seiſin of T. S. in Fee; for by his Entry to make Feoffment, and executing of it, he is ſeiſed by Diſſeiſin. Br. Traverſe per &c. pl. 5. cites 27 H. 8. 4.

So if he *ſays, that he leaſed for Years to the ſaid T. S. and he made the Feoffment,* and the Plaintiff enter'd &c. For it is confeſs'd and avoided. Br. Traverſe per &c. pl. 5. cites 27 H. 8. 4.

12. In Treſpaſs the *Defendant ſaid, that J. N. was ſeiſed in Fee, and and leaſed to him for 21 Years,* and gave *Colour.* The *Plaintiff ſaid, that his Father was ſeiſed, and died ſeiſed* &c. *and he enter'd, and was ſeiſed till the Treſpaſs*; abſque hoc, *that the ſaid J. N. any thing had at the Time of the Demiſe,* and an ill Traverſe: But *ſhall ſay, abſque hoc, that J. N. was ſeiſed in Fee, Modo & Forma prout* &c. Br. Traverſe per &c. pl. 372. cites 4 E. 6.

Br. N. C. pl. 407. cites S. C.——D. 112. pl. 48. Hill. 1 & 2 Ph. & M. Boſſe v. Waters, ſeems to be S. C. and ſays the Traverſe was held a Jeofaile, per tot. Cur. and that the Jury ready at the Bar was diſcharged.——And there in the Margin it is ſaid, that the Traverſe ought to have been upon the Seiſin in Fee.——Heath's Max. 117. cites S. C.——S. P. Heath's Max. 116. cap. 5. cites Br. Traverſe 372. and 4 E. 2. [but it ſeems it ſhould be 4 E. 6.]

13. In *Intruſion* brought by the Heir upon a Leaſe made by his Anceſtor, the Tenant traverſed *that the Anceſtor never had any thing in the Land,* Priſt, and this was held a good Plea; and the Demandant maintain'd the Seiſin of his Anceſtor, and his Leaſe alſo; but upon the Seiſin only the Jury ſhall be charged. D. 122. b. pl. 23. Mich. 2 P. & M. in an Anonymous Caſe, cites Trin. 43 E. 3.

See Replication (B) pl. 3. (but in the laſt Line of the Note there, the Reader is deſired to read (does) inſtead of the Word (ſhall) it being miſ-printed.)

14. In *Treſpaſs* the *Defendant pleaded, that J. W. was ſeiſed, and infeoff'd M. and ſo convey'd* a Title *to himſelf.* The Plaintiff *replied, that A. his Anceſtor was ſeiſed, and ſo the Land deſcended to him, abſque hoc, that J. W. was ſeiſed.* Anderſon ſaid, The Seiſin is not traverſable but where it is material, and therefore clearly the Traverſe is not good; and ſo was the Opinion of all the Court clearly Goldſ. 31. pl. 4. Mich. 29 Eliz. Wylgus v. Welche.

6 Rep. 24. Mich. 41 & 42 Eliz. Read's Caſe, S. C. and it was objected, that the Seiſin in Fee was traverſable, and not the Leaſe, becauſe he *alleged a Freehold in a Stranger*; and if in Treſpaſs the Defendant ſays, That the Place where is the Franktenement of A. and he by A.'s Command &c. The Command is not traverſable, if the Plaintiff claims by a Stranger; for the Franktenement being alleged in a Stranger, it ought to be anſwer'd. But it was adjudg'd, that the Traverſe was good, and a great Diverſity between the ſaid Caſes; for in the one Caſe the Pleading is, that at the Time of the Treſpaſs ſuppoſed it was the Franktenement of A. But in the Caſe at Bar the Defendant pleaded, that long Time before the Treſpaſs J. S. was ſeiſed, and ſo ſeiſed demiſed; and this might be true, and that G. diſſeiſed him, and a Deſcent was caſt. So that it is not alleged, that J. S. was ſeiſed in Fee, as in the other Caſe, and then the material Thing to be traverſed is the Leaſe. The Reporter cites ſeveral Books, and ſays it ſeems upon all thoſe Books, that the one or the other, in many Caſes, is traverſable.

15. In *Treſpaſs* &c. the Defendant pleaded, *that J. S. was ſeiſed, and made a Leaſe to him for Years*, and gave Colour to the Plaintiff. The Plaintiff *replied, that after J. S. was ſeiſed, G. the Father of the now Plaintiff was ſeiſed, and died ſeiſed, and that the Lands deſcended to him, abſque hoc, that J. S. made a Leaſe to the Defendant.* The Defendant demurr'd. And adjudg'd for the Plaintiff, becauſe he had ſufficiently confeſs'd and avoided the Seiſin of J. S. and aptly traverſed the Leaſe. Mo. 574. pl. 792. Paſch. 41 Eliz. Rede v. Armiger.

Brownl. 183. Mich. 20 Jac. S. C. but ſeems miſ-printed for 2 Jac. but otherwiſe ſeems a Tranſlation from Yelverton.——

* Cro. J. 44. pl. 11. Mich. 2 Jac. S. C. And Gawdy J. was of Opinion, that the only Thing material was How B. was ſeiſed, and therefore the Iſſue taken was ill. But all the other Juſtices held, that in regard the Seiſin in Fee is eſpecially alleged in E. and the Conveyance of the Reverſion to B. as it ought to be of Neceſſity; (for otherwiſe the Reverſion cannot be convey'd unto him) therefore the Seiſin alleged in her might be well traverſed; and if it be not an Apt Iſſue, yet it is aided by the Statute of 32 H. 8. for it is an Iſſue, altho' it be not an Apt Iſſue; wherefore it was adjudged accordingly for the Avowant.

16. In Replevin the Defendant *avow'd, that* one *E. E. was ſeiſed in Fee* of 3 Acres &c. *and married A. and* that they *had Iſſue B.* That E. E. died, and *A. was Tenant by the Curteſy*; and that *B. the Heir in Reverſion, granted a Rent of 5 l.* out of the ſaid 3 Acres, to the Avowant; [* *and ſhew'd the Death of A.*] The Plaintiff *replied, that E. E. was Tenant in Tail* of the 3 Acres, and married A. and had Iſſue B. who, in the Life of A granted the Rent, [* and died] *abſque hoc, that E. E. was ſeiſed of the 3 Acres in Fee.* Iſſue was join'd, and a Verdict for the Avowant. It was objected, that the Traverſe of the Seiſin in Fee of E. E. was idle, becauſe the Title to the Rent is not derived from her; but that he ought to have traverſed the Seiſin of B. But, per Cur. tho' it be not good, yet, it being after a Verdict, it was help'd by the Statute of Jeofails. Yelv. 54. Mich. 2 Jac. B. R. Pigot v. Pigot.

2 Roll. Rep. 362. Barker v. Blackamore, S. C. ſays, the Defendant pleaded that A. was ſeiſed in Fee, and infeoff'd J. D to the Uſe of B. in Tail, and

17. Treſpaſs. The Defendant pleaded, that A. was ſeiſed in Fee, and made a Gift in *Tail* to B. which *deſcended to 4 Daughters* &c. The Plaintiff *replies, that A.* was ſeiſed in Fee, and *gave* the Lands *to B. and to his Heirs Males*; and the Plaintiff *claims the Intail as Heir Male*, and the Defendant's under the General Tail, *abſque hoc, that A. was ſeiſed in Fee.* Dodderidge J. ſaid, The Seiſin in this Caſe is traverſable. And Ley Ch. J. ſaid, Take away the Seiſin, and then no Gift, and therefore the Seiſin here is traverſable. Haughton and Chamberlain, Juſtices, agreed. The Court reſolved, that either the Seiſin in Fee, or the Gift in Tail, is traverſable. And Dodderidge ſaid, If they both convey from one and the ſame Perſon, then they muſt traverſe the Conveyance; and

and cited 6 Rep. 24. where the Books are cited which warrant the Traverſe of either; and it was adjudged for the Plaintiff. Godb. 427. pl. 493. Trin. 21 Jac. in B. R. Baker v. Blackamore.

claimed under the Entail; the Plaintiff replied that A. was ſeiſed in Fee, and made a Feoffment thereof to him, and he continued ſeiſed till the Defendant did the Treſpaſs, abſque hoc that A. infeoff'd J. D. in Fee; and adjudged ill, becauſe he ought not to traverſe the Conveyance, when the Claim is from ſeveral Perſons; for there the laſt Feoffment or laſt dying ſeiſed is traverſable only; but when both Plaintiff and Defendant claim from one Perſon, the Conveyance may be travers'd——Cro. J. 681. pl. 18. Baker v. Blackman, S. C. adjudged for the Plaintiff, that in this Caſe he might traverſe either the Seiſin in Fee alleg'd in the Bar, or the Gift in Tail.

18. In *Treſpaſs* the Defendant *pleaded, that C. S. was ſeiſed in Fee* of the Land, and that it *was extended on an Outlawry*; *and that he, by the* Sheriff's *Command, enter'd upon a Levari facias* &c. The Plaintiff replies *Proteſtando, that C. S. was not ſeiſed, ſays, that the Maſter and Fellows of* &c. *were ſeiſed in Fee*, and that, *before the Outlawry*, and the Inquiſition thereon, they *demiſed to the Plaintiff, abſque hoc, that the Cloſe*, in which &c. *was contain'd in the Inquiſition.* The Plaintiff had a Verdict. It was moved in Arreſt of Judgment, that the Traverſe was ill, and that the Seiſin in Fee, and not the being compriz'd in the Inquiſition, ought to have been traverſed. But per Cur. the Traverſe is good; for any Part of that which the Defendant makes his Title, is traverſable. Beſides the Seiſin in Fee is not material in this Caſe, becauſe the Juſtification is by Command of the Sheriff, who had Authority by Virtue of the Extent and Levari fac. tho' C. S. never had been ſeiſed. Judgment for the Plaintiff. Hard. 316. Mich. 14 Car. 2. in the Exchequer, Moor v. Pudſey.

19. In Treſpaſs, if the Defendant *alleges a Seiſin in Fee in J. S. and a Demiſe to himſelf*, the Plaintiff may traverſe either the Seiſin in Fee or the Demiſe at his Election. Hard. 317. Mich. 14 Car. 2. in Caſe of Moor v. Pudſey.

20. In *Treſpaſs* S. the Defendant *pleaded that A. was in Fee and leaſed to B.* for 3 Lives who aſſigned to S. who thereupon put his Beaſts into the Common. Plaintiff *replies Abſque hoc, that A. was ſeiſed in Fee when he made the Leaſe. Defendant confeſſed that A. was Tenant for Life and enfeoffed B. but that before A. was ſeiſed, W. R. was ſeiſed and levied a Fine to the Uſe of himſelf the Reverſion to T. R. who enfeoffed the Leſſor of the Plaintiff.* Defendant *rejoins and confeſſes the Fine but ſaid that T. R. died before A. Abſque hoc, that T. R. enfeoffed the Leſſor of the Plaintiff.* The Plaintiff demurred. Windham conceived the Traverſe was moſt proper, and it is not like the Confeſſing that Leſſee for Years enfeoffed, which would be admitting a Fee in him, but not ſo of Tenant for Life; And further the Seiſin of A. is not here ſufficiently confeſſed without a Traverſe; for if A. had Fee, the Under-Leaſes are good, elſe not. And Judgment for the Plaintiff, Niſi. Keb. 374. pl. 73. Mich. 14 Car. 2. B. R. Holden v. Swindall.

In this Caſe Windham ſaid, that if in Treſpaſs the Defendant *pleads that J. S. was ſeiſed in Fee and infeoffed*; and the Plaintiff *replies, that he was ſeiſed in Fee and leaſed to J. S. for Life Abſque hoc, that J. S. was ſeiſed in Fee* it is good; And per Curiam, this nor the Caſe at Bar cannot be pleaded otherwiſe. Keb 374. in Caſe of Holden v. Swindall.

21. In an Action upon the Caſe for a Nuſance in ſtopping *Lights*; upon Demurrer it was ruled per Cur. That if in *Treſpaſs* or Action upon the Caſe, one *declares that J. S. was ſeiſed in Fee and leaſed to him*, and the Defendant *pleads that J. N. was ſeiſed in Fee and leaſed to him* &c. this Seiſin of J. N. ſhall be intended by Diſſeiſin; for the *Defendant ought to have traverſed the Seiſin of J. S. and to ſay that a long Time before, ſuch a one was ſeiſed* &c. Sid. 227. pl. 22. Mich. 16 Car. 2. B. R. Palmer v. Fleſhees.

Raym. 87. S. C. but S. P. does not appear. —— Lev. 122. S. C. but S. P. does not appear.

22. In *Treſpaſs* the *Defendant juſtified by Licence* made *the Day before* the Treſpaſs, *by S. who was ſeiſed*; The Plaintiff demurred becauſe he does *not ſay that S. was ſeiſed at the Time of the Treſpaſs*, and ſo the Plaintiff

tiff can make no Traverſe; ſed Curia contra, the *Plaintiff may traverſe the Licence*, which will bring the Freehold and Seiſin of S. in Iſſue, or he may *take the Licence by Proteſtation, and traverſe the Seiſin of S.* becauſe his Seiſin ſhall be intended to continue, albeit the Pleading had been more formal to ſay Tempore quo, and long time before S. was ſeiſed; but this is not Matter of Subſtance; and Judgment pro Plaintiff Niſi. 2 Keb. 266. pl. 25. Mich. 19 Car. 2. B. R. Thacker v. Cumberbech.

23. In *Replevin* the Defendant *avows for the Moiety of* certain *Rents*, and *ſets forth, that A. B. Anno* 83. *demiſed to one H. rendring Rent, and afterwards aſſigned the Moiety of the Reverſion* &c. The Plaintiff *replies, that the Defendant at the Time of the Diſtreſs was ſeiſed of a Moiety, and M. C. heretofore was, and her Son now is ſeiſed of a Moiety*; The Chief J. ſaid he *ſhould have traverſed the Original Seiſin at the Time of the Leaſe.* Judgment for the Avowant. Comb. 230. Mich. 5 W & M. in B. R. Turner v. Fuller.

(K. a) *Seiſin in Fee, in Tail, or Franktenement.*

1. IN Treſpaſs, The one *intitled himſelf by Special Tail by Gift to his Father and Mother and the Heirs of their Bodies, who had Iſſue the Feme of the Defendant*; the *other ſaid that the Gift was to the Father and Mother, and the Heirs of the Body of the Father, who had Iſſue the Son now Plaintiff by a Second Wife*; And no Plea *without traverſing the Special Tail* in the Bar. Br. Traverſe per &c. pl. 286. cites 9 H. 6. 9.

2. Entry in Nature of Aſſiſe; The *Tenant ſaid that W. was ſeiſed in Fee, and infeoffed him* and gave *Colour* to the Plaintiff, and the *Plaintiff ſaid that W. was ſeiſed in Fee in jure Uxoris, and had Iſſue by her, and the Feme died, and W. was ſeiſed as Tenant by the Curteſy and infeoffed the Tenant*, Abſque hoc, *that W. was ſeiſed in Fee Modo & Forma* &c. and the others e contra; And ſome doubted if he need traverſe or not, therefore quære; but it ſeems the Traverſe is well taken. Br. Traverſe per &c. pl. 375. cites 30 H. 6. 4.

He ought to have traverſed the Seiſin in Fee which was alleged. Poph 113. in Caſe of Holmes v. Gee, Popham and Clench, cited 18 E 9. 4. 3.

3. In Treſpais the *Defendant juſtified the Entering and Cutting of Corn, becauſe C. M. was ſeiſed of the Place in Fee, and ſowed the Land, and the Defendant as Servant to him* &c. *entered and cut it* &c. The *Plaintiff ſaid that the Land was his Franktenement at the Time* &c. *Abſque hoc, that it was the Franktenement of C. M.* And per tot. Cur. he ought to traverſe the Seiſin in Fee, quod nota; For the *Franktenement of C. M. was not pleaded in the Bar, but his Seiſin in Fee.* Br. Traverſe per &c. pl. 254. cites 18 E. 4. 3.

Br. Replication. pl. 45. cites S. C. —— Heath's Max. 117. cap 5. cites S. C.

4. [In Treſpaſs,] The *Defendant alleged that his Father was ſeiſed in Fee*, and the *Plaintiff ſaid that J. S. was ſeiſed in Fee and leaſed to him for 9 Years, and after he held over his Term, and the Leſſor entered and gave to the Plaintiff in Tail* &c. And a good Plea without traverſing the Seiſin in Fee in the Father of the Defendant; for when he holds over his Term it is a Doubt in the Law, whether he has Seiſin in Fee thereby. Br. Traverſe per &c. pl. 277. cites 22 E. 4. 38.

5. *Avowry* was made *for a Rent Charge in Fee, ſuppoſing the Grantor ſeiſed* of the Place where &c. *in his Demeſne as of Fee at the Time of the Grant.* The *Plaintiff ſhewed that the Grantor was ſeiſed of an Eſtate Tail at the Time* of the Grant, *and* ſhewed *of whoſe Gift the Tail was, and that* the *Grantor was dead, and* that *he was his Iſſue and Heir of his Body* &c. This is not good without traverſing the Fee-Simple, by the Opinion of Mounſon,

Mounſon, Harper, and Dyer; but Manwood e contra. D. 280. b. in pl. 16. cites Mich. 14 & 15 Eliz. Anon.

6. *Avowry* for *Damage Feaſant in W.* &c. The Plaintiff *replied* that he *is ſeiſed in Fee of B. which is the Cloſe adjoining, and the Defendant* and thoſe whoſe Eſtate &c. Time out of Mind have *uſed to incloſe againſt B.* The Defendant *rejoin'd that B. was the Franktenement of G. and traverſed the Seiſin of the Plaintiff in Fee* at the Time when &c. the Plaintiff demurred. The Court was of Opinion that the *preciſe Eſtate* which the Plaintiff had in B. was not traverſable, if the Plaintiff had ſaid only in general that he was ſeiſed, without ſaying of what Eſtate, and had only ſaid it was his Franktenement; and then the other Side muſt have ſaid that he had nothing in it; but now this Special Traverſe of the Eſtate in Fee is good, becauſe the Plaintiff had given Advantage to do ſo, whereas otherwiſe it had been ill; For if he had but an Eſtate for Years, or at Will or Sufferance, or Common, or Licence only to put in his Beaſts pro hac vice, it ſuffices; contra if but a Treſpaſſer. But Windham doubted. D. 365. pl. 32. Mich. 21 & 22 Eliz. Sir Fra. Leake's Caſe.

S.P. by Hobart Ch. J. Hob. 105. at the End of the Caſe of Digby v. Fitzherbert. — For, as it was held Yelv. 195. in Caſe of Tatem v. Perient, every Matter of Fact alleged by the Plaintiff may be traverſed, and Defendant by way of Traverſe may anſwer the Matter alleged in the ſame Words.

7. In *Waſte* the Plaintiff *ſet forth that he was ſeiſed in Fee, and made a Leaſe to the Defendant for Years* who committed Waſte; the Defendant *pleaded that R. H. was ſeiſed in Fee, who conveyed to the Defendant in Fee, who re-granted to the Plaintiff and his Heirs ſo long as R. H. ſhould have Iſſue of his Body, whereupon the Plaintiff entered and made the Leaſe to the Defendant prout* &c. *and that R. H. died at D. without Iſſue of his Body*; The Plaintiff had Judgment in C. B. and it was affirmed in B. R. for the Seiſin in Fee ſet forth by the Plaintiff as in himſelf ſhall be intended an abſolute Fee ſince the Defendant does not diſcloſe any Eſtate but a determinable Fee in the Plaintiff which from differs that alleged by the Plaintiff, and ſo not good without a Traverſe. Yelv. 140. Mich. 6 Jac. B. R. Ewer v. Moile.

Cro. E. 771. Ewer v. Moyle is a D. P. — Mo. 665. pl. 908. is a D. P. — Lane 83. is a D. P.

(L. a) *Seiſin, Or Tenure* &c.

See Avowry.

1. IN *Reſcous* the Seiſin is not traverſable; for a Man *may diſtrain who never was ſeiſed.* Br. Seiſin pl. 29. cites 5 E. 4. 62.

S. P. but the Tenure is. Keilw. 31. b. pl. 3. Mich. 13 H. 7. Anon. per Fineux and Rede Juſtices.

2. *Contra in Replevin*; for there the Seiſin is traverſable. Br. Seiſin, pl. 29. cites 5 E. 4. 62.

In Replevin the Defendant made *Conuſance as Bailiff* to the Earl of B. *and ſhew'd that the Lands were Parcel of ſuch a Chantry, which came to E. 6. by the Stat. of 1 Ed 6. and pleaded the Saving in the Statute, by which the Rights of others were ſaved, and ſhewed that ſo much Rent was behind* &c. The Plaintiff *replied that the Lands were out of the Fee and Seigniory of the Earl* &c. This was ruled to be no Plea, becauſe he confeſs'd ſo much by the Avowry; but this is for Rent reſerved by the Saving of the Act of Parliament, and is a Rent-ſeck diſtrainable for the Privilege which was before; but he may traverſe the Tenure, (viz.) *Abſque hoc, that at the Time of the making the Statute, or ever after the Lands were holden of the ſaid Earl.* Winch. 77. Paſch. 22 Jac. Stephens v. Randal.

3. *But in Ceſſavit* the Ceſſer ſhall be traverſed and not the Seiſin. Br. Seiſin, pl. 29. cites 5 E. 4. 62.

In Ceſſavit the Tenure is traverſable and not the Seiſin per Fineux and Rede J. Keilw. 31. b. pl. 3. Mich. 13 H. 7. Anon.

4. *And in Writ of Eſcheat* the Tenure ſhall be travers'd, but not the Seiſin. Br. Seiſin, pl. 29. cites 5 E. 4. 62.

If in *Ward* or Raviſhment of Ward, the Defendant pleads Feoffment of the Father of the Infant, he ſhall ſay Abſque hoc that he died his Tenant, and not that he did not die ſeiſed. Br. Traverſe per &c. pl. 49. cites 14 H. 4. 16.—Br. Ejectione &c. pl. 3. cites 13 H. 4. 17. S. C.

5. *So in Right of Ward, and* in Writ of * *Raviſhment* of Ward. Br. Seiſin, pl. 29. cites 5 E. 4. 62.

The Poſſeſſion, nor the Seiſin in Raviſhment of Ward, nor in Ejectment of Ward, is not traverſable. Br. Traverſe per &c. pl. 50. cites 14 H. 4. 24. Per Thirn and Hill.

Per Catesby, if *Lord and Tenant* are, and the *Tenant is diſſeiſed, and dies*, and the Lord brings Writ of Ward, ſuppoſing that the Tenant died in his Homage, this *dying ſeiſed is not traverſable*; for the Lord ſhall have the Ward, tho' he does not die ſeiſed, becauſe he died in his Homage But Brooke ſays, See the Writ and the Count thereof among the Entries; for it ſeems that the *Lord ſhall ſay that he died in his Homage, and not that he died ſeiſed of the Land.* And in Writ of Ward by the Lord of the Ward of the Heir of the Meſne, ſuppoſing that the Meſne died ſeiſed in Fee, this is not traverſable. But ſee that the Entry in Writ of Ward, and in Raviſhment of Ward, is no more but that he died in his Homage. Br. Traverſe per &c. pl. 255. cites 18 E. 4. 5.

* S. P. Per Fineux and Rede J. Keilw. 31. b. pl. 3. Mich. 13 H. 7. Anon.

S. P. *But* in *Avowry*, the which is in the Poſſeſſion, the *Seiſin* is traverſable, and *not the Tenure*; for the Avowant ſhall have Judgment there to have Return for the Services. *And ſo* the *Difference* has always been taken between Action of *Treſpaſs and Avowry.* Keilw. 31. b. pl. 3. Mich. 13 H. 7 Anon. Per Fineux and Rede J.

6. *So in Treſpaſs* the Tenure ſhall be travers'd, and not the Seiſin. Br. Seiſin, pl. 29. cites 5 E. 4. 62.

As in Replevin the Defendant avow'd, *becauſe the Plaintiff held of him one Acre by Homage, Fealty, and Eſcuage, and 2 s. Rent*, and *alleged Seiſin by the Hands of the Plaintiff as his very Tenant* &c. and *for 2 s. Arrear* at Eaſter he avow'd. Vaviſor ſaid he ought not to avow; for we *hold this Acre by Fealty and 2 d. of which Services* &c. *abſque hoc that we hold* of you *by Homage, Fealty, and Eſcuage, and 2 s. Rent, Modo & Forma* &c. Per Huſſey, You ought to traverſe the Seiſin, and not the Tenure, as here. And Per Brian Ch. J. He ſhall traverſe the *Seiſin*; for *the Eſcuage makes the Service of Chivalry, and the Defendant has alleg'd Seiſin in the other Service, and not in the Eſcuage*; and therefore he ſhall traverſe the Seiſin of them, viz. of the 2 s. and of the Homage; for all this may be Socage; and therefore he ſhall traverſe the Seiſin of that which makes the Socage Tenure, but not the Service of that which makes the Service of Chivalry. Br. Avowry, pl. 104. cites 20 E. 4. 16.

7. *Where the Plaintiff confeſſes the ſame Tenure that is in the Avowry, and of the ſame Nature, but he holds by leſs Rent*, there the *Plaintiff ſhall anſwer to the Seiſin.* * *But if* the *Defendant avows for Service of Chivalry, and the Plaintiff ſays that he holds in Socage*, there he ſhall traverſe the Tenure, and not the Seiſin; Per Nele J. and Brian Ch. J. agreed it to be a good Diverſity. Br. Avowry, pl. 104. cites 20 E. 4. 16.

And per Huſſey, in Avowry *for Tenure by 10 d. and alleging Seiſin* &c. the *Plaintiff may ſay that he holds of him by a Hawk, abſque hoc that he holds of him by 10 d. and ſhall not anſwer to the Seiſin*; quod Brian conceſſit. Br. Avowry, pl. 104. cites 20 E. 4. 16.

* S. P. Per Fineux and Rede J. *And* per Rede J. the Tenure is traverſable, *tho' they do not vary in the Tenure*, in ſome Caſes in Avowry; As if the Avowant *ſhews the Commencement* of his Tenure, and he ſhews before the Statute of &c. and ſince Time of Memory, and ſhews when his Anceſtor was ſeiſed of the ſame Lands where the taking &c. and infeoff'd &c. to hold of him by Fealty and certain Rent payable &c. and for ſo much &c. In this Caſe the Tenure is traverſable, and not the Seiſin. Kelw. 31. b. pl. 3. Mich. 13 H. 7. Anon.

9 Rep. 35. a. in Bucknal's Caſe, it is obſerved by the Reporter, that where it is ſaid that when the Lord varies in the Nature and Quality of the Services, that the Tenure is traverſable, this is true when the Tenant confeſſes the Tenure in Part, but he cannot traverſe all the Tenure; as if the Defendant in Replevin avows upon the Plaintiff for Rent and Services, as upon his very Tenant, the Plaintiff cannot ſay that he holds the ſame Land of a Stranger, abſque hoc that he holds of the Avowant; but he muſt diſclaim or plead Hors de ſon Fee; and ſays that with this agrees 10 H. 6 6. b. and 7. a. 35 H. 6. Tit. Avowry 28. 37 H. 6 25. a. 11 H. 4 11. 9 E. 2. Avowry 222. 15 E. 2. Avowry 214.

S. P. Mar. 175. Hill. 17 Car. C. B. in Caſe of **Layton v. Grange**, by Banks Ch. J. that where the Lord and Tenant differ in the Services, the Traverſe ſhall be of the Tenure and not of the Seiſin; but where they agree in the Services the Seiſin may be travers'd; and cites 21 E. 4. 64. and 84. 20 E. 4. 17. 22 Aſſ. 68. and 9 Rep. 33. Bucknall's Caſe.

8. In *Aſſiſe of Rent*, the *Tenure* is traverſable, and *not the Seiſin*; Per Fineux and Rede J. Kelw. 31. b. pl. 3. Mich. 13 H. 7. Anon.

9. In Replevin the Defendant *avow'd*, for *that the Plaintiff held of him one Acre of Land in the Place where* &c. *by Fealty, and 16 s. Rent payable at two Feaſts*; the Plaintiff *replied* that *he held* of the Avowant *the ſame Acre, and two more by Fealty, and 16 s. Rent payable at one Day, abſque hoc*

hoc that he held the ſaid Acre by the Services payable at 2 Days, it was objected that the Plaintiff ought not to traverſe the Tenure. But Walmſley contra; for if he ſhould traverſe the Seiſin, that would be a Confeſſion of the Tenure, quod Periam conceſſit; and ſaid that the Difference commonly taken in the Books is, that *where the Parties agree in the Tenure*, there *the Seiſin is traverſable*, *Et Vice verſa*; and he conceived that the Payment at two Days alters the Tenure. Godb. 24. pl. 34. Trin. 26 Eliz. C. B. Throgmorton v. Terringham.

(Ma) *Seiſin Sole, or Joint.*

1. IN *Raviſhment of Ward*, the *Plaintiff claimed the Heir as Heir of H. who died ſeiſed* &c. and the *Defendant ſaid that A was ſeiſed in Fee before that H. any thing had, and took H. to Baron, and had Iſſue the Infant, abſque hoc that H. was ſole ſeiſed at the Time of his Death* &c. and the others econtra; and the Plea held good. Br. Traverſe per &c. pl. 142. cites 37 H. 6. 31. In Raviſhment of Ward the *Defendant ſaid that the Anceſtor and J. N. were jointly ſeiſed, and J. N. ſurvived*; this is ſufficient without traverſing the ſole Seiſin; for the *Writ and Declaration is only Suppoſal*. Br. Confeſs and Avoid, pl. 61. cites 1 E. 4. 9. and 2 E. 4. 28, 29. accordingly.

But in Raviſhment of Ward by Executors, who counted that A. was ſeiſed in Fee, and held of their Teſtator in Chivalry &c. and died, his Heir within Age, by which the Lord ſeiſed him and died, and the Executors Plaintiffs were poſſeſs'd, and the Defendant raviſh'd him; the *Defendant ſaid that the Father of the Infant was only ſeiſed in Right of J. his Wife now Defendant, and the Father died, and ſhe ſurvived and ſeiſed the Infant her own Son* &c. And Per Cur. This is no Plea, without traverſing Abſque hoc that the Father died ſeiſed in Fee prout &c. Br. Traverſe per &c. pl. 255. cites 18 E. 4. 5.

2. In Treſpaſs, if *Sole dying ſeiſed* be *pleaded in Bar, Title, or Replication* &c. *and avoided by Joint Eſtate in him and in another who ſurviv'd*, there he ſhall traverſe the Sole dying ſeiſed; for Bar, Title, Replication, and ſuch Pleadings, are *Matter in Fact*. Br. Confeſs and Avoid, pl. 61. cites 1 E. 4. 9. Br. Brief, pl. 339. cites S. C.—Br. Traverſe per &c. pl. 205. cites S. C.——

S. P. Ibid. pl. 213. cites 2 E. 4. 28, 29.

3. *But* where ſuch dying ſeiſed is *alleg'd in Ayel, Beſayel, and Mortdanceſtor* &c. there *it is ſufficient to plead the Jointure in him and another, and that the other ſurviv'd*; and well without Traverſe; for *Writ and Declaration is not but Suppoſal*; quod nota by both Courts of B. R. and C. B. Br. Confeſs and Avoid, pl. 61. cites 1 E. 4. 9. Br. Brief, pl. 339. cites S. C.—Br. Traverſe per &c. pl. 205. cites S. C——

S. P. Ibid. pl. 213. cites 2 E. 4. 28, 29——S. P. Cro. E. 795. pl. 41. in Caſe of Cowper v. Temple.

4. Where a Man *pleads Jointenancy in Aſſiſe, or Præcipe* quod reddat, *or Seiſin in Jure Uxoris*, Judgment of the Writ; this is ſufficient *without affirming Seiſin in Fact, or traverſing the ſole Seiſin*, where the Seiſin is in Jure Uxoris; for the Writ is only Suppoſal, but Title is Matter in Fact, therefore otherwiſe it ſhall be there. Br. Traverſe per &c. pl. 237. cites 10 E. 4. 16.

5. *In Dower*, if the *Tenant alleges Jointenancy in the Baron, and in J. J. who ſurvived*, the *Feme ſhall ſay that he was ſole ſeiſed*, abſque hoc *that they were jointly ſeiſed*. Br. Traverſe per &c. pl. 279. cites 22 E. 4. 39. Heath's Max. 111. cap 5. cites S. C.

6. Replevin; the Defendant made *Cognizance as Bailiff to Sir Anthony Cook for Damage feaſant in his Freehold*; the *Plaintiff ſaid he held* the Land *in Coparcenary with the ſaid Sir* Anthony, as Coheirs to Sir Edw. Belknap: And Harper and Weſton thought it not good without a Traverſe

verſe of the ſole Freehold of the ſaid Sir Anthony, but Welſh and Dyer e contra; and at length Iſſue was joined upon the Coparcenary, and not whether the Intire was the Coparcenary of Sir A. which is only Suppoſal as a Declaration; and this Plea of Coparcenary is only in Abatement of the Avowry in Effect. D. 280. b. pl. 15. Mich. 10 & 11 Eliz. Sir Ant. Cooke's Caſe.

7. In Replevin the Defendant *avow'd, for that a Copyhold was granted to the Defendant and B. C. D. and E. and that C. D. and E. died,* and afterwards B. died, whereby *the Defendant was in by Survivorſhip, and ſo is ſole ſeiſed, and took the Cattle Damage feaſant*; the Plaintiff *confeſs'd the Grant, and that C. D. and E. died, and that B. and the Defendant ſurvived; but* ſays *that B. afterwards ſurrendered his Part to a Stranger, who ſurrendered to the Plaintiff, abſque hoc that the Defendant was ſole ſeiſed at the Time* of the taking. It was objected that the ſole Seiſin was not traverſable, but the Survivorſhip only; and that the Jointenancy and Survivorſhip are confeſs'd and avoided, and ſo the Traverſe is double. But per tot. Cur. the Traverſe is good; for the ſole Seiſin being alleg'd by the Defendant by Way of Bar preciſely and materially, it ought to be travers'd. Cro. E. 795. pl. 41. Mich. 42 and 43 Eliz. C. B. Cowper v. Temple.

8. In *Treſpaſs* brought *by M. Widow* &c. the Defendant *pleaded that before the Treſpaſs B. her Husband was ſeiſed in Fee, and ſo ſeiſed died, whereby the Lands deſcended to C. his Son and Heir, who demiſed it to the Defendant,* by Virtue whereof he entered; the Plaintiff *replied that before C. any thing had &c. A. his Grandfather was ſeiſed in Fee; and in Conſideration of a Marriage between B. and M.* the Plaintiff, *he made a Feoffment to them and to the Heirs of B. on the Body of M.* to be begotten, *Remainder to B.* in Fee, *abſque hoc that B. died ſeiſed in Fee Modo & Forma prout* &c. Upon Demurrer it was adjudged for the Plaintiff, becauſe no dying ſeiſed is pleaded ſo as it might be travers'd, but with a Sic Seiſitus obiit. And the only Matter traverſable here is the Seiſin in Fee Modo & Forma; for the Replication has confeſs'd a Joint-Seiſin of B. and M. and to the Heirs of the Body of B. with a Fee-ſimple in B. and that is good with the Traverſe. Hutt. 123. Trin. 9 Car. Edwards v. Laurence.

Freem. Rep. 202. pl. 205. S C. ſays, it was agreed that when a Dying Seiſed is *alleged generally, it ſhall be intended a ſole Seiſin.* And ſays, it was argued,

9. In *Treſpaſs* for taking his Horſe, the Defendant *juſtified* that he was ſeiſed of ſuch Lands, *and intitles himſelf to an Heriot*; the Plaintiff *replies that J. S. was jointly ſeiſed with the Defendant,* & hoc paratus eſt Verificare. The Plaintiff demurr'd generally, becauſe the Plaintiff ſhould have travers'd the ſole Seiſin. It was anſwered that he need not traverſe the ſole Seiſin, becauſe the Matter alleg'd by him avoids the Bar without a Traverſe. The Chief J. held the Traverſe of the ſole Seiſin neceſſary, becauſe it is iſſuable; and the other Juſtices (abſente Ellis) were of the ſame Opinion; and gave Judgment for the Defendant. 2 Mod. 60. Mich. 27 Car. 2. C. B. Snow v. Wiſeman.

that the Plaintiff ought to have traverſed the Sole Seiſin, becauſe otherwiſe there are only 2 Affirmatives, and yet no Confeſſing nor Avoiding neither; and 2 Affirmatives cannot make any Iſſue And he cited 22 H. 6. 23. 1 Bulſt. 48. 5 H. 7. 10, 11. And that there was a great Difference between Jointenancy pleaded in the Bar, where a Sole Seiſin is alleged in a Count or Declaration, and when it is in the Replication, when a Sole Seiſin is alleged in the Bar; but the Count is but as ſuppoſal, and ſo need not be traverſed; as the Bar muſt, where it is contradicted, becauſe the Bar muſt be more certainly and poſitively alleged, and cited 1 Ed. 4. 9. Cro. Trav. 279. Yelv. 140, 141. and 3[Cro. 230.

6 Mod. 158. S. C. and Holt Ch. J. for the alleging himſelf to be Tenant in Common with him, is not a Con-

10. In Replevin for taking his Cattle, the Defendant made *Conuſance, that A. was ſeiſed of the Place where* &c. *in Fee, and* that *by his Command he took the Cattle Damage feaſant.* The Plaintiff *replied, that he was ſeiſed of one 3d Part, and put in his Cattle, abſque hoc, that A. was Sole ſeiſed.* Upon Demurrer the Plaintiff had Judgment; for the Defendant made Conuſance that his Maſter was ſeiſed, which muſt neceſſarily be intended ſole ſeiſed; and whatever is neceſſarily intended, or implied, is traverſable, as well as if it were expreſs'd; therefore tho' the Defendant alleged

alleged a Seiſin in Fee generally only, yet that being intended a ſole Seiſin, the Plaintiff may traverſe the ſole Seiſin; and ſince the Plaintiff makes himſelf Tenant in Common with the Defendant, it had not been enough to ſay, that he is Tenant in Common with the Defendant, without traverſing his ſole Seiſin, or that he was ſeiſed Modo & Forma. Salk. 629. pl. 6. Paſch. 3 Annæ, B. R. Gilbert v. Parker.

ſeſſion and an Avoidance. And whereas the Caſe of D. 2 280. [above] had been objected, he

ſaid, 1ſt, that the Court were divided upon it. And 2dly, there may be a Difference between Coparceners and Jointenants, and Tenants in Common; for the two firſt are ſeiſed, per My & per Tout; but the laſt has a ſeveral Seiſin; and here, to introduce his Traverſe, he muſt make himſelf ſome Title, to enable him to controvert with the Defendant.

(N. a) *Seiſin in General.*

1. IT was held, that if a Man brings Writ of Right, and counts upon Seiſin of his Anceſtor, or upon his own Seiſin, this Seiſin is not traverſable; but he may tender the Half-Mark to inquire of the Seiſin. But if ſuch Recovery by Writ of Right be pleaded in Bar in another Action, the Demandant may traverſe the Seiſin by Way of Falſifying; and note, that at this Day the *Seiſin in every Action is traverſable by the Statute of new Limitations.* Br. Traverſe per &c. pl. 338. cites 10 E. 4. 9.

2. A Writ of *Entry, in Nature of an Aſſiſe*, was brought againſt A. who *pleaded, in Abatement* of the *Writ, that before the Seiſin and Diſſeiſin* ſuppoſed, *E. was ſeiſed in Fee* of this Land, *and* being *ſo ſeiſed, leaſed* the Land *to him and his Wife for their Lives, and that his ſaid Wife is in full Life* at Dale, and is *not named in the Writ.* The Plaintiff *replies, that long after the Seiſin of E.* of the Lands aforeſaid, *he was ſeiſed in Fee* of the ſaid Lands, *and leaſed them to E. for Life; and that E.* being *ſo ſeiſed, made the ſaid Leaſe* for Lives *to A. and his Wife, and that he enter'd for the Forfeiture, and was ſeiſed till A. enter'd and ouſted* him. This is a good Replication, without traverſing the Seiſin in Fee of E. for that was confeſs'd and avoided before; for when E. made a Leaſe for Life to the Husband and Wife, he gain'd a wrongful Fee to himſelf by this Leaſe; which Fee is deſtroy'd by the Entry of the Demandant for the Forfeiture, as is alſo the Jointenancy between A. and his Wife. Jenk. 105. pl. 1.

3. Where Seiſin is *materially alleged in a Real Action*, in a Bar, Replication, or Title, it ought to be traverſed; and the *Confeſſion and Avoidance of joint Seiſin and Survivorſhip will not ſerve*; for the Allegation of Seiſin is poſitive, and is to be underſtood ſole Seiſin. Jenk. 117. pl. 34.

But where the Seiſin is alleged *by way of Suppoſition*, as in a Writ of

of *Ayel or Mortdanceſtor*, where the Dying Seiſed of the Anceſtor is alleged by the Words *& quod cum* in the Count; there a Confeſſion and Avoidance will ſerve, for the Reaſon aforeſaid; and ſo if, in the Writ of Ayel, the Seiſin is alleged in the Ayel ut dicitur. In Mortdanceſter the Writ is for the Jury to enquire whether the Anceſtor of the Demandant died ſeiſed. Jenk. 117. pl. 34.

4. In Replevin &c. the Defendant *avow'd* the Taking &c. Damage feaſant, ſetting forth, that *one J. was ſeiſed in Fee* &c. *and demiſed* the Land *to him for* 21 *Years* &c. The Plaintiff *replied, that before J. was ſeiſed, King H.* 8. *was ſeiſed in Fee* &c. *and made a Grant thereof, by Copy of Court-Roll in Fee.* It was objected, that the Plaintiff ſhould have traverſed the Seiſin in Fee in J. who might come to the Land by a good Title of Puiſne Time Wray ſaid, there is no Queſtion but where the Defendant alleges a Seiſin in one from whom he claims, there the Plaintiff cannot allege a Seiſin in another from whom he claims before the

2 Le. 80. pl. 107. Herring v. Baldock, S. C. and the Demurrer was, becauſe by that Bar, the *Leaſe ſet forth in the Avowry was*

not anſwer'd; for that the Plaintiff in the Avowry ought to have concluded thus, (viz.) And ſo he was ſeiſed by the Cuſtom till the Avowant, Prætextu of the ſaid Leaſe for Years, enter'd; and ſo it was adjudged.——3 Le. 94. pl. 186. S. C. in the ſame Words.

Seiſin of &c. without traverſing, confeſſing, and avoiding the Seiſin alleged by the Defendant. And Judgment was given for the Avowant. Cro. E. 30. Trin. 26 Eliz. B. R. Herring v. Blucklow.

(O. a) *Title, or Intruſion.*

Heath's Max. 113. cap. 5. cites S. C.

1. DEtinue of *a Box of Charters, bail'd by T. to the Defendant to deliver to the Plaintiff.* The *Defendant ſaid, that they concern'd the Manor of B. whereof he himſelf is ſeiſed, and was poſſeſſed of the* Box of Charters *till the ſaid T. took them, and after he bail'd them to the Defendant, as in the Declaration*; by which he retain'd them, as lawfully he might. The *Plaintiff ſaid, that before that the Defendant any thing had, R. was ſeiſed of the Manor, and poſſeſſed of the Charters, and gave them to the ſaid T. who deliver'd them to the Defendant, and after R. died ſeiſed, and the Defendant intruded.* And the *Defendant rejoin'd, and maintain'd the Bar, abſque hoc, that he intruded* after the Death of R. prout &c. And, per Cur. this is not traverſable; for the Subſtance is the Title of R. which ought to be traverſed. Br. Traverſe per &c. pl. 196. cites 5 E. 4. 85.

(P. a) *Neceſſary* in what Caſes.

Every Bar ought to be anſwer'd by Confeſſion and Avoidance, or Traverſe, unleſs in Special Caſes, (*or* by *Denial* thereof may be added; for this is commonly ſaid to be Part of this Rule.) 2 Lutw. 1625. Trin. 1 Annæ, in the Appendix, by the Reporter in the Caſe of Walters v. Hodges.

1. TO all *Bars* that are *pleaded in the Affirmative*, the *Plaintiff*, in his Replication, *ought* either *to traverſe the Bar, or confeſs and avoid* the ſame. Brown's Anal. 10.

2. In *Treſpaſs* the *Defendant ſaid, that the Place is his Franktenement* &c. The *Plaintiff ſaid, that J. P. was ſeiſed in Fee, and infeoff'd him, by which he was ſeiſed till the Defendant did the Treſpaſs; and he re-enter'd, and brought the Action.* The *Defendant ſaid, that N. was ſeiſed, and died ſeiſed, and his Heir enter'd, and died without Iſſue; and the Defendant as Heir enter'd, and ſhew'd How Heir* &c. *and of ſuch Eſtate he was ſeiſed at the Time of the Treſpaſs.* And the Opinion was, that it is no Plea; for he has not traverſed the Replication, nor confeſs'd and avoided it; for it may be, that the Defendant diſſeiſed the Plaintiff, and infeoff'd N. who died ſeiſed, and to whom the Defendant is Heir, and he ſhall not take Advantage of this Deſcent. Br. Replication, pl. 18. cites 7 H. 6. 31.

As in Diſceit, becauſe the *Defendant ſued the Plaintiff in Debt in the Name of M. without his Aſſent*, the Defendant *ſaid, that he retain'd him at B.* &c. *by which he ſued him with Aſſent of M. without traverſe*, and well. Br. ibid.

3. Where the *Plaintiff alleges a Negative*, the Defendant may anſwer in the Affirmative without Traverſe. Br. Traverſe per &c. pl. 63. cites 7 H. 6. 43.

4. In

4. In *Treſpaſs* the *Defendant ſaid, that he and A. did the Treſpaſs, to which A. the Plaintiff has releaſed* &c. by this Deed &c. The *Plaintiff ſaid, that A. did not do the Treſpaſs, but thereof is Not Guilty*; and a good Replication. Br. Replication, pl. 64. cites 11 H. 6. 35.

5. *Dower againſt R. and J.*——*R. pleaded Nontenure generally*; and *J. anſwer'd as Tenant of the Entierty, and pleaded in Bar*; and no Plea, *without ſaying abſque hoc, that R. any thing had*, by which he ſaid accordingly. But after Newton agreed the Plea good without the Traverſe. Br Several Tenancy, pl. 17. cites 22 H. 6. 44.

6. *Where the one Party traverſes, the other, who rejoins* to him, *ſhall not traverſe alſo*; but it ſuffices to maintain the Writ. Br. Maintenance de Brief, pl. 14. cites 9 E. 4. 36.

7. When the *Tenant pleads in the Negative*, it ſuffices for the Demandant to *anſwer in the Affirmative*. Br. Maintenance de Brief, pl. 14. cites 9 E. 4. 36.

As where he pleads *Nontenure*, it ſuffices for the other to ſay, that *Tenant the Day of the Writ purchaſed*, Priſt. Ibid.

8. In *Aſſiſe* the *Tenant pleaded Feoffment of the Anceſtor of the Plaintiff with Warranty, whoſe Heir he is.* The *Plaintiff ſaid, that the ſame Anceſtor is yet alive at D. in the County of N.* and a good Replication. Br. Replication, pl. 63. cites 11 E. 4. 18.

9. In *Aſſiſe*, if the *Tenant pleads Feoffment with Warranty of the Father of the Plaintiff ſimply*, the *Plaintiff may ſay, that it was upon Condition, without Traverſe*, that it was not ſimply; for it is *no Defect in the Bar.* Br. Nugation, pl. 15. cites 15 E. 4. 24.

10. In *Appeal of Death by the Heir*, it is a good *Plea that he has an elder Brother who is Heir, without traverſing that the Plaintiff is Heir*; Per Huſſey Ch. J. Br. Traverſe per &c. pl. 279. cites 22 E. 4. 39.

So in Appeal by a Feme, to ſay *that ſhe was not lawfully accupled* &c. Br. Ibid ——*So to allege Outlawry.* Br. Ibid.——*And* in thoſe he *ſhall not traverſe the next Heir, nor* the *lawfully accoupled.* Br. Ibid.

11. In Formedon, if the *Tenant pleads Feoffment of the Anceſtor with Warranty and Aſſets deſcended*, it is a good Replication *that after the Aſſets deſcended, and before the Action brought J. N. had recovered the Aſſets by elder Title, and had ſued Execution*; Quod nota by all the Juſtices Arguendo in Treſpaſs. Br. Replication, pl. 66. cites 1 E. 5. 3.

12. Where the *one alleges Dying ſeiſed in Tail, and the other* dying ſeiſed *in Fee*, there are 2 Affirmatives; and therefore there are ought to be a Traverſe, and becauſe not, therefore ill by the beſt Opinion. Br. Confeſs & Avoid, pl. 64. cites 5 H. 7. 11, 12.

13. *In ſome Caſe* Plea ſhall be good without Traverſe *for the Miſchief of the Trial, as* where a Man * *pleads Baſtardy*, the *other ſays that Mulier*, and well; *Quære* inde, *without ſaying, And not Baſtard.* Br. Traverſe per &c. pl. 187. cites 6 H. 7. 5. Per Huſſey and Fairfax.

* S. P. Per Huſſey Ch. J. Br. Traverſe per &c. pl 279. cites 22 E. 4. 39.

14. *But* where the *Thing* is *to be tried ultra Mare*, there it is good Law, that he need not traverſe. Br. Traverſe per &c. pl. 187. cites 6 H. 7. 5.

15. Where one *juſtifies by Leaſe from J. S.* the *Plaintiff ſays that J. S. infeoff'd him before*, it is not good without Traverſe. Cro. E. 754 pl. 17. Paſch. 42 Eliz. C. B. in Covert's Caſe.

16. When a *Matter is expreſsly* pleaded *in the Affirmative*, which is *expreſsly anſwered* by the other Party *in the Negative*, there a Traverſe is needleſs, becauſe there is a ſufficient Iſſue joined, as 36 H. 6. 15. is. Cro. E. 755. pl. 18. Huiſh v. Philips.

17. *As* where A. was bound in a *Statute Merchant to B.* the Defendant in 600l. *to the Uſe of C. defeaſanc'd*, that if he paid ſuch Sums at ſuch Days, the Statute ſhould be void. In *Audita Querela* by *A.* he *ſhew'd that he was Paratus* at the ſaid Days and Places to pay, & *obtulit* the ſaid Sums,

Yelv. 38. Paſch. 1 Jac. Hughes v. Phillips, S. C. And

tho' ſeveral Exceptions were taken to the Judgment upon Error brought thereupon, the Judgment was affirm'd in B. R. per tot. Cur. in omnibus.

Sums, *and C. was not there to receive them.* The *Defendant pleaded that at ſuch a Day C. was at the Place* where &c. *and demanded the Sum, and neither the Plaintiff, nor any for him, were there to pay it, abſque hoc that the Plaintiff obtulit the ſaid Sum at the ſaid Day* &c. and thereupon the Plaintiff demurr'd. It was held, That the Traverſe was not good; for there being an expreſs Affirmative before, Quod paratus fuit, & obtulit &c. and Non Obtulit being an expreſs Negative, there ſhall not be any Traverſe; Wherefore it was adjudged for the Plaintiff. Cro. Eliz. 754, 755. pl. 18. Paſch. 42 Eliz. C. B. Huiſh v. Philips.

——Cro. J. 13. pl. 17. Paſch. 1 Jac. B. R. Philips v. Lugre, S. C. and Judgment affirm'd.

18. In ſecond Deliverance the Caſe was, that J. being *Leſſee for Years* 9 *Eliz. aſſign'd his Eſtate to A. the Plaintiff.* The Defendant *pleaded that before the Grant to A. viz.* 8 *Eliz. T. aſſign'd his Eſtate to the Defendant, without traverſing the Grant to the Plaintiff.* Williams ſaid, there needs no Traverſe; for being granted the 8 Eliz. it is impoſſible it ſhould be granted 9 Eliz. and cited 2 Ed. 6. and 1 H. 5. But Anderſon held that he ought to traverſe; for it is impoſſible to confeſs and avoid a Grant by Confeſſion that was granted to another before; for if it were ſo, the 2d Grant is void, and being confeſs'd, here ought to be a Traverſe; Walmſley contra; But Glanvill and Kingſmill held, that there muſt be a Traverſe; for there ought to be a Confeſſion before there can be an Avoidance, but here he *does not confeſs the Grant, but pleads Matter that denies its being granted.* And at laſt Anderſon gave Judgment that he ought to traverſe. Ow. 142. 44 Eliz. in C. B. Ayer v. Joyner.

As if the *Plaintiff intitles himſelf* to a Fee *ſo long as J. S. has Iſſue*, and the *Defendant* would derive an Eſtate *ſo long as J. D. has Iſſue*, he muſt take a Traverſe; for tho' they agree in the Nature of the Eſtate, yet they vary in the Subſtance by reaſon of the different Limitations. Yelv. 140, 141. Mich. 6 Jac. B R. in Caſe of Ewer v. Moile.

19. The *Plea* of the Defendant *ought* either *to confeſs and avoid, or traverſe the material Point in the Declaration*; and Confeſſion is only where the Plaintiff and Defendant agree in one and the ſame Thing; and where they *vary in Eſtate in the Quantity of it*, there ought to be a Traverſe. Yelv. 140. in Caſe of Ewer v. Moile.

So if the *Plaintiff* in Waſte *declares of an Eſtate to him and his Heirs Males*, and the *Defendant derives Eſtate to the Plaintiff and his Heirs Female* &c. this is not good without traverſing the Eſtate ſurmiſed by the Plaintiff. Yelv. 141. in Caſe of Ewer v. Moile.

20. *In all Actions where the Plaintiff makes a Title to the Thing in Demand, or* to a Thing *for which he demands Damages*, there the Defendant ought to make a better Title to himſelf, and to traverſe the Plaintiff's Title, or otherwiſe to confeſs and avoid it. Arg. Quod fuit conceſſum per tot. Cur. Yelv. 174. Hill. 7 Jac. B. R. in Caſe of Prieſtly v. White.

21. When a Man *juſtifies all the Fact*, there needs no Traverſe. Mo. 864. pl. 1192. Hill. 13 Jac. Weaver v. Ward.

22 *He who pleads in the Negative, ſhall never* take a *Traverſe*; for he muſt only maintain his Bar; Per Jones and Whitlock. Palm. 511. Hill. 3 Car. B. R. Farrer v. Gate.

23. Where any *Thing pleaded is directly contrary to the Matter in the Declaration*, ſuch Plea is not good without a Traverſe, but it is in the Election of the other Party to paſs by it, or to demur upon it; Per Twiſden J. who ſaid that this ſeemed to be a Rule as to Traverſes. Sid. 301. Mich. 18 Car. 2. B.R. in Caſe of Courtney v. Phelps.

2 Mod. 60. Mich. 27 Car. 2. C. B. S. C. accordingly.

24. North Ch. J. ſaid, He had always taken the Law to be, that when you come to the *Replication*, the *omitting of a Traverſe where it ought to be taken, was Matter of Subſtance*; for if they ſhould not be bound to traverſe, they might plead on ad infinitum. And he ſaid ſo he had often ſeen it ruled in B. R. that Hoc paratus eſt verificare, inſtead of Hoc petit

tit quod inquiratur per Patriam, or De hoc ponit ſe ſuper Patriam, was Matter of Subſtance. Freem. Rep. 203. pl. 205. Mich. 1675. in Caſe of Snow v. Sir Wm. Wiſeman.

25. In Replevin, the Defendant made *Conuſance as Bailiff* to Sir P. W. ſetting forth, that he was ſeiſed in Fee of the Place where &c. and ſo *juſtifies* the taking *Damage-feaſant*; The Plaintiff *replies and confeſſes the Seiſin* of Sir P. W. *but pleads, that Sir G. W. his Father was ſeiſed* &c. *in Fee, and made a Leaſe to W. R. for* 3 *Lives* of the Place where &c. *that W. R. was dead, and* that *W. W. entred as Occupant, and made a Leaſe to the Plaintiff.* The Defendant demurred, for that the Plaintiff had not traverſed the Seiſin in Fee of Sir P. W. the Son. It was held per Curiam, that either in Treſpaſs or in Avowry, if a Freehold is pleaded it muſt be traverſed, unleſs the Party does wholly confeſs and avoid it by a defeaſable Title, only with this Difference, That if in Action of Treſpaſs a Freehold is pleaded, the Party may traverſe it generally, without inducing his Traverſe by a Title; but in Avowry, the Traverſe muſt be induced by ſetting forth a Title; Et per Curiam, the Want of a Traverſe is Matter of Subſtance in the Principal Caſe, becauſe there are 2 *Affirmatives* in the Pleading, and that will not admit any Trial without a Traverſe; therefore 'tis *not helped by a general Demurrer*; but a *ſuperfluous Traverſe is only Matter of Form*, becauſe it doth the other Party no Injury. 3 Salk. 354, 355. pl. 7. Mich. 4 Jac. 2. Radborne v. Kennadale.

3 Mod. 318. Mich. 2 W. & M. in B. R. S. C. by the Name of Bradburn v. Kennerdale argued, but no Judgment was given. —— Carth. 164. S. C. that in Hill. Term following it was adjudg'd by the Court, That the Bar was ill for want of a Traverſe; that the Place where was Parcel of the Manor Tempore captionis; for tho' it was granted that the Reverſion of the Locus in quo remained Parcel of the Manor after the Demiſe for three Lives; yet the Place itſelf and the Freehold were ſevered by the Demiſe, and by Conſequence they were not Parcel of the Manor Tempore quo &c. therefore the Plaintiff ought to have traverſed that which the Defendant had affirmed (viz.) that the Locus in quo was Parcel of the Manor of A. Tempore quo &c. And as to this Matter there is a Difference between Replevin and Treſpaſs; And the Court held that the Seiſin in Dominico of the Place where &c. was not traverſable; for 'tis not expreſsly alleged in the Conuſance, that Sir P. &c. was ſeiſed in Dominico of the Place where, but only by Conſequence as it was Parcel of the Manor of Aſley, of which he (Sir P. W.) was ſeiſed in Dominico; therefore if he had traverſed the Seiſin, it muſt have been of all the Manor. The Judgment was affirmed.

26. The *Default of a neceſſary Traverſe* is Subſtance, and not aided by a general Demurrer. Carth. 166. Mich. 2 W. & M. B. R. in Caſe of Bradburn v. Kennerdale.

(Q. a) Neceſſary in what Caſe, *Where there is a Confeſſing and avoiding.*

See (N. a)

1. WHERE the Matter is confeſſed and avoided it *need not* be traverſed. 3 Salk. 353. pl. 4. Paſch. 9 W. 3. Anon.

2. In Annuity the Plaintiff *declared upon Preſcription*, the *Defendant ſaid that it was granted upon Condition, which is broken on the Part of the Plaintiff*; and no Plea per Cur. without *traverſing* the Annuity by Preſcription; *For Annuity by Preſcription, and Annuity by Grant upon Condition cannot be extended to one and the ſame Annuity.* Br. Confeſs and avoid, pl. 63. cites 32 H. 6. 4.

But where *Feoffment is pleaded ſimply* it is ſufficient for the other *to ſay that it was upon Condition* &c. without traverſing &c. for it may be *intended one and the ſame* Feoffment; note the Diverſity. Br. Confeſs and Avoid, pl. 63. cites 32 H. 6. 4.

3. Where the *Plaintiff confeſſes as much as the Defendant alleges and more*, he need not traverſe. Br. Traverſe per &c. pl. 143. cites 37 H. 6. 34.

As in Treſpaſs the Defendant *juſtified for Common appendant to his Houſe in D.* and 40 Acres of Land in the Place where &c. The *The Plaintiff ſaid that he had*

had no Common there, but during the Time he dwelt in the ſaid Houſe, and he did not dwell there at the Time of the Treſpaſs, abſque hoc that he had Common there in other Manner; per Choke where the *Plaintiff confeſſes all that which the Defendant has ſaid and more*; he need to traverſe; But per Priſot he ought to traverſe; for he does not confeſs all that the Defendant has ſaid, for he claimed Common there at all times; And the Plaintiff ſaid, that he had not Common there, but when he dwelt in the Houſe to which &c. By which he traverſed the Common Modo & Forma &c. Br. Confeſs and Avoid, pl. 22. cites 37 H. 6. 36.

For in Aſſiſe if the *Tenants pleads Feoffment of the Father of the Plaintiff with Warranty*; and the *Plaintiff ſays, that it was upon Condition* &c. *and that he entred as Heir for the Condition broken*, he need not to traverſe &c. for he has confeſſed all that the Tenant ſaid and more, which *Surplus avoids the Bar of the Tenant*. Per Choke. Br. Confeſs and Avoid, pl 22. cites 37 H. 6. 36 ——— S. P. ibid. pl. 38. cites 6H. 7. 5. per Huſſey, Fairfax and Wood,—S. P. Br. Traverſe per &c. pl. 187. cites 6 H. 7. 5. per Wood. ——— Heath's Max. 111. cap. 5. cites S. C.

So elſewhere, if the *one alleges dying ſeiſed*, and the *other alleges Deviſe of him who died ſeiſed*; which Ground was admitted there for Law. Br. Confeſs and Avoid, pl. 22. cites 37 H. 6. 36.

Br. Traverſe per &c. pl. 214. cites S. C.

4. In Treſpaſs the *Defendant ſaid that R. H. was ſeiſed in Fee, and infeoffed 2, who infeoffed 3, who infeoffed 5, and one died, and* the 4 *infeoffed the Defendant* and gave Colour to the Plaintiff; and the *Plaintiff ſaid, that before R. H. any Thing had, J. H. was ſeiſed in Fee, till by the ſaid R. H. diſſeiſed who occupied at Will, which R. H. infeoffed the* 2, *who infeoffed the* 3, *who infeoffed the* 5 *and* 4 *others, by which they were ſeiſed*, and ſhew'd how the Defendant came to the Poſſeſſion by them, and he re-enter'd, and was ſeiſed till the Defendant did the Treſpaſs, and the Defendant rejoin'd that R. H. did not diſſeiſe J. H. And a good Plea, and need not to traverſe that the 3 did not infeoff the 9 but the 5 only; for he *confeſſes all that the Defendant has ſaid and more*; quod nota. Br. Confeſs and avoid, pl. 43. cites 3 E. 4. 17.

5. Where one *juſtifies by a Leaſe from J. S.* and the *Plaintiff ſays, That* the ſaid *J. S. infeoffed him before, and after the Feoffment enter'd, and diſſeiſed him and made the Leaſe, and afterwards re-enter'd.* This is good without Traverſe; for thereby he confeſſes and avoids the Leaſe alleged, per Cur. Cro. E. 754. pl. 17. Paſch. 42 Eliz. C. B. in Covert's Caſe.

For a Confeſſing and Avoiding is a full Anſwer of the Matter alleged, and ſo there needs no Traverſe of it, or Denial of the Thing. L. P. R. tit. Traverſe cites Paſch. 24 Car. B. R.

6. In Replevin the *Defendant avow'd for that W. R. was ſeiſed and made a Leaſe* to him (the Defendant) for one Year, and ſo juſtified the taking &c. Damage-feaſant. The *Plaintiff replied, that* true it is, that W. R. was ſeiſed &c. but *before he made a Leaſe to the Defendant he made another to the Plaintiff*, which is ſtill in being and not determined; this is ſufficient without a Traverſe, becauſe the Title of the Defendant is confeſſed and avoided. 3 Salk. 353. pl. 4. Paſch. 9 W. 3. B. R. Anon.

See (W) pl. 2.

(R.a) *Good* or not. Where there is a *Confeſſing and avoiding*.

For by that Means the Party denies what he had before confeſſed. Jenk. 105. pl. 1.

1. *WHERE the Plea is fully confeſſed and avoided, and then a Traverſe* moreover is taken; this Traverſe *vitiates the whole Plea.* Ld. Raym. Rep. 238. Trin. 9 W. 3. in Caſe of Lambert v. Cook, cites Brook confeſs and avoid 65. 33 H. 6. 28.

2. In *Ejectment* the Defendant *pleaded* in Bar *that the Dean &c. of Windſor were ſeiſed and made a Leaſe for Years to W. R. who aſſigned* it *to* the *Defendant, who was poſſeſſed till the Leſſor of the Plaintiff ouſted him and diſſeiſed the Dean &c. and* being ſo ſeiſed *made a Leaſe to* the Plaintiff, *upon whom* the *Defendant re-enter'd*; the Plaintiff *replied, and confeſſed the Seiſin of the Dean &c. and made Title* to the Term *by the Aſſignment* made *by the Leſſee to his own Leſſor before the Aſſignment made to* the *Defendant, and traverſed*

verſed the Diſſeiſin. The Court held clearly that the Traverſe was ill, becauſe the Plaintiff had confeſſed and avoided, and alſo traverſed, whereas he ſhould have left the Matter upon the Aſſignment of the Term without any Traverſe, ſo as the Defendant might have traverſed the Aſſignment in his Rejoinder, which is the only material Point in Variance; for if the firſt Aſſignment was made to the Defendant it was a Diſſeiſin, but if to the Leſſor of the Plaintiff it was no Diſſeiſin. So that the Point was upon the Priority of the Aſſignment, and ought to be in Iſſue. Mo. 557. pl. 757. Trin. 40 Eliz. Townſend v. Kingſmill.

3. In *Ejectment* upon a Leaſe made by E. *J.* the Defendant *pleaded that before the ſaid E. had any Thing one M. J. was ſeiſed in Fee and had Iſſue H. to whom the Lands deſcended* after his Death, *and that the ſaid E. enter'd, and was ſeiſed by Abatement, and died*; The Plaintiff *replied, and confeſſed the Seiſin of M. and that he deviſed the Lands to E. in Fee, and ſo claimed under the Deviſe, and traverſed that ſhe was ſeiſed by Abatement Modo & Forma.* And upon Demurrer it was adjudged for the Defendant; for the Plaintiff need not both to confeſs and avoid and alſo to traverſe the Abatement; for the Plaintiff made Title under E. the Deviſee of M. and ſo her Entry legal and not by Abatement, and ſo *the Traverſe over makes the Replication vitious*; for no Traverſe ſhould be taken but where the Thing traverſed is iſſuable; and the Deviſe here is only the Title Iſſuable. Beſides the Traverſe was not good as to the Manner of it; for he ſhould not have traverſed Abſque hoc, that E. was ſeiſed by Abatement. But it ſhould have been Abſque hoc, that ſhe did abate &c. Cro. J. 221. pl. 3. 7 Jac. B. R. Bedel v. Lull.

Brownl. 144. S. C. accordingly; and adds, that if the Plaintiff had intended to have fully anſwered the Defendant, he ought to have taken his Traverſe in the very ſame Words the Defendant had pleaded it againſt him, viz. Abſque hoc that ſhe did enter,

and was ſeiſed by Abatement; Quod Nota.——S. C. Yelv. 151. accordingly.

4. In *Treſpaſs* for Treſpaſs done *in an Acre Parcel of the Manor* of D. the Defendant *pleaded that R. was ſeiſed* of the Manor *and the Acre eſcheated* to him *who conveyed the Manor, of which the Acre is Parcel, after the Eſcheat* by meſne Conveyance *to A. in Fee*, and *that A. 12 Eliz. infeoffed B. of the ſaid Manor of which the ſaid Acre is Parcel*, and ſo juſtified by Conveyance from B. to the Defendant; The Plaintiff *replied that 10 Eliz. R. infeoffed C. of the ſaid Acre, Abſque hoc, that he enfeoffed B. of the ſaid Manor of which the ſaid Acre is Parcel.* The Defendant demurred generally. It was argued that the Traverſe was good and alleged 38 H. 6. 49. the ſame Traverſe, and that here when the Defendant had pleaded that the Acre had eſcheated and alleged a Feoffment of the Acre, the Plaintiff may traverſe that which is not expreſsly alleged, and cited 34 H. 6. 15. But Hobart Ch. J. ſaid that the Traverſe is not good; for by the Feoffment made 12 Eliz. he had confeſſed and avoided the Feoffment made the 10 Eliz. and ſo there needed no Traverſe. Adjornatur. Het. 37, 38. Mich. 20 Jac. C. B. Johnſon. v. Norway.

5. *Debt upon Bond dated 30 Novemb. 20 Jac. to perform* an *Award, ſo as it be made before the firſt* Day of *June*; the *Defendant* by his Plea *confeſſed the Bond* dated 30 Novemb. *but ſaid it was primo deliberat' 28 Aprilis 21 Jac. after which* Day, *and before* the *1ſt* Day *of June following there was no Award* made, *abſque hoc quod cognovit ſe teneri Modo & Forma* &c. It was held that the Traverſe was repugnant; for he had confeſſed the Bond, but denied it by the Traverſe; for by Doderidge J. the Traverſe Abſque hoc, goes to the Deed itſelf. Lat. 59. 61. Paſch. 1 Car. The Biſhop of Norwich v. Cornwallis.

Jo. 66. pl. 3. S. C. accordingly.

(S. a) Good

See (S) pl. 5. (S. a) Good or not. *Where* the *Party may wage his Law.*

Br. Dette, pl. 88. cites S. C.——S.P. Keilw. 39. pl. 4. cites 13 H. 7. Anon.

1. WHERE a Man may wage his Law, there he *cannot traverſe the Cauſe of the Debt nor the Contract.* Br. Traverſe per &c. pl. 64. cites 8 H. 6. 5.

Br. Dette, pl. 88. cites 8 H. 6. 5.—* S. P. Becauſe he may wage his Law. Keilw. 39. pl. 4. Trin. 13 H. 7. Anon.

2. *As in Debt upon* Buying and † Lending* or the like, he ſhall not ſay that he did not buy nor did not borrow, but ſhall plead that he owes him nothing or wage his Law. Br. Traverſe per &c. pl. 64. cites 8 H. 6. 5.

† In Debt againſt an Abbot of 20 l. and counted that the *Predeceſſor borrowed the Money* of him, *which came to the Uſe of the Houſe*, that is to ſay, *in Reparations* &c. Per Choke, it is ſufficient to ſhew generally how it came to the Uſe of the Houſe, and not how it was laid out; and the *Defendant ſaid that he did not borrow*, and a good Iſſue notwithſtanding that by ſome he may wage his Law. Br. Traverſe per &c. pl. 245. cites 13 E. 4. 4.

S. P. Br. Ibid. pl. 275. cites 22 E. 4. 29. Per tot. Cur. except Brian.——

3. *So* in Debt upon Arbitrement, the Defendant ſhall not plead *No ſuch Submiſſion*; for he may wage his Law, and there he cannot traverſe the *Cauſe of the Debt, nor Contract.* Br. Traverſe per &c. pl. 64. cites 8 H. 6. 5.

But Br. Traverſe per &c. pl. 245. cites 13 E. 4. 4. It was ſaid that in Debt upon Arbitrement, he may traverſe the Arbitrement, or wage his Law.———S. P. Br. Ibid. pl. 264. cites 21 E. 4. 55. that he may ſay No ſuch Arbitrement, and yet he may wage his Law. Brooke ſays Quære inde.——S. P. Becauſe this Arbitrement *lies in Notice of a 3d Perſon*, and ſo the Lay People may have Conuſance of it, and for this Cauſe the Plea has been held good. Kelw. 39. pl. 4. Trin. 13 H. 7. Anon.

*S.P. Br. Traverſe per &c. pl. 228. cites 8 E. 4. 3. that he may traverſe the Leaſe.——†Br. Traverſe per &c. pl. 264. cites 21 E. 4. 55. That he may ſay Nul tiel Account, and yet may wage his Law. Brook ſays, *Quære* inde.

4. *Contra* in Debt *upon a * Leaſe for Years, or* upon † *Arrears of Account before Auditors*, there he cannot wage his Law; therefore there Non dimiſit &c. or Nul tiel Account is a good Plea. Br. Traverſe per &c. pl. 64. cites 8 H. 6. 5.

S. P. Br. Traverſe per &c. pl. 264. cites 21 E. 4. 55.——

5. In *Detinue of Charters*, the *Defendant may traverſe the Bailment*, becauſe he cannot wage his Law. Br. Traverſe per &c. pl. 228. cites 8 E. 4. 3.

But in Detinue of a Cheſt ſealed with Charters, the *Defendant ſaid that it is a Box ſealed with Charters which the Prior Predeceſſor of the Plaintiff delivered to the Defendant, in Pledge for* 100 *s. borrowed, which he took to re-deliver when the* 100 *s. ſhall be paid, abſque hoc that he detained ſuch Cheſt of Charters*; and a good Plea, and yet he might have wag'd his Law, becauſe he *did not count of any Charter ſpecial.* Br. Traverſe per &c. pl. 272. cites 22 E. 4. 7.

As in Detinue of *Bailment of a Horſe to re-bail when* &c. the *Defendant ſaid that he bail'd to him to Bail to a Stranger, which he has done*, abſque hoc *that it was bailed to him to re-bail, prout* &c. And per tot. Cur. it is no Plea, becauſe he may wage his Law, and ſo ſhall not traverſe the Bailment. Br. Traverſe per &c. pl. 264. cites 21 E. 4. 55.

6. *But where he may wage his Law*, there he ſhall not traverſe the Bailment; By all the Juſtices. Br. Traverſe per &c. pl. 228. cites 8 E. 4. 3.

So in Detinue of Goods, and *counted of Bailment*, the *Defendant ſaid that the ſame Day* &c. *and at another Time the Plaintiff gave to the Defendant the ſame Goods*, abſque hoc *that he bailed them to the Defendant prout* &c. And per tot. Cur. except Brian, it is no Plea; for it is only Argument; And alſo when the Defendant may wage his Law, as here, he ſhall not be ſuffered to traverſe the Meſne Conveyance,

reyance, and in *Debt upon Buying of a Horſe*, That he did not buy is no Plea; for it is only argumentatively. Br. Traverſe per &c. pl. 275. cites 22 E. 4. 29. Nihil Debet

(T. a) Good or Neceſſary. *Where* the *Writ or Count is of more or leſs than it ought* to be. See (D. b)

1. UPON the Enterpleading in Detinue of Goods, the *one ſaid that they were delivered upon Condition to ſtand to the Arbitrement of W. P. who awarded that he ſhould do ſuch an Act, which he has done, and that the other inſeoff him, which he has not done, and pray'd Livery*; and the *other ſaid that he awarded this, and that the other ſhould be bound to him in* 100*l. which he has not done, abſque hoc that he awarded as above.* Per Aſcough, Where a Man *alleges an Award where the Award was* * *of this, and more*, there the other ſhall ſay that he awarded this and ſuch another Thing, *abſque hoc that he awarded this only.* And per Newton, Where a Man pleads *Award of* 3 *Things, and that the Defendant has done* 2 *of them, and not the* 3*d, where in Fact the Award was but of* 2 *Things*, there the other may *ſay that he awarded the* 2 *Things which he has performed, abſque hoc that he awarded the third*; and there it is ſufficient for the other to maintain that he awarded the third Thing. Br. Traverſe per &c. pl. 68. cites 19 H. 6. 3. 19.

* S. P. Per Priſot and Danby, and the beſt Opinion. Br. Traverſe per &c. pl. 33. cites 35 H. 6. 38.

2. Detinue of two Bonds, the *Garniſhee pleaded Arbitrement* made between the Plaintiff and him, *that the Plaintiff ſhould make Partition of the Manor of B. and of* 100 *Acres of Land in C. and pay to the Garniſhee* 10*l.* and ſaid that the Plaintiff had not made the Partition, nor paid the 10 l. the *Plaintiff ſaid that they awarded as above, and alſo that the Garniſhee ſhould deliver to him a Deed of Annuity* &c. abſque hoc *that they awarded as above only.* And per Paſton, the * *only* cannot make Iſſue. Br. Traverſe per &c. pl. 88. cites 21 H. 6. 18.

* Orig. is (Tenant) in all the Editions, but it ſeems it ſhould be (Tantum.)

3. By which the *Plaintiff ſaid that the Award was, that he ſhould make Partition of the Manor by itſelf, and of the Land by itſelf*, abſque hoc that they awarded that the Partition ſhould be made of the Manor and Land altogether prout &c. and ſo ad Patriam; and 'twas ſaid there that 19. the (*only*) was not ſuffered to make Iſſue alſo; *quod Miror*; therefore ſee. Br. Traverſe per &c. pl. 88. cites 21 H. 6. 18, 19.

4. In Debt of 4 l. the *Plaintiff counted of a Leaſe of* 20 *Acres of Land, rendring* 4*l. per Ann.* and the *Defendant ſaid that he leaſed the* 20 *Acres, and* 12 *other Acres for the ſame Term, rendring the* 4*l. per Ann.* Judgment of the Count; and the beſt Opinion was that he ought to traverſe, *abſque hoc that he leas'd the* 20 *Acres only* prout &c. Br. Traverſe per &c. pl. 381. cites 32 H. 6 3.

5. *Debt upon a Leaſe of* 4 *Acres* of Land *for* 4 *l. Rent*, the Defendant demanded *Judgment of the Count, becauſe the Plaintiff leaſed the Acres, and a Rectory, and* 10 *s. Rent, and View of Frank-pledge, for the ſame Sum*, and *did not traverſe* abſque hoc *that he leaſed the Land only for this Rent.* And the beſt Opinion was, that he ought to traverſe; for the Leaſe of the 4 Acres is not a Leaſe of the Rectory and Reſidue. Br. Traverſe per &c. pl. 33. cites 35 H. 6. 38.

S. C. cited Le. 44 pl. 56. Arg. in the Caſe of Kempton v. Bellamy, Mich. 28 & 29 Eliz. C. B. and the Court clear of Opinion, that for Want of ſuch Traverſe the Plea is not good.

6. *But* in Debt upon a Leaſe, it is a *good Plea to the Writ*, without traverſing *that the Plaintiff and another leaſed who is alive, or* that the *Leaſe was made to the Defendant, and another* who is alive; for there every

So in Debt for the Arrears of Rent of 14 *Acres leaſed*

&c. the *Defendant to 4 Acres ſaid*, one leaſes the Entire, and the Entire is leaſed to every one. Br. Traverſe per &c. pl. 33. cites 35 H. 6. 38.

that *Ne leſſa pas, and to the* 10 *Acres* that he *leaſed to him and his Feme who is alive not named*, Judgment of the Writ; And by the Opinion of the Court he *ſhall ſay that he leaſed the* 10 Acres, *abſque hoc that he leaſed the* 14 *Acres, prout* &c. Br. Traverſe per &c. pl. 249. cites 17 E. 4. 7.

7. *So of Selling a Horſe by 2, or to* 2, and the Action is brought by one, or againſt one. Note the Diverſity. Br. Traverſe per &c. pl. 33. cites 35 H. 6. 38.

Br. Avowry, pl. 87. cites S. C.— Br. Double, pl. 93. cites S. C.—— Brian ſaid that the

8. Avowry by *Tenure of 2 Acres by* 12 *s.* The Plaintiff ſaid *he held thoſe 2, and 2 others by* 10 *s.* abſque hoc *that he held the 2 by* 12 *s.* Per Keble, This is *pregnant*, but may take the *Quantity* of the Services *by Proteſtation*, and traverſe the Tenure of the 2 Acres only; but if he will ſpeak to the Quantity of the Services, he ſhall traverſe *the Seiſin*; & adjornatur. Br. Traverſe per &c. pl. 310. cites 8 H. 7. 5.

Plaintiff could not plead otherwiſe; for there is no Reaſon that for the Falſe Avowry the Plaintiff ſhould be at any Miſchief, but he ought to have an Anſwer to it then, and then if he was never ſeiſed of more than 10 s. and he alleges 12 s. he cannot traverſe the Tenure, abſque hoc that he holds by 12 s. and as to the 2 s. Reſidue Ne unques Seiſie, becauſe then he ought to agree with him in the Quantity of the Land, which here he does not; but Keble contra, as here, Mich. 8 H. 7. 5. pl. 1.

9. If *White-acre and Black-acre* be *adjoining*, and *are holden the one of J. S. and the other of J. D.* and *J. S. diſtrains, and avows for both Acres*, he may well traverſe the Tenure; Per Periam J. Godb. 24. in Caſe of Throgmorton v. Terringham.

See (M) pl. 2.

(U. a) Not good, by its *not anſwering the Point of the Writ, or being only to Part.*

1. IN Account againſt Guardian in Socage, it is no *Plea that the Anceſtor held of him in Chivalry, by which he ſeiſed the Ward*, unleſs he traverſes *abſque hoc that he held of him in Socage, prout* &c. Quod nota; for he ſhall anſwer the Point of the Writ. Br. Traverſe per &c. pl. 373. (bis) cites 10 H. 6. 7.

2. In *Caſe for ſtopping* 3 *Lights* totaliter, the Defendant *juſtified* the *Stopping* 2 Lights, and Part of the 3d, and *traverſed that he ſtopp'd the* 3 Lights aliter, vel alio Modo. Williams J. ſaid this was no Anſwer to the Declaration, but ſhould have ſaid Guilty or Not guilty, as to the Reſidue, and not have travers'd at all, and the Abſque hoc goes to the 2 Lights, and as to the 3d it is no Anſwer; and thereupon the Court gave Judgment for the Plaintiff. 2 Bulſt. 116, 117. Paſch. 9 Jac. Newall v. Barnard.

3. If a Traverſe is *too narrow*, and ſhort of the Matter traverſable, this *is Subſtance*. Carth. 166. Mich. 2 W. & M. in B. R. in Caſe of Bradburn v. Kennerdale.

(W. a) Of an *Immaterial Traverſe.*

S. P. ibid. pl. 92. cites 21 H. 6. 35.

1. WHERE the *Plea, or Matter of the Plea, is not ſufficient*, there the Sans ceo ſhall not aid it, *tho' the* Sans ceo or *Traverſe be good*. Br. Traverſe per &c. pl. 132. cites 9 E. 4. 40.

2. In

2. In Treſpaſs the *Defendant ſaid, that J. Long, and Alice his Feme, were ſeiſed in Fee jointly, and J. ſurvived Alice, and died by Proteſtation ſeiſed, and convey'd to the Defendant as Heir by Deſcent*, and gave *Colour*. And the *Plaintiff ſaid, that before the ſaid J. any thing had, the ſaid Alice was ſeiſed in Fee, and took J. to Baron, by which he was ſeiſed in Right of the ſaid A. and after they granted the ſaid Tenement to two by Fine, who re-infeoff'd the ſaid J. and A. and to the Heirs of the ſaid A. and the Plaintiff convey'd to him as Heir of A.* Abſque hoc, *that the ſaid J. was ſeiſed in Fee*; and ſo to Iſſue, and *found for the Plaintiff*. Per Brian, the Traverſe is void; for if J. was ſeiſed in Fee or not, yet by the Fine, which is confeſs'd by both, his Intereſt in Fee was determin'd, ſo he *ought to have traverſed, that J. was not ſeiſed in Fee after the Fine*; quod Priſot Conceſſit, that the Traverſe is void for the Cauſe aforeſaid; but Catesby contra. Br. Traverſe per &c. pl. 271. cites 21 E. 4. 83.

3. In Replevin the Defendant *avow'd* the *taking Damage feaſant*. The Plaintiff *replied, that J. S. made a Leaſe to him*, by which he enter'd, and put in his Cattle. The Defendant rejoin'd, *that before the Leaſe made to the Plaintiff, J. S. made a Feoffment to him.* The *Plaintiff maintain'd* the Leaſe, *abſque hoc, that J. S. Seiſitus feoffavit.* It was held, per tot. Cur. that the Word *ſeiſitus* is idle, and ought to have been left out; for a Man cannot make Feoffment, unleſs he is ſeiſed. Godb. 111. pl. 132. Mich. 28 and 29 Eliz. Hales v. Home.

4. In Replevin &c. the Defendant *avow'd* &c. and the Plaintiff *replied in Bar, that the Prior and Convent of N. were ſeiſed in Fee, and ſo convey'd a Title to himſelf by a Leaſe* &c. The Plaintiff [Defendant] *rejoin'd, abſque hoc, that the Prior and Convent were ſeiſed in their Demeſne as of Fee* &c. Upon a Demurrer the Judges agreed, that this Traverſe was good, notwithſtanding it was ſaid a thing impoſſible, (viz.) that the Prior and Convent can be ſeiſed of Land, whereas the *Monks are dead Perſons* in Law, and therefore can have no Seiſin, but the Prior alone; the Monks being in Conſideration of Law as Dead Perſons, and therefore it ſhall be taken as if it had been pleaded, that the Prior was ſeiſed, without mentioning the *Convent*; ſo that the Traverſe is good, and the Word Convent *ſurpluſage*. And. 268. pl. 276. Trin. 32 Eliz. Eden v. Downing.

5. In Debt upon an Obligation, where the *Condition* was, *That* one *Lea ſhould be his true Priſoner, and pay every Month for his Diet, and the Fees due to the Plaintiff, by reaſon of his Office*, the Defendant *pleads the Statute of* 23 *H.* 8. and that this Obligation was made for the Eaſe and Favour of the Priſoner by Colour of his Office. And the Plaintiff replied, *that the Fleet is an ancient Priſon, and that Time out of Mind* &c. *they uſed to take ſuch Obligations, abſque hoc, that this Obligation was made for the Eaſe and Favour, contrary to the Statute*; upon which the Defendant demurr'd generally. But Atthowe pray'd Judgment, for that the Traverſe waives the Matter before, which was but an Inducement. And in 23 H. 6. there is an Exception of the Warden of the Fleet, and the Warden of the Palace of Weſtminſter, that they might take ſuch Obligations which they uſed; to which the Court agreed. And for that *the Traverſe over deſtroys the Bar*, the *Defendant ought to have join'd in that*; upon which Judgment was given for the Plaintiff, if &c. Het. 146. Mich. 5 Car. C. B. Harris v. Lea.

6. Where a Traverſe is immaterial, unleſs there be a *Special Demurrer* to it *with the Cauſes ſhewn*, it ſhall not vitiate the Pleadings; but it is naught upon a Special Demurrer. 2 L. P. R. 588. Tit. Traverſe, cites Mich. 6 W. & M.

7. Replevin. The Defendant *avow'd Damage feaſant in his Freehold* The Plaintiff in Bar *replied, that B. was rite & legitime ſuch a Day ſeiſed in Fee of the Manor of W. whereof the Place is*, and Time out of Mind has been *Parcel, and lays a Cuſtom for the Copyholders to have Common* in the Place where; and *then ſets out a Grant of a Copyhold* Tenement &c. *to*

2 Salk. 701. S. C. but S. P. does not appear. —3 Salk. 355 pl. 9. S. C. accord-

ingly; only there the Day of the Grant is expreſly mention'd, and ſays, that the Day of granting it is not material; for a Grant at one Day is a Grant at any Day.

to himſelf from B. &c. The *Defendant rejoin'd*, that the Cattle were Damage feaſant in his Freehold, *abſque hoc, that B.* at the Day in the Bar mention'd, *was rite & legitime ſeiſed in Fee of the Manor*, and granted the Copyhold Eſtate to the Plaintiff &c. The Plaintiff demurr'd. Exception was taken firſt, that the Defendant ought not to have traverſed the *Rite & legitime*; nor, 2dly, the Day of the Seiſin, becauſe if the Lord were a Diſpoſer [Diſſeiſor] the Grant would be good; and the Time of the Seiſin is not material, if it were before the Grant. Judgment was given for the Plaintiff. 2 Ld. Raym. Rep. 902. Trin. 2 Ann. Helliot v. Selby.

8. Declaration in *Prohibition*, that *Defendants in Error were elected Common Council-men*, that the Plaintiffs (Defendants in Error) intending to draw their Election into Queſtion, exhibited a Petition to the Common Council-men with Deſign to remove them; whereas the ſaid Common Council have no Power to examine concerning ſuch Elections; for that, Time out of Mind, *ſuch Election belong'd to the Court of Mayor and Aldermen.* Defendants by their *Plea* affirm, *that the Common Council, Time out of Mind, have had, and ought to have Juriſdiction to examine into ſuch Elections*: And *aver, that the Court of Mayor and Aldermen have not ſuch Juriſdiction.* Plaintiffs *reply, that the Common Council have not ſuch Juriſdiction.* Defendants demur. The Traverſe is immaterial, and the Iſſue ought to have been join'd upon the Juriſdiction of the Common Council; for tho' the Mayor and Aldermen ſhould have no Juriſdiction, it does not follow, that the Common Council have. MS. Tab. 1718. Belton & Bridger v. Jeffes.

9. Where in Treſpaſs there is a *good Juſtification*, a Traverſe of the Time, when the Treſpaſs was done, would be wholly immaterial. 8 Mod. 31. Hill. 7 Geo. 1721. Carvell v. Manly.

(X. a) *How. General or Special.* And where it *amounts* only *to the General Iſſue.*

1. WHERE the Defendant *juſtifies to take a Vagrant for Suſpicion*, the Plaintiff *may ſay*, that *De ſon Tort demeſne abſque tali Cauſa*, but ſhall *not* ſay De ſon Tort demeſne, *abſque hoc, that he was a Vagrant*; for he *ſhall not traverſe the Special Matter, but where it is Matter of Record, or of Writing*, and *not where it is Matter in Fact.* Br. De ſon Tort demeſne, pl. 20. cites 2 E. 4. 9.

2. *Where the Matter in the Declaration and in the Replication is of one and the ſame Nature*, the *Defendant ſhall take the General Traverſe*; per Choke. Br. Treſpaſs, pl. 359. cites 21 E. 4. 75, 76.

And *as to the* Plea of *taking and driving* the Beaſts, the *Plaintiff preſcrib'd for Common*; *and* ſaid, *that immediately after the Defendant pounded his Cattle, he requir'd him to deliver them to him, which the Defendant refuſed* &c. The Defendant *rejoin'd, and maintain'd his Bar, abſque hoc, that die & loco, alleged by the Plaintiff, he required the Defendant to deliver them.* Upon a Demurrer the

3. *Treſpaſs* for *entering his Cloſe*, and *ſpoiling his Graſs* &c. and taking and *driving his Beaſts* to Places unknown. The Defendant pleaded, *that the Place* where &c. *is a Waſte, Parcel of his Manor, and the Plaintiff's Beaſts were there mix'd with the Beaſts of Strangers, who had no Right there; and becauſe he could not ſeparate the one from the other, he drove them all together to a Pound in the Waſte to part them, and then drove the Stranger's Beaſts out of the Waſte, and left the Plaintiff's in it.* The Plaintiff *replied; and as to the Plea of entering into his Cloſe demurr'd, becauſe it amounted only to the General Iſſue.* But it was reſolved, that the Bar being intire, tho' ſuch Plea be only the General Iſſue, as being his own Act, yet being *join'd with the Special Matter of Juſtification in one intire Plea*, it is good. 3 Lev. 40, 41. Hill. 33 Car. 2. C. B. Thomas v. Nichols.

the Rejoinder was adjudg'd ill; beſides it is multifarious, and he ſhould have traverſed one ſingle Point, and not all together. 3 Lev. 40. Thomas v. Nichols.

And as to the Replication, it was adjudg'd ill; for the *Plaintiff ſhould have traverſed the Bar*, viz. either, firſt, that the Defendant did not leave the Beaſts in the Waſte after Severance; or, 2dly, that he might have ſever'd them without pounding them; or, 3dly, De Injuria ſua propria abſque tali Cauſa; and then the Defendant in this Iſſue muſt have proved the Neceſſity of impounding them. 3 Lev. 40, 41. Thomas v. Nichols.

4. In *Covenant for not keeping and imploying his Apprentice*, the Defendant *pleaded, that, from ſuch a Time to ſuch a Time, he did keep and employ him; and* that *then he ſervitium ipſius* (the Defendant) *deſeruit & reliquit, & ab eo deceſſit & ulterius in ſervitio ſuo remanere neglexit & abinde poſtea hucuſq; ad loca incognita ſeipſum elongavit & abſentavit.* The Plaintiff *replied*, and traverſed, *abſque hoc quod Servitium* (of the Defendant) *deſeruit vel reliquit vel ab eo deceſſit, vel in ſervitio ſuo remanere* (omitting *neglexit*) *vel ſeipſum elongavit.* And upon a Demurrer to this Replication it was objected, that the Traverſe was *multifarious*, conſiſting of ſo many Particulars in the Disjunctive; and that by omitting the Word (Neglexit) it was not Senſe. Sed per Cur. the Traverſe is good; for it is *purſuant to the Defendant's Plea*, which may be traverſed, as he has pleaded it; and that Part of it which is Nonſenſe will not hurt, becauſe the Traverſe is good without it. 3 Salk. 355. pl. 8. Paſch. 2 W. 3. B. R. Newdigate v. Selwin.

5. Every Thing that is traverſable *muſt be expreſs'd in Certainty*; and then if it be a good Plea, and not traverſable, it is not queſtionable. Skin. 486. in Caſe of Philips v. Bury.

6. In Replevin the Defendant *avowed for a Rent-charge* in Arrear; the Plaintiff *replied De injuria ſua propria, abſque hoc that Rent was in Arrear*; and upon a ſpecial *Demurrer, for that this* Replication and Traverſe *amounted to no more than the General Iſſue*, the Court held that this is not a proper Inducement to the Traverſe; the natural and proper Plea to this Avowry had been Nihil in Aretro, which is quaſi the General Iſſue; ſo that this is a pleading Special Matter, which amounts to the General Iſſue, and no other Evidence can be given but ſuch as might have been given upon the proper Iſſue; therefore this Circumlocution is ill, becauſe it *prolongs the Cauſe*, by inforcing the Avowant to an unneceſſary Replication; and tho' it is no more than Matter of Form, becauſe it does not alter the Evidence, yet Per Holt Ch. Juſt. This being upon a Special Demurrer, is naught. 3 Salk. 356. pl. 11. Hill. 12 W. 3. B. R. Horn v. Lewin.

Ld. Raym. Rep. 639. 641. S. C. and held accordingly per tot. Cur. And tho' it be the ſame Thing in Effect with a Plea of Riens arrear, yet Riens arrear is the proper Plea in Avowry, and is quaſi the General Iſſue; and tho' it be but Form, yet it is legal Form, which the Law will have to be followed.——12 Mod. 254. S. C. accordingly.———2 Salk. 583. pl. 4. S. C. accordingly.———And in 3 Salk. 356. pl. 11. it is ſaid to be as if in Treſpaſs a Man ſhould plead De Injuria ſua propria, abſque hoc quod eſt culpabilis, ſo De Injuria ſua propria abſque hoc quod he is Bailiff, & de Injuria ſua propria abſque hoc that there was ſuch a Preſcription, theſe are naught.

7. *Juſtification on* a Publick *Act of Parliament* may be travers'd generally. Ld. Raym. Rep. 700, 701. Mich. 13 W. 3. Chauncey v. Winde & al.

12 Mod. 580. S. C. and in arguing the Caſe it was agreed, that when the *Plea conſiſts of a Juſtification, Part depending of Matter of Record*, the Replication ought to be with a ſpecial Traverſe. Agreed Arg. 12 Mod. 581. in Caſe of Chancey v. Win & al

But 'twas ſaid that this Rule *has its Exceptions*; for if Matter of Record be made Uſe of *by Way of Inducement* to the Part of Juſtification, there it is not neceſſary to reply ſpecially, and cited 2 Le. 102. and that that general Rule only holds Place where *ſuch Matter of* Record is pleaded, *to which the Plaintiff may have an Anſwer*, as to a Scire facias &c. but here there can be no Anſwer to a Juſtification under an Act of Parliament, as in the Principal Caſe. *And* he likewiſe agreed, that where one claims Common by Preſcription, Rent by Grant, Goods by Sale, &c. and ſo *juſtifies as having Intereſt*, there the Plaintiff muſt anſwer directly to the Title, and not with a general De injuria ſua propria abſque tali cauſa. *But* when one *intitles himſelf by Act of Parliament*, eſpecially a *General* Act, which none can traverſe, there he may well reply De injuria ſua propria abſque tali cauſa. And by Holt Ch. J. The Act of Parliament here, if it had not been pleaded, would have been taken Notice of by the Court; therefore its being pleaded being ſuperfluous, will be no Hinderance to the Replication, with this general Traverſe. 12 Mod. 581, 582. Mich. 13 W. 3. in Caſe of Chancey v. Win & al.

(Y. a) How, as to Time. Where it muſt be *of* the *Time before, or* of the Time *before and after, or* of the Time *after.*

1. IN Aſſiſe, the *Tenant intitled himſelf, becauſe W. was ſeiſed in* Fee, *and made Recognizance to the Defendant in* 40 *l. by Statute Merchant, and he ſued Execution, and ſhewed the Record certain* &c. The *Plaintiff ſaid that W. two Years before the Statute infeoff'd the Plaintiff, which Eſtate he continued till by the Defendant diſſeiſed,* abſque hoc *that W. the Day of the Statute, or ever after, any Thing had,* priſt, and the *other that he was ſeiſed the Day of the Statute, but* was *not ſuffered to ſay* the Day of Statute, *and after*; for it is double on the Part of the Tenant, and yet well for the Plaintiff. Br. Traverſe per &c. pl. 170. cites 24 Aſſ. 2.

And by ſome, the Defendant ſhall ſhew what Hour of *the Day he was infeoff'd, and that he took them the ſame Day after*; for if he took them in the Morning, and was not infeoff'd till the Noon of the ſame Day, he cannot juſtify before the Noon. Br. Traverſe per &c. pl. 199. cites 5 H. 4. 124.

2. Treſpaſs *of Goods taken*; the *Defendant ſaid that J. B. was ſeiſed of a Houſe there in Fee; and where the Plaintiff declares the* 2d *Day of May Anno* 5 E. 4. *he infeoff'd the Defendant the* 14*th May in the Year aforeſaid, and the ſame Day the Defendant found the Goods there Damage feaſant, by which he took them* abſque hoc *that he is guilty before the ſaid* 14*th* Day of May; and it was challeng'd becauſe he did nor traverſe before and after, and ſo was the Opinion of 2 or 3 Juſtices, and the beſt Opinion. Br. Traverſe per &c. pl. 199. cites 5 H. 4. 124.

But by 9 E. 4. fol. 4. *it is ſufficient, prima facie,* without ſhewing the Hour, by which he pleaded the Feoffment above at 6 in the Morning, by which he took them there after on the ſame Day Damage feaſant, *abſque hoc that he was guilty before or after the* 14*th Day* &c. Br. Traverſe per &c. pl. 199.

In Treſpaſs, the Plaintiff declared that the Defendant 1ſt May 28 Eliz. *cut down 6 Poſts of the Houſe of the Plaintiff* at D. The Defendant *juſtifies, becauſe the Freehold of the Houſe* 10 *April* 27 *Eliz. was to J. S. and that he by his Commandment the ſame Day and Year did the Treſpaſs* &c. The Plaintiff demurr'd, becauſe the Defendant did *not traverſe,* without *that that he was guilty before or after.* And the Opinion of Wray was, that the Traverſe taken was well enough, becauſe the Freehold ſhall be intended to continue &c. See 7 H. 7. 3. But all the other 3 Juſtices were of a contrary Opinion; but they *all agreed* that *where the Defendant does juſtify by Reaſon of his Freehold at the Day ſuppoſed in the Declaration,* there *the Traverſe* (*before*) *is good enough.* And afterwards Judgment was given againſt the Defendant. 1 Le. 95. pl. 123. Hill. 30 Eliz. in B. R. Higham v. Reynolds.——Cro E. 87. pl. 9. S. C. that the Defendant travers'd, abſque hoc that he was guilty of any Treſpaſs before the 10th April 27 Eliz. but did not traverſe the Time after &c. And the Court inclined that when he pleads his Freehold, it ſhall be intended to continue, except the contrary be ſhewn, and therefore need not traverſe the Time after, but they would adviſe; but afterwards it was adjudged for the Plaintiff.

* S. P. Per Littleton, Pigot and Nele J. And that it is a good Replication that Ne infeoffa pas. cites S. C.

3. *Contra in Treſpaſs in the Land* the 2d Day of May, and he pleads Feoffment the 14th Day of May, abſque hoc that he is guilty before, this is ſufficient in Treſpaſs of * Clauſo fracto, Graſs fed, and the like; for the *Soil remains to him after the Feoffment.* Contra of Taking of Goods. Br. Traverſe per &c. pl. 199. cites 5 H. 4. 124.

Br. Traverſe per &c. pl. 110. cites 15 E. 4. 23.——Heath's Max. 105. cap. 5.

*In ſuch Caſe he ſhall traverſe *before and after*; for the Juſtification does not ſerve but for this Time only. Br. Traverſe per &c. pl. 144. cites 37 H. 6. 37.

4. Treſpaſs *of Aſſault and Battery done to W. H. his Servant, Anno* 7 H. 6. *at B. and of entring into the Houſe of the Plaintiff*; the *Defendant ſaid that* Writ of *Subpœna was deliver'd to him to ſerve upon the Plaintiff, by which he ſerved it Anno* 18 H. 6. *and the Plaintiff and his Servants carried him to the Houſe of the Plaintiff in ſpight of his Teeth, and detained him there for half a Day,* which is *the ſame* Treſpaſs, *and to any Treſpaſs before this Day Not Guilty*; and *to the Battery of the Servant, ſaid that de ſon Aſſault demeſne Anno* 18. *and to the Treſpaſs before this Day Not Guilty*; and by the Reporter he may juſtify the Treſpaſs or maintain another Day which the Plaintiff does not count of *without any Traverſe*; And in * Battery whe1

when he juſtifies at another Day which the Plaintiff does not count of, he ſhall plead Not Guilty to all before this Day and after; *Quære.* Br. Traverſe per &c. pl. 104. cites 22 H. 6. 49.

5. Treſpaſs *Anno* 17. the *Defendant ſaid that the Place* &c. *Anno* 18 *was the Franktenement of J. N. who leaſed to the Defendant for* 10 *Years, and as to any Treſpaſs before Not Guilty.* Br. Traverſe per &c. pl. 105. cites 22 H. 6. 49.

Where the Defendant *juſtifies by a Leaſe for Years*, he ſhall traverſe *before, and not* the Treſpaſs *after*; for it is Lawful after by his Leaſe. Br. Traverſe per &c. pl. 144 cites 37 H 6. 37.

And it was ſaid that *tho' the Leaſe be determined* yet he need not to traverſe after. Br. Traverſe per &c. pl, 144. cites 37 H. 6. 37.

But ibid. pl. 220. cites 5 E. 4. 5. it is ſaid by Genney and Choke, that if the *Leaſe* be *determined* he ſhall traverſe before and after.——S. P. Heath's Max. 106. cap 5. cites S C.

But where the Leaſe continues he ſhall not traverſe the time before. Br. Traverſe per &c. pl. 220. cites 5 E. 4. 5.

6. *So* where he *juſtifies another Day after by Deſcent from his Father* &c. and to any Treſpaſs before Not Guilty; quod nota. Br. Traverſe per &c. pl. 105. cites 22 H. 6. 49.

7. In Treſpaſs the *Defendant juſtified the taking of the Cattle* 3 *Days after the Day of the Treſpaſs ſuppoſed by the Declaration, by Virtue of a Precept of the Sheriff to make Replevin*, abſque hoc *that he was guilty before the* 3*d Day.* Laken Serjeant ſaid, that he ought to traverſe before and after, but Priſot ſaid No, but before only, and not after; for the Precept is an Authority to him to make Deliverance at any Day after, and continues till Deliverance be made. Br. Traverſe per &c. pl. 144. cites 37 H. 6. 37.

Br. Treſpaſs pl. 204. cites S. C. —— So in Treſpaſs *of taking his Cow*, the Defendant *juſtified by Writ of the King as Sheriff of the County to attach the Cow*, by which he attached her ſuch a Day and took her with him, *abſque hoc that he is Guilty before the Writ directed to him and after* the Return of it. And the Traverſe admitted good; quære. Br. Traverſe per &c. pl. 189. cites 9 H. 7. 6. —— Br. Treſpaſs, pl. 283. cites S. C.

8. *But* where a Man *pleads Releaſe*, he ſhall traverſe all Times *after*; for the Releaſe diſcharges that which was before. Br. Traverſe per &c. pl. 144. cites 37 H. 6. 37.

S. P. Ibid. pl. 104 cites 22 H. 6. 49. ——S. P. Ibid. pl. 268, cites 21 E. 4. 66.——S. P Ibid. pl. 309. cites S. C.——*In Treſpaſs the 4th of May*, if the *Defendant pleads a Releaſe the 1ſt of May*, he ſhall traverſe all Days after only. Br. Traverſe per &c. pl. 220. cites 5 E. 4. 5.—— S P. Ibid. pl. 242. cites 12 E. 4. 6.——S. P. Per Periam J. Godb. 111. pl. 131. Mich 28, 29 Eliz C. B. Anon.——S. P. And the Plaintiff may ſay Quod non eſt Factum, without maintaining his Day, if he will; for if there be no ſuch Releaſe, he ſhall be puniſhed at any Day; and ſo ſee that it ſhall not be travers'd, Per Cur. Br. Traverſe per &c. pl. 304. cites 10 E. 4. 2.

But in *Treſpaſs* laid to be *done* 1 *Maii*, the Defendant *pleads a Releaſe* to him made 1 *Juni*, *abſque hoc that he was guilty at any Time after the 1ſt of June*, Coke Ch. J. ſaid that the Day of the Treſpaſs is not material, it ſhould have been *abſque hoc that he was guilty before or after the 1ſt of June.* And Judgment for the Plaintiff. 3 Bulſt. 209. Trin. 14 Jac. Amſon v. Walcott.

9. *So of Arbitrement.* Br. Traverſe per &c. pl. 144. cites 37 H. 6. 37.

S P. Br. Traverſe per &c. pl. 242. cites 12 E. 4. 6.

10. In Treſpaſs *of Goods taken*, the *Defendant ſaid that the Plaintiff was poſſeſs'd, and ſold to F. who let them remain with the Plaintiff, and after F. ſold to the Defendant, and he took them*, the *Plaintiff ſaid that he was poſſeſs'd till the Day in the Declaration when the Defendant took them, abſque hoc that he ſold to F. before the ſaid Day*, and the others econtra; for it is a good Plea per Cur. and by this means the Plaintiff ſhall puniſh the Treſpaſs done before the Sale to F. Br. Traverſe per &c. pl. 302. cites 2 E. 4. 16.

11. Treſpaſs *de Clauſo fracto* 6 *October, Anno* 1 *E.* 4. *againſt the Peace of the ſaid King E.* 4. the *Defendant ſaid that* 8 *January* 39 *H.* 6. *the Place was his Franktenement*, abſque hoc *that he was guilty after the ſaid* 8*th Day of January*, and * well, tho' he did *not ſay before and after*, becauſe it

* S. P. Heath's Max. 107. cap. 5 becauſe upon

that Writ he cannot be guilty before, cites S. C. —— *And after*, becauſe he

it is in the Time of another King, and this Writ is againſt the Peace of the now King; ſo that if the Jury find the Defendant guilty in the Time of Henry the 6th, he ſhall not recover by this Writ. Contra if the Writ had been againſt the Peace of King Henry the 6th, and the now King; Quod nota. Br. Traverſe per &c. pl. 212. cites 2 E. 4. 23, 24.

might be guilty after the Day, in the Time of H. 6. and in the Time of E. 4. alſo he amended his Traverſe, and *traverſed that he was not guilty after the ſaid Day and Time of E.* 4. and then well; Quod nota. Br. Traverſe per &c. pl. 212. cites 2 E. 4 23, 24.

If he *juſtifies before the Day in the Declaration*, there he *ſhall traverſe the Time after*. Br. Traverſe per &c. pl. 220. cites 5 E. 4, 5.

If he *pleads his Franktenement*, there the Defendant ought

12. *But if he had ſaid* that *His Franktenement ſuch a Day in the Time of E.* 4. there he ſhall traverſe *before and after*. Note the Diverſity. Br. Traverſe per &c. pl. 212. cites 2 E. 4. 23, 24.

to traverſe *all Times after*; for that excuſes all times before. Br. Traverſe per &c. pl. 268. cites 21 E. 4. 66.

But where he ſays that it was his *Franktenement ſuch a Day*, he ſhall traverſe *all the Time before*; and this ſeems to be *where the Day, that the Plaintiff counts of, was before*, and ſhall be intended his Franktenement always after. Br. Ibid.——S. P. Br. Ibid. 309. cites S. C. and 12 E. 4. 6.——S. P. Br. Ibid. pl. 242. cites 12 E. 4. 6.——S P. Br. Ibid. pl. 220. cites 5 E. 4. 5.

In Treſpaſs of *Impriſonment the 2d of May* 4 E. 4. the *Defendant juſtified the*

13. Falſe Impriſonment; the *Defendant ſaid that ſuch a Day after the Day in the Declaration, he arreſted the Plaintiff by Warrant of the Peace, and carried him to Gaol, abſque hoc that he is guilty before*; And per Jenney and Choke, he ought to traverſe before and after. Br. Traverſe per &c. pl. 220. cites 5 E. 4. 5.

4th of Auguſt in the 4th Year aforeſaid, by Force of a Warrant of the Peace to him directed, to make the Plaintiff find Surety of the Peace, which is the *ſame* Impriſonment, *abſque hoc that the Defendant is guilty of any Impriſonment before this Day*; and it was doubted if he ſhall traverſe all Impriſonments before and after, and long debated, & adjornatur. Br. Traverſe per &c. pl. 191. cites 5 E. 4. 12.

Heath's Max. 106. cap. 5. cites S. C. —— S. P. Br. Traverſe

14. In *Treſpaſs the 2d of May* if the *Defendant pleads Licence the 4th of May* there he ſhall ſay abſque hoc that he is Guilty before or after; for Licence does not continue, but extends only to the Day in the Licence. Br. Traverſe per &c. pl. 220. cites 5 E. 4. 5.

per &c. pl. 309. cites 21 E. 4. 66. —— S. P. and ſo if he juſtifies by Aſſent of the Plaintiff. Br. Traverſe per &c. pl. 268. cites 21 E. 4. 66.

So when a Matter which amounts only to a *Licence* is pleaded at another Day than is mention'd in the Declaration, the Defendant ought to traverſe both *before and after*. Sid. 294. pl. 13. Trin. 18 Car. B.R. in Caſe of Dame Madicin, ſays it ſeems to be agreed.

15. Treſpaſs was *the 22 June 36 H.* 6. the *Defendant ſaid that J. N. was ſeiſed in Fee, and infeoffed the Defendant 3 May 37 H.* 6. and gave *Colour by the Feoffor* Anno 37 H. 6. *abſque hoc, that he is Guilty before this Day*; and a good Plea, tho' he claims by a Stranger and not by the Plaintiff, and gives Colour by the *Stranger*. Br. Traverſe per &c. pl. 195. cites 5. E. 4. 79.

16. Treſpaſs *of Cutting his Wood the firſt Day of Auguſt*, the *Defendant juſtified by Preſcription that the Lords of the Manor of D. have uſed to have 20 Load of Wood there yearly between Michaelmas and Chriſtmas, and he being Lord of D. cut the 20 October between Michaelmas and Chriſtmas*, abſque hoc *that he is Guilty before Michaelmas and after Chriſtmas: The Plaintiff ſaid, that he cut as in the Declaration, and traverſed the Preſcription of the 20 Load Modo & Forma*. And well per Cur. for *where the Defendant alleges Title, the Plaintiff* ſhall not be compelled to maintain his Day if the Defendant has no ſuch Title; and ſo he *has Election to maintain his Day or to traverſe the Title of the Defendant*; and ſo ſee Traverſe upon Traverſe. Br. Traverſe per &c. pl. 304. cites 10 E. 4. 2.

17. Treſ-

17. Treſpaſs *de Clauſo fracto in D.* 6 *July*, the *Defendant juſtified for Tithes ſevered from the* 9 *Parts as Parſon the* 10*th Day of Auguſt, abſque hoc that he is Guilty unleſs after the Tithes ſevered and till they were carried away*; And it was held clearly that every Parſon may *enter to collect his Tithes and to turn them till they are dry*, and of this the *reaſonable Time ſhall be tried*; and a good Plea, and *ſhall not be compelled to ſay that he is Not Guilty before nor after*; for he is Guilty every Year after the Tithes ſevered. Br. Traverſe per &c. pl. 242. cites 12 E. 4. 6.

18. *So of Common, from the Time of the Corn ſown till they are re-ſown*; becauſe thoſe Things are *incertain*. Br. Traverſe per &c. pl. 242. cites 12 E. 4. 6.

But where a Man ought to have *Common from Lammas to Candlemas*, there he ought to *traverſe all Times before Lammas and after Candlemas*. Per Choke. Br. Traverſe per &c. pl. 242. cites 12 E. 4. 6.

19. Where a *Man juſtifies another Day for Rent arrear at Eaſter*, he ſhall traverſe *that he is Not Guilty of any Entry, but to diſtrain when the Rent was Arrear*. Br. Traverſe per &c. pl. 242. cites 12 E. 4. 6.

20. Account as Receiver, the *Defendant ſaid that he accounted before the Plaintiff himſelf for the ſame Sum the firſt Day of April*, abſque hoc *that he was his Receiver after*. And no Plea per Cur. for it does not go but for this Time only, and not for the Time before; or it may be that he received the like Sum diverſe Times before, and ſo he *ought to traverſe before and after*. Br. Traverſe per &c. pl. 309. cites 21 E. 4. 66.

But where the Defendant *juſtifies the ſame Day that the Plaintiff counts*, there needs no Traverſe. Br. ibid. —— S. P. Br. ibid. pl. 242. cites 12 E. 4. 6. ——*Contra* where he juſtifies *at another Day*, as ſaid elſewhere for clear Law. Br. ibid. pl. 309. cites 21 E. 4. 66.

21. In Second Deliverance the *Defendant ſaid that A. leaſed to B. for* 20 *Years, which B. granted his Intereſt to the Defendant, and* ſo *avow'd Damage feaſant*; and the *Plaintiff ſaid that ſuch a Day and Year B. granted to him his Intereſt, abſque hoc that he granted his Intereſt to the Defendant before that he granted his Intereſt to the Plaintiff*, and admitted for good. Br. Traverſe per &c. pl. 113. cites 14 H. 8. 17.

22. In a *Quare Impedit* the Plaintiff *declared that the Defendant being Parſon* of the Church in Queſtion *was preſented to another Benefice, and was inducted* 15 *April*, by which the firſt became void &c. The Defendant *pleaded, that he was qualified* 18 *April abſque hoc, that he was inducted* 15 *April*. The Court was of Opinion (abſente Anderſon) that the Traverſe was not good; for he ought to have ſaid generally *Abſque hoc, that he was inducted before the Day on which he had alleged he was qualified*. Godb. 111. pl. 131. Mich. 28 & 29 Eliz. C. B. Anon.

(Z.a) How. *Where the King is Party.*

1. A Man was *outlaw'd of Felony*, and *alien'd his Land to J. N.* by which *Scire Facias iſſued* againſt him, who came and would have *traverſed the Felony*; and the Court doubted if he might traverſe it, by Reaſon that he is a Stranger to the Record. But per Pigot 7 E. 4. 2. he cannot traverſe it in Caſe of Felony, he being a Stranger to the Record; contra in Caſe of Treſpaſs; by which it was pray'd for the King that Year, Day and Waſte be adjudged for the King immediately; and ſo it was immediately from that Day till a Year and a Day next after; quod nota. Quære if the King may take the Year and the

Day *what Time he pleaſes*; it ſeems that he cannot. Br. Corone, pl. 205. cites 49 Aſſ. 2.

2. If *A. be bound in a Bond to* 2. *and* after the *one is felo de ſe* and found by Office, by which the King claims the entire Bond, the *other may traverſe that he did not kill himſelf felonioufly*. Br. Traverſe per &c. pl. 229. cites 6 E. 4. 3. by the beſt Opinion.

3. Where a Man *makes Title or pleads* a Plea *againſt the King and takes a Traverſe* abſque hoc &c. againſt the King, there *the King may chooſe to maintain the Matter of the Abſque hoc, or to traverſe the Title or Plea of the other Party, and not to maintain the Abſque hoc*; Contra of a common Perſon. Br. Traverſe per &c. pl. 207. cites 3 H. 7. 3.

Keb. 920. pl. 24. S. C. ſays that the Defendant rejoin'd that the Anceſtor of the Plaintiff granted to J. S. and ſo convey'd under him to the Defendant, which the Court held a Departure; but if the Replication be ill, the Plaintiff cannot have Judgment. And Keeling agreed that the Plaintiff ought to have traverſed, but Twiſden doubted; But it being a trivial Action againſt 3 Schoolboys, for playing in a Court-yard near the School, where they had long uſed ſo to do Adjornatur.

4. In *Treſpaſs* Quare clauſum fregit, the Defendant *pleads that H.* 8. *was ſeiſed in Fee, and ſo the Lands deſcended to the King that now is, and that he as Servant* &c. The Plaintiff *replies, that H.* 8. *granted to the Plaintiff*, and does *not traverſe the dying ſeiſed of King Cha.* 1. and it might come to the King otherwiſe. Twiſden J. ſaid, a Traverſe needs not, and if it came to the King again, this ought to be ſhewn in the Rejoinder; the laſt Seiſin ſhall be traverſed if [for] it might be gained by Diſſeiſin. Adjourned. Raym. 137, 138. Trin. 17 Car. 2. B. R. Thatcher v. Ullocke.

See (S) pl. 13. — (I.a)

(A. b) How, *Where both Parties* claim *by one* and the ſame Perſon.

1. WHERE the Plaintiff and Defendant claim by one and the ſame Perſon, there the Traverſe of the *Gift* is good; per tot. Cur. Br. Traverſe per &c. pl. 278. cites 5 E. 4. 133.

But if the Colour had been given by C. who was the laſt, *there to ſay that A. was ſeiſed, and infeoffed him abſque hoc, that he enfeoffed B.* is not a good Replication, becauſe they *do not claim by one and the ſame Perſon*; *But* there *he ſhall ſay that C. infeoffed him* abſque hoc, *that he infeoffed the Defendant.* Br. ibid.

2. *In Treſpaſs* if the *Defendant ſays that A. was ſeiſed in Fee and infeoffed B. who infeoffed C. who infeoffed the Defendant*, and gives *Colour by A.* There it is ſufficient *to ſay that A. was ſeiſed, and infeoffed the Plaintiff abſque hoc, that he infeoffed B. prout* &c. For now the *Plaintiff and Defendant claim by one and the Perſon*; and there it is ſufficient to *traverſe the firſt Feoffment*. Br. Traverſe per &c. pl. 200. cites 5 E. 4. 133.

3 It was ſaid, that a *Que Eſtate* is traverſable, if both Parties claim by one and the ſame Perſon. Br. Traverſe per &c. pl. 231. cites 10 E. 4. 6.

Br. Traverſe per &c. pl. 256. cites S. C.

4. In *Treſpaſs* the *Defendant ſaid, that J. S. was ſeiſed of the Place* &c. *and infeoff'd B. who infeoff'd C.* And *no Plea, unleſs the Plaintiff conveys by the ſame, by whom Defendant convey'd.* Br. Que Eſtate, pl. 36. cites 18 E. 4. 10.

5. *In Formedon in Remainder the Deed is not traverſable*; *but* if the Demandant claims by the ſame by whom the Tenant claims, the Deed is traverſable, and he may *chuſe to traverſe the Deed or the Gift.* Br. Traverſe per &c. pl. 179. cites 4 H. 7. 9.

6. In

6. In Replevin the *Defendant ſaid, that B. was ſeiſed in Fee, and leaſed to E. for* 60 *Years, which E. granted his Intereſt to the Defendant Anno* 38 *H.* 8. *by which he was poſſeſſed, and diſtrain'd for Damage feaſant.* The *Plaintiff ſaid, that this ſame E. Anno* 32 *H.* 8. *granted his Intereſt to him.* He ſhall not traverſe the Grant in Anno 38. for he has confeſs'd and avoided it by *the elder Grant* obtain'd. Br. Confeſs and Avoid, pl. 65. cites 2 E. 6. S. C. cited per Cur. Ld. Raym. Rep. 238. Trin. 9 W. 3. in Caſe of Lambert v. Cook.

7. Where the Parties do not claim by one and the ſame Perſon, the *Dying Seiſed ſhall be traverſed, and not the Deſcent.* Le. 310. pl. 429. Arg. in Caſe of **Maidwell v. Andrews,** cites D. 366. Vernon's Caſe.

8. In Replevin by H. againſt W. the Defendant made *Conuſance as Bailiff to H. becauſe A.* in 1 E. 6. *leaſed to B. for* 90 *Years, who aſſign'd the Term to C. who granted it to D. who granted it to E. who granted it to H.* The *Plaintiff confeſs'd the Aſſignment to C. and ſaid, that D.* took to Baron J. S. who *granted to the Plaintiff; and traverſed the Grant to E.* Adjudg'd that this Traverſe was ill; for a Leaſe for Years cannot be gain'd but by a lawful Grant, and therefore the laſt Leaſe ought not to be traverſed by him; but the other Party ought to traverſe the firſt Leaſe, or ſhew how he came to it again, to enable him to make the 2d Grant. 6 Rep. 24. b. Hill. 41 Eliz. B. R. Helyar's Caſe. Cro. E. 650. pl. 6. **Helier v. Whytier,** S. C. accordingly, and adjudg'd (abſente Gawdy) for the Defendant. —Mo. 551. pl. 743. S. C. the Defendant demurr'd, becauſe the Traverſe was ſuperfluous, he having made Title before, and Paramount the Grant, which he offer'd to traverſe; whereas he *ſhould have pleaded the former Aſſignment, and pray'd Judgment without Traverſe*; otherwiſe it amounts to a Confeſſing and Avoiding, and to a Traverſe alſo. And adjudged for the Avowant, for the Inſufficiency of the Traverſe.———S. C. cited 2 Bulſt. 1. Mich. 10 Jac. in Caſe of Rice v. Harris.———S. C. cited Ld. Raym. Rep. 237, 238. in Caſe of Lambert v Cook.

9. *But* in Caſe of a *Feoffment*, the *firſt Feoffee muſt confeſs and avoid the laſt Feoffment*, as by Diſſeiſin &c. For a Diſſeſor may gain an Eſtate in Fee, whereas a Leaſe for Years can be only by lawful Conveyance. But when H. claim'd by a former Aſſignment of a Term, it would be impertinent to traverſe, that he after aſſign'd his Intereſt; for perhaps he did aſſign all his Intereſt without having any. 6 Rep. 25. a. in Helyar's Caſe.

10. In *Replevin* &c. the Defendant *juſtified*, for *that M. was ſeiſed in Fee, and upon the* 20 *Sept.* 1 *W. & M. demiſed* the Premiſes *to him for a Year*, and he enter'd, *and ſo avow'd for Damage feaſant.* The Plaintiff *confeſs'd the Seiſin of M. but ſaid, that before the Leaſe to the Defendant*, viz. 5 June, 1 W. & M. *ſhe demiſed to the Plaintiff for* 6 *Years* &c. *and traverſed the Leaſe made to the Avowant.* The Avowant *demurr'd generally.* Pollexfen Ch. J. inclin'd, that the Traverſe was no Cauſe of Demurrer, tho' it might have been omitted, and that there were divers Authorities againſt **Helyar's Caſe**; and that the Books generally are only, that there needed no Traverſe, as the Caſe of the **Biſhop of Saliſbury v. Hunt,** Cro C. 581. and **Kelland v. White,** Cro. C. 494. But the other Juſtices doubted, by reaſon of Helyar's Caſe, and * **Rice and Harveſton's Caſe,** where it is ſaid, that ſuch a Traverſe makes the Plea vitious. But here the Demurrer being general, it is but Form, and aided by 27 Eliz. where if one confeſs and avoid, and traverſes, it is only in Nature of a double Plea; and cited Cro. C. 323. **Edwards v. Woodden.** And ſo per tot. Cur. Judgment was given for the Plaintiff. 2 Vent. 212. Mich. 2 W. & M. in C. B. Denny v. Mazey. At the End of the Caſe of **Lambert v. Cook,** in Ld. Raym. Rep. 238. there is a Nota, that the Court ſaid the Caſe of Denney v. Mazey was a blind Caſe. * See (B. b) pl. 3.

11. *Treſpaſs* of taking Cattle at D. The Defendant *juſtifies, that J. S. was ſeiſed* of Bl. Acre, *and demiſed it to the Defendant for* 3 *Years*, from Lady-Day 8 W. 3. who by Virtue thereof enter'd, *and took the Cattle Damage feaſant* &c. The Plaintiff *replies, that before the Demiſe to the Defendant, J. S. demiſed the ſame to him*, to hold *De Anno in Annum Quamdiu ambabus partibus placuerit*; and *that he enter'd, and put in his Cattle, and the Defendant took them within the* 2 *Years, abſque hoc, that*

J. S.

J. S. demiſed to the Defendant modo & forma &c. The Defendant demurr'd, for that the Plaintiff did * not traverſe the laſt Leaſe &c. Exception was taken to the Traverſe of the laſt Leaſe, becauſe the Plaintiff had ſufficiently avoided it before. And the ſame Diverſity was taken between Leaſes and Feoffments, as in **Helyar's Caſe** above; and then inſiſted, that ſuch Traverſe is ill upon a General Demurrer. But after ſeveral Arguments at the Bar the Court was of Opinion, that *when the firſt Termor* (admitting that the Leſſor had ouſted him, and made a ſubſequent Leaſe) *re-enters*, the *2d Leaſe is become void*; ſo that to traverſe the 2d Leaſe is to traverſe a void Leaſe, which would be ill upon a General Demurrer. But the Court reſolved, that this Demurrer was a Special Demurrer; for as to the († Non,) ſince it is contrary to the Record, they ſaid they would reject it as Surpluſage; and therefore Judgment was given for the Defendant. Ld. Raym. Rep. 237, 238. Trin. 9 W. 3. Lambert v. Cook.

* See infra †

† See ſupra *

(B. b) Where *ſeveral Things of the ſame Nature* are traverſable, *which* of them *ſhall be traverſed firſt.*

Heath's Max. 120. cap. 5. cites S. C.

1. IN Treſpaſs, if the *Defendant ſays, that A. was ſeiſed, and infeoff'd B. who infeoff'd C. who infeoff'd D. whoſe Eſtate the Defendant has*, and gives *Colour by A.* there per Cur. the *Plaintiff may traverſe any of thoſe Feoffments*, becauſe the Bar is at large, and does not bind him. Br. Traverſe per &c. pl. 346. cites 16 H. 6.——Contra where the Bar binds the Plaintiff, as this Bar here does not. Br. ibid. cites 15 H. 7. 3. and Fitzh. Double Ple. 83.

2. A Biſhop brought *Treſpaſs againſt a Prior*, who pleaded, *that his Predeceſſor was ſeiſed in Fee, and died, and he elected* Prior, *and enter'd*, and gave Colour. The Plaintiff replied, *that before this his Predeceſſor was ſeiſed in Fee in Jure Epiſcopatus, till by J. diſſeiſed; upon whom the Predeceſſor of the Defendant enter'd, and his Predeceſſor died, and he was elected Biſhop, and enter'd, and was ſeiſed till the Treſpaſs.* And the *Defendant maintain'd his Bar, abſque hoc, that J. diſſeiſed the Predeceſſor of the Plaintiff*, and well; for it is no Traverſe, that the Predeceſſor of the Defendant did not diſſeiſe J. by his Entry upon him; for the Diſſeiſin to the Predeceſſor of the Plaintiff is the Matter which binds, and the meſne Conveyance nothing to the Purpoſe. Br. Traverſe per &c. pl. 355. cites 35 H. 6. 59.

Brown. 147, 148. S. C. accordingly, and the Court held, that *ſuch a Traverſe would make the Plea vitious.*——Yelv. 221. S. C. by the Name of Rice v. Harriſon accordingly.——2 Bulſt. 1.

3. *Ejectment.* The Plaintiff *declared on a Leaſe made by J. B.* The Defendant *pleaded, that the Land was Copyhold, Parcel of the Manor of S. of which the King was and is ſeiſed, who by his Steward granted the ſame to the Defendant in Fee*, to hold &c. The Plaintiff *replied, that before the King had any thing in the Lands, the Queen was ſeiſed in* Fee, *in Right of the Crown; and by her Steward, at ſuch a Court, granted* the Lands to the Plaintiff in Fee, to hold &c. The *Defendant demurr'd* to the Replication, *ſuppoſing* that *the Plaintiff ſhould have traverſed the Grant alleged* by him *in his Bar.* But the Court held the Replication good, becauſe the *Plaintiff had confeſs'd and avoided the Defendant's Title, by a former Copy granted by Queen Eliz. and therefore needed not to traverſe the Grant* made *to the Defendant.* Cro. J. 299. pl. 2. Paſch. 10 Jac. B. R. Rice v. Harveſton.

S. C. by Name of Rice v. Farris, accordingly; and Williams J. ſaid, that it appearing by the Replication, that the Grant to the Plaintiff, being firſt in time, had avoided the Defendant's Leaſe, being the

laſt. The *Defendant ought* therefore *to have rejoin'd and ſo to have traverſed the firſt Grant; but by his Demurrer* to the Replication *he had confeſs'd the Grant, under which the Plaintiff claim'd.*

(C. b) *Suppoſal* of the Writ &c. *Traverſable in what Caſes.*

1. WRIT *of Entry* by A. *that the Tenant has not Ingreſs, unleſs by J. N. who diſſeiſed the Plaintiff.* The *Tenant ſaid, that the Demandant infeoff'd J. N. by his Deed; Judgment if againſt his Deed* &c. Per Thorp, this is contrary to the Writ &c. by which he ſaid, that A. infeoff'd J. N. abſque hoc, that J. N. diſſeiſed A. Quod nota, that where the *Plaint is contrary to the Suppoſal of the Writ*, it *is not good without traverſing the Point of the Writ.* Br. Traverſe per &c. pl. 56. cites 38 E. 3. 1. and 15 E. 4. 28. 4 H. 6. 29. 8 H. 6. 2, 3. 9 H. 6. 32. and 15 H. 7. 16, 17. accordingly.

2. In *Mortdanceſtor* the Tenant may *allege Joint-ſeiſin in himſelf, and in the Father of the Demandant*; and this is a good Plea, *without traverſing the ſole Dying Seiſed*; and the Reaſon ſeems to be, becauſe the * *Writ and Declaration is only ſuppoſal.* But where the Jointenancy is alleged for Bar in Aſſiſe, or other Action, or in a Title, there the ſole Dying Seiſed is traverſable. The Reaſon ſeems to be, becauſe the *Bar, Title, and Replication are Matters in Fact, and not ſuppoſal.* Br. Traverſe per &c. pl. 185. cites 5 H. 7. 11, 12.

S. C. cited, Arg. Ld. Raym. Rep. 355. in Caſe of Pullein v. Benſon.

* S. P. Br. Traverſe per &c. pl. 279. cites 22 E. 4. 39.

3. In Formedon it is a good *Plea, that the Anceſtor is alive, without traverſing the Death*, becauſe the Death is not alleg'd but by Suppoſal. *Contra where it is alleged by Matter in Fact*; for where one alleges *Life* in Fact, the other ſhall ſay that he is *dead, abſque hoc, that he is alive*; and where Death is alleged, the other ſhall ſay that he is alive, abſque hoc, that he is dead; and where the Abſque hoc is alleged, there ſhall come the Viſne. Br. Traverſe per &c. pl. 187. cites 6 H. 7. 5.

S. C. cited Arg. Ld. Raym. Rep. 355. in Caſe of Pullein v. Benſon.

(D. b) *By whom, or in whoſe Name* to be taken. Plaintiff &c. or Defendant, Tenant &c.

1. WHERE *the Tenant takes no Sans ceo in his Plea*, there the *Demandant ſhall take no Sans ceo in his Replication*, but ſhall maintain that which the Tenant has traverſed. Br. Traverſe per &c. pl. 70. cites 19 H. 6. 13. per Newton.

As *in Precipe againſt 2, if the one takes the entire Tenancy* upon him, *and touches or pleads in Bar, abſque hoc that his Companion any thing has, and the other likewiſe takes the entire Tenancy upon him, abſque hoc that the other any thing has, and touches or pleads in Bar*; there it is ſufficient for the Demandant to ſay that they two are Tenants as the Writ ſuppoſes, Priſt; without Traverſe; becauſe they in their Pleas have taken Traverſe; per Newton and Fulthorp accordingly. Br. Traverſe per &c. pl. 70. cites 19 H. 6. 13.——Br. Maintenance de &c. pl. 9. cites 9 H. 6. 13.

2. *But where the Tenant takes no Sans ceo in his Plea*, there the *Demandant ought to take* a Sans ceo *in the Replication.* Br. Traverſe per &c. pl. 70. cites * 19 H. 6. 13. per Newton.

As in Formedon, if the *Tenant pleads Jointenancy with a Stranger not named, of the Gift of J. N.* Judgment of the Writ; there the *Demandant ſhall ſay that he*

is Tenant as the Writ ſuppoſes, abſque hoc, *that the Stranger any thing has*. Br. Traverſe per &c. pl. 70. cites 19 H. 6. 13. per Newton. ——— Br. Maintenance de Brief, pl. 9. cites 9 H. 6. 13. ——— S. P. Br. Traverſe, per &c. pl. 187. cites 6 H. 7. 5. per Huſſey and Fairfax J.

Contra if he was attainted *by Confeſſion*; per Young, which none denied. Br. Traverſe per &c. pl. 320. cites 7 E. 4. 2.

3. In Outlawry it was ſaid per Young, that where a Man is *attainted of Felony by Verdict*, his *Feoffees nor his Mainpernors for his good Behaviour ſhall not traverſe that he was Not Guilty*. Br. Traverſe per &c. pl. 320. cites 7 E. 4. 2.

——— *But* upon Outlawry of the Principal, the *Feoffee* may traverſe the Felony, contrary of Verdict. Br. Traverſe per &c. pl. 323. cites 49 E. 3. 11.

It is ſaid in the Margin of Dyer, that this Opinion of Shelly was affirm'd in C. B. as to the Traverſe.

4. In *Debt for Rent* the Plaintiff *declared that he demiſed* to the Defendant 26 *Acres rendring Rent*; the Defendant *pleaded that he demiſed* to him the 26 *Acres*, *and alſo* 4 *Acres more abſque hoc*, *that he demiſed the* 26 *Acres tantum*; and the Jury found that the Plaintiff demiſed 21 Acres only; the Court doubted for whom to give Judgment; but Shelley ſaid, that the Defendant needed not to have traverſed, he having confeſſed that and more, and then the Traverſe ought to come on the Part of the Plaintiff, viz. abſque hoc, that he demiſed the ſaid 4 Acres prout &c. and then the Charge of the Jury would be only upon the Surpluſage, viz. the Demiſe of the 4 Acres; whereas here it is upon the whole 26. &c. but he would adviſe. D. 32. b. pl. 7. Paſch. 28 & 29 H. 8. Anon.

Raym. 125. S. C. very ſhort and no Judgment mention'd.— Sid. 405. pl. 15. Sammon v. Smith, S C. that Judgment was given for the Plaintiff becauſe Defendant had not concluded his Plea, abſque hoc, that the Plaintiff had demiſed

5. In *Debt* for Rent, the Plaintiff *declared on a Demiſe of* 4 *Acres at* 5 *l.* The Defendant *pleaded that the Demiſe was of the ſaid* 4 *Acres and one Acre more*, viz. *Wh. Acre*, and *that before the Rent due the Plaintiff enter'd into Wh. Acre.* The Plaintiff demurred, becauſe the Defendant did *not traverſe abſque hoc*, *that he demiſed the* 4 *Acres only*; But it was ſaid on the other Side, that the Traverſe ought to come on the Part of the Plaintiff, viz. That he ſhould have maintain'd the Demiſe abſque hoc, that he demiſed Wh. Acre. It was anſwer'd, that this would be a Departure and therefore the Traverſe ſhould be by the Defendant; becauſe when he pleads other Leaſe than that on which the Plaintiff declared he ſhould traverſe the Leaſe upon which the Plaintiff declared, viz. he ſhould have pleaded the Leaſe of Wh. Acre abſque hoc, that he demiſed the 4 Acres tantum: And of this Opinion was the Court, and gave Judgment for the Plaintiff. Lev. 263. Hill. 20 & 21 Car. 2. B. R. Salmon v. Smith.

Modo & Forma. ——— Saund. 206. S. C. adjudged accordingly. But Saunders who argued for the Defendant, ſays at the End of his Report of the Caſe that it ſeems to him that the leaving the Matter at large in the Plea, and ſo for the Traverſe to come of the Part of the Plaintiff in his Replication would have been the moſt apt and ſubſtantial Manner of Pleading; but that the Court was of another Opinion, as he had before reported.

(E. b) *How much.*

Br. Repleder, pl. 50. S. C. for it may be that he who died ſeiſed of the Land and Houſe did not die ſeiſed of the Ma-

1. IN Forcible Entry the *Declaration was of* 2 *Houſes*, *and* 100 *Acres of Land*, the *Defendant ſaid that A. B. was ſeiſed of the Manor of D. of which the Houſes and Land is Parcel*, *and conveyed himſelf to it by Tenure and Eſcheat of the Manor*, and gave *Colour of the Houſes and Land only*, and the *Plaintiff intitled himſelf to the Manor*, *and ſo he was ſeiſed of the Houſes and Land till* by the Defendant diſſeiſed, and *travers'd the Dying ſeiſed of the Tenant* [of] the *Defendant of the Houſes and Land alleg'd in the Bar of the Eſcheat*, *and did not anſwer to the entire Manor*, *as his Title was in*

in the Premiſſes; and yet well, per Judicium. Br. Traverſe per &c. pl. 156. cites 36 H. 6. 19.

nor; and the Action is only of the

Houſe and Lands. —— *And* he need not traverſe, but *only that of which he complains who brought the Action*, and it may be that the Houſe and Land were Parcel of the Manor at one Time and not at another. Br. Traverſe per &c. pl. 156. cites 36 H. 6. 19.

But where a Fine is levied of the Manor, and he brings *Scire Facias of* 3 *Acres Parcel*, there it is otherwiſe; for he alleges the entire Manor to be in the Fine. Br. ibid.

2. A Man may traverſe *more than is alleged*; Per Wangf. Br. Traverſe per &c. pl. 26. cites 33 H. 6. 49.

For where one *alleges Condition* or Arbitrement *to conſiſt in one Point*, the other Party *may ſay that it was upon this Condition and another, and ſomewhat, abſque hoc, that it was upon the one only*, or that they arbitrated this Point, and another abſque hoc, that they arbitrated this Point only. Br. ibid.

And in Waſte by the Heir, if the *Tenant alleges Grant of the Reverſion by the Father in his Life, to which he attorn'd*, the *Plaintiff may ſay he did not attorn in the Life of his Father*. Br. ibid.

And in Aſſiſe, if the *Tenant pleads that his Father was ſeiſed in Fee, and died by Proteſtation ſeiſed*, the *Plaintiff may make Title by a Stranger*, abſque hoc, *that the Father of the Tenant ever any thing had*. Br. ibid. —— And it is ſaid P. 38. H. 8. that he may ſay *abſque hoc, that the Father was ſeiſed in Fee* &c. ibid. —— Heath's Max. 116. cap. 5. cites S. C.

So where a Writ of *Privilege was brought* by the Defendant in Treſpaſs *as Servant of an Officer* of the Exchequer; the Plaintiff *replied*, that the Defendant was *Servant in Husbandry, abſque hoc*, that he is a Servant *attending at the Office*. And Priſot held this a good Iſſue; And none but Laken denied it. Br. Traverſe per &c. pl. 27. cites 34 H. 6. 15. —— But Brooke makes a Quære if he ought not to traverſe, abſque hoc, that the Privilege extends to all the Servants, prout &c.

3. Where the *Juſtification goes to a Time and Place not alleg'd* by the Plaintiff, there muſt be a Traverſe *of both*. 2 Mod. 68. Hill. 28 & 29 Car. 2. C. B. Wine v. Rider.

4. *Judgment* was given *in Debt* in C. B. The Defendant brought Writ of *Error*, and *aſſigned the Want of an Original*, to which the *Defendant in Error pleaded a Releaſe of Errors*. The *Plaintiff in Error replies, that Defendant had obtain'd two Judgments againſt him in the ſame Term, and traverſed that the Releaſe of Errors pleaded was a Releaſe of Errors in that Judgment of which the Writ of Error was now brought*. Holt Ch. J. ſaid the Plea is good now, after the Releaſe is ſet out upon Oyer; for now it appears to be a Releaſe of this Judgment, and it ſhall not be intended that there was another Judgment between the ſame Parties of the ſame Term. And your Replication is not good; for if there were another Judgment to which this Releaſe might be applied, you ſhould have pleaded it ſpecially and certainly, and have averr'd, that this Releaſe was a Releaſe of the Errors in that Judgment, and ſo have given the Plaintiff an Opportunity of anſwering that Judgment, as by pleading Nul tiel Record; for if there be no ſuch Record, the very Foundation of your Replication is gone; forif there be no other Judgment, this Releaſe releaſes this Judgment, and the Traverſe is of a Thing in the Air. 2 Ld. Raym. Rep. 1054, 1055. Mich. 3 Ann. Davenant v. Raſtor.

(F.b) *What muſt be alleged, tho'* it be *not traverſable.*

1. IN *Formedon* the Explees ought to be alleged, for otherwiſe the Count is not good; and *yet when they are alleged they are not traverſable*. Per Martin. Br. Explees, pl. 6. cites 9 H. 6. 61.

Br. Attachment ſur Prohibition, pl. 1. cites S. C.

2. Attachment upon a Prohibition, the *Writ was tenuit placitum contra Prohibitionem noſtram*, and *did not count that Prohibition was delivered to the Defendant*, by which the Defendant demanded Judgment of the Count for this Default; and per Cur. he ought to count it; and yet it is not traverſable. Br. Attachment ſur Prohibition, pl. 1. cites 9 H. 6. 61.

3. In *Formedon* in Remainder, *Deed of Remainder* ought to be ſhewn, and yet it is not traverſable. Br. Traverſe per &c. pl. 324. cites 14 H. 6. 1.

4. *He*

4. *He who prays to be received ought to ſhew Cauſe*, and *if the Cauſe be not ſufficient the Demandant may demur*; and *yet he ſhall not traverſe the Cauſe.* As a Man may demur for a Thing formal, as the Year and Day in Treſpaſs, and yet they are not traverſable. Br. Reſceit, pl. 133. cites 32 H. 6. 12.

5. If *a Man diſſeiſes me* I may have *Treſpaſs for the meſne Profits* tho' I do not re-enter, but in Pleading I *ought* to *allege Re-entry*; but this ſhall not be traverſed; quod nota per Pigot, and none denied it. Br. Traverſe per &c. pl. 131. cites 9 E. 4. 38. at the End.

6. In Replevin, if the *Defendant ſays that he took them in another Place than where the Plaintiff counts*, it is no Plea if he does not *ſhew Cauſe of the taking*, as to make Avowry &c. and there the Cauſe or Matter of the Avowry *ſhall not be travers'd*, but the Iſſue ſhall be taken upon the Place; Quod nota; Iſſue tender'd, which ſhall not be tried. Br. Replevin, pl. 45. cites 21 E. 4. 64.

7. Condition of an Obligation was, *that the Obligor ſhould not enter or claim ſuch a Houſe*; and the *Defendant ſaid that he did not enter nor claim.* Keble ſaid he claim'd, Priſt. Per Brian, You ought *to ſay that he came to the Land, and claim'd the Land, and entered into it*, and yet *nothing of the Entry ſhall be travers'd, but only the Claim*; Quod nota. Brooke makes a Quære of this Opinion; for there he alleges both Points of the Condition &c. Br. Conditions, pl. 130. cites 4 H. 7. 13.

So where in Caſe upon *an Indebitatus*, the *Conſideration* was *executed*,

8. The *Conſideration in* an Action upon the *Caſe* is material, but not traverſable; Per Wray and Fenner Juſtices. Cro. E. 201. pl. 27. Mich. 32 & 33 Eliz. B. R. in Caſe of Smith v. Hitchcock.

it is not traverſable. Ibid. cites 5 H. 7. 21 H. 7. 13.

9. *So* in an Action *ſur Trover*, the *Converſion* is material, but not traverſable; Per Wray and Fenner J. Cro. E. 201. pl. 27. in Caſe of Smith v. Hitchcock.

10. *Treſpaſs for killing* &c. *a tame Deer*; the Defendant *pleaded* in Bar *that he was poſſeſs'd of ſuch Lands* for a Term of Years, *and that a ſtray Deer came thereon, and* that *he not knowing it to be a tame Deer, killed it, Quæ eſt eadem interfectio* &c. And upon Demurrer the Court inclined, that the *Plaintiff ſhould have averr'd* in his Count *that the Defendant knew the Deer to be tame*, otherwiſe they inclined that he is excuſable; but afterwards they ordered the Declaration to be amended, and Defendant to plead Not guilty. 2 Lutw. 1359. Paſch. 3 Jac. Atkinſon v. Hunter.

(G. b) *What* Thing *is traverſable in one* Action *which is not* ſo *in another Action.*

1. *Annuity.* Per Danby, Priſot, and others, Anno 30 H. 6. A *Parſon* ſhall have Aid *of the Patron without Cauſe ſhewn, otherwiſe than* to ſay *that B. was ſeiſed of the Manor of D. to which the Advowſon was appendant, and preſented him, and that he found the Church diſcharg'd* &c. and pray'd Aid; and the Cauſe is not traverſable where he ſhews Cauſe, as it ſhall be where *Land* is *demanded againſt Tenant for Life*; for *he ſhall ſhew Cauſe*, and the Cauſe is traverſable of the Aid, and not in Writ of Annuity; Note the Diverſity. Br. Aid, pl. 89. cites 22 H. 6. 47.

2. *Replevin.* The *Defendant makes Conuſance as Bailiff* to J. S. The *Plaintiff traverſes*, abſque hoc *that he is Bailiff:* The Defendant demurs, and

and Judgment for him; for the *Difference is between Treſpaſs and Replevin.* In the former ſuch a Traverſe may be taken, but not in the later. 1 Ld. Raym. Rep. 233. Trin. 9 W. 3. Harriſon v. Britton.

3. A *Preſentment in a Court Leet* is traverſable, but no Action lies againſt the Steward, for awarding Proceſs upon it. Such Preſentment *is traverſable in Replevin, not in Treſpaſs, nor in Action againſt the Judge.* Ld. Raym. Rep. 470. Eaſt. 11 W. 3. in Caſe of Groenvelt v. Dr. Burnel & al.

(H. b) *By what Words, or what* will *amount* to a Traverſe.

1. THE Words *Abſque hoc* are *not neceſſary.* See Saund. 22. in the Caſe of Bennet v. Filkins.

2. *Et non* Virtute Warranti &c. See Saund. 21, 22. Mich. 18 Car. 2. Bennet v. Filkins.

3. *Non Antea* in ſome Caſes will make a Traverſe; Per Holt Ch. J. Ld. Raym. Rep. 349, 356. in Caſe of Pullen v. Benſon. See 2 Salk. 628. pl. 2. S. C.——See (E) pl. 5. S. C.

4. *Partes Finis nihil habuerunt* &c. is a ſufficient Denial of the Seiſin alleg'd at the Time of the Fine, and is a Traverſe in Effect, tho' not induc'd with the formal Words of Abſque hoc &c. 2 Lutw. 1625. Trin. 1 Ann. in ſome Obſervations of the Reporter on the Caſe of Walters v. Hodges.

5. *Non Aſſumpſit*, and *Non eſt Factum*, are both of them Pleas which traverſe Matters in thoſe reſpective Actions that are pleaded by Way of Recital; Per Parker Ch. J. 10 Mod. 191. Mich. 12 Ann. B. R. Seſtern v. Cibber.

(I. b) *Aliter, vel alio Modo. Good or Neceſſary,* in what Caſes.

DEBT againſt Executors, who *ſaid that the Party died Inteſtate, and the Ordinary committed the Adminiſtration to N. and they as Servants of N. ſold the Goods, and render'd to him an Account*, abſque hoc *that they adminiſter'd in other Manner.* Br. Traverſe per &c. pl. 379. cites 31 H. 6. 13. S P. Heath's Max. 118. cap. 5. cites 13 H. 6. 13.

2. Debt *againſt the Marſhal, upon an Eſcape* of one T. who was condemned to the Plaintiff in Aſſiſe in 10 l. and brought Writ of Error; and the Judgment was affirm'd, and he committed to the Marſhalſea, and ſuffered to eſcape, the *Defendant ſaid that a great Number of the King's Enemies broke the Priſon, and took them out*, abſque hoc *that he eſcaped aliter, vel alio modo.* And the Opinion was, that it is no Plea, if he *does not ſay that they were ſtrange Enemies*, as of France &c. For if they were of England, he may have his Recompence, and if they were Strangers, the Plea is good without any Sans ceo; & adjornatur. Br. Dette, pl. 22. cites 33 H. 6. 1. *And* it was ſaid that if he pleads that *Strange Enemies* did it, he *ſhall ſhew ſome of their Names*, and not Quod ignoti fecerunt &c. Ibid.

3. Treſpaſs *of Graſs cut*, the *Defendant juſtified, becauſe he was ſeiſed of a Houſe, and* 100 *Acres in Fee, to which he and all thoſe whoſe Eſtate* &c. *have*

have had Common appendant in 40 Acres, of which the Place where &c. *with all manner of Beaſts* &c. Littleton *proteſtando that he has not* &c. Et *Pro placito, that he has Common there, as long as he and thoſe* &c. *dwell in the Houſe aforeſaid, with their Beaſt levant and couchant, and not otherwiſe*; and *that at the Time of the Treſpaſs the Defendant was not dwelling in the ſaid Houſe*, abſque hoc *that he, and thoſe whoſe Eſtate* &c. *have had Common in any other Form.* Per Priſot, He ought to traverſe here; for where the *Plaintiff confeſſes as much as the Defendant alleges, and more*, he need not traverſe; but as here he has [not confeſs'd ſo largely as the Defendant has alleg'd; for he *alleg'd all Times*, and the Plaintiff did not *confeſs but during the Time that the Defendant dwelt in the Houſe*, but this Traverſe abſque hoc that he has Common in any other Manner, is not good; quod Curia conceſſit, by which he travers'd *abſque hoc that he has Common there Modo & Forma*, prout &c. and the others econtra. Quære of the Diverſity of thoſe Traverſes well. Br. Traverſe per &c. pl. 143. cites 37 H. 6. 34.

Heath's Max. 118. cap. 5. cites S. C.

4. Treſpaſs upon the 5 R. the *Defendant juſtified, becauſe Diſtreſs was awarded againſt the Plaintiff in the Court of B. and he at the Deſire of the Bailiff aided him to diſtrain*, which is the ſame Entry of which &c. and no Plea by 2 Juſtices, becauſe he *claims nothing in the Soil by ſuch Entry*, by which he ſaid further, *abſque hoc that he entered in any other Manner*; and then a good Plea, Per Coke Juſtice; for the general Iſſue is obſcure to the Lay Jury, but Aſhton and Markham contra; for Per Needham, he ſhall ſay *abſque hoc that he entered as the Writ ſuppoſes*; and Aſhton contra, and that he ſhall have the *General Iſſue, and give the Matter in Evidence.* Br. Traverſe per &c. pl. 215. cites 4 E. 4. 13.

5. Treſpaſs upon 5 R. 2. the *Defendant juſtified his Entry* into the Land *to make Withernam by Precept* &c. *abſque hoc that he entred in other Manner*; and held no Plea becauſe he did *not anſwer to the Entry and Expulſion of the Plaintiff*, by which *he ſaid Abſque hoc, that he entred as the Writ ſuppoſes*: And the Plaintiff imparl'd; for this laſt Plea was held a good Plea by the Juſtices. Br. Traverſe per &c. pl. 192. cites 5 E. 4. 26. 34. quod nota.

So in *Annuity againſt the Prior* of St. John of Jeruſalem in England *by Preſcription*; the *Defendant pleaded that he is Parſon Imparſonee of*

6. *An Abbot by Name of the Abbot of D. recovered an Annuity againſt a Vicar*, the *Defendant died*, and the *Abbot brought Scire facias againſt the Succeſſor, who ſaid that where the Abbot recovered by Preſcription by Name of Abbot, he ſaid that the Abbot had the Annuity, as Parſon Imparſonee of W.* and ſo the Recovery not naming him Parſon void and null in Law; and becauſe he did not ſay Abſque hoc that the Abbot had other Annuity, therefore no Plea per Judicium; for it may be that he had two Annuities, the one as Abbot and the other as Parſon. Br. Traverſe per &c. pl. 305. cites 10 E. 4. 16.

C. and that he and his Predeceſſors have uſed to pay it as Parſons of C. and not as Priors, abſque hoc that the Plaintiff has been ſeiſed of any Annuity in other Manner; and after he ſaid, *abſque hoc that the Plaintiff or his Predeceſſor have been ſeiſed of any Annuity other than this Annuity*; Judgment of the Writ, and this was ſaid a perilous Iſſue, by which he ſaid *Abſque hoc that he was ſeiſed of this Annuity in other manner*, Priſt; & adjornatur; and this a good Plea that he is charg'd as Parſon, and not as Prior; for otherwiſe he may be doubly charg'd with two Annuities. Br. Traverſe per &c. pl. 280. cites 22 E. 4. 43. 44.

So in Debt upon Eſcape the 18th December, the Defen-

7. The Traverſe *Aliter, vel alio Modo, ſhall never anſwer to the Time, but to the Manner* of the Converſion. Cro. E. 434. pl. 43. Mich. 37 & 38 Eliz. B. R. in an Action of Trover &c. Aſcue v. Saunderſon.

dant pleaded the Eſcape the 16th December, and a Re-taking upon Freſh Suit the 17th December, and that he retained him, abſque hoc that he is guilty Aliter, vel alio Modo; It was moved that this Traverſe of Aliter, vel alio Modo, anſwers not to the Time, but to the Manner *of any Thing alleged*; and cited 33 H. 6. 28. and 37 H. 6. 67. And of that Opinion were all the Juſtices at this Time, beſides Popham, that the Plea was ill for that Cauſe; but adjornatur. Cro. E. 439. pl. 55. Mich. 37 & 38 Eliz. B. R. Grills v. Ridgway.

So in *Treſpaſs* for Breaking and Entring his Houſe at Norwich, *on the 10th Day of November* &c. the Defendant *juſtified by a Proceſs cut of an Inferior Court*, by Virtue whereof he entred the Houſe *on the*

11th

11th *Day of* November &c. *Quæ eſt eadem Fractio* & Intruſio, *and then travers'd that he was guilty Aliter vel alio Modo*; and upon a Special Demurrer, and ſhewing this for Cauſe, the Plea was adjudged ill; and agreed by all, as well at Bar as at Bench, that the Traverſe *Aliter vel alio Modo*, does not extend to Time, but to the Manner of doing the Thing. 2 Lutw. 1457. Hill. 9 W. 3. Hargrave v. Ward.

8. *Indictment for uſing a Trade at H. in Suffolk, not having ſerved an Apprenticeſhip to that Trade* &c. The Defendant *pleaded the Cuſtom of London to buy and ſell any where, and that he being a Citizen and Freeman* of London, *did reſide at F. to buy and ſell* Goods prout ei bene licuit, *which is the ſame Uſing* the Trade, as in the Indictment, abſque hoc *that he uſed it Aliter, vel alio Modo*; The Court held the Traverſe and Plea ill. The Reporter in a Nota ſays he thinks the Plea ill, becauſe the Defendant had confeſs'd the Uſing the Trade, and yet has travers'd abſque hoc that he us'd the Trade Aliter, vel alio Modo, which he ſays is idle and abſurd to traverſe the uſing the Trade Aliter, vel alio Modo; for he was not charg'd by the Indictment of uſing it Aliter, vel alio Modo; and therefore the Traverſe ought to have been omitted. Saund. 311, 312. Mich. 21 Car. 2. The King v. Kilderby.

(K. b) *Modo & Forma. Neceſſary*, or *good*. In what Caſes.

See (F) pl. 1. in the Notes, and pl. 5. and (M. a)

1. IN Avowry, if the *Plaintiff agrees with the Avowant in the Services, but varies in the Quality of the Land*, the Traverſe may be Abſque hoc that he holds Modo & Forma. 9 Rep. 35. b. in Bucknal's Caſe cites it as reſolved 5 H. 5. 4. b,

2. *Annuity of* 10 *s.* the Plaintiff *counted by Preſcription*, the *Defendant ſaid that he held the Advowſon of B. of him by the* 10 *s. which is the ſame Rent now in Demand*; Judgment of the Writ, and he was put to anſwer over; for it is only Argument. Br. Traverſe per &c. pl. 23. cites 33 H. 6. 27.

3. By which he *ſaid that he held* 3 *Acres of Land in B. and the Advowſon of B. of the Plaintiff by* 10 *s. which is the ſame Rent* of which the Plaintiff demands the Arrears, *abſque hoc that the Plaintiff and his Predeceſſors Time out of Mind* &c. *were ſeiſed of any yearly Rent of* 10 *s. except of the ſaid Rent of* 10 *s. for the ſaid Advowſon and* 3 *Acres*, & hoc &c. and the Plaintiff demurr'd, and the beſt Opinion was that the Traverſe is not good; for he ought to have concluded with Modo & Forma, and not with an Except of &c. For this is repugnant to his Plea; for the one and the other is Annual. Br. Traverſe per &c. pl. 23. cites 33 H. 6. 27.

4. Debt upon an *Obligation* with Condition *to ſtand to the Award, ſo that it be made before Octab. Mich.* &c. the Defendant *ſaid that the Arbitrators ſuch a Day before the ſaid Octab. made ſuch Award* &c. *which the Defendant was ready to perform, in caſe the Plaintiff would perform his Part*; to which the *Plaintiff ſaid that* after the making of the Obligation, and before the ſaid Octab. Mich. and *before the Day whereof the Plaintiff ſpeaks*, viz. ſuch another Day, *they made Award* &c. and ſhewed what, *which he was ready to have performed, in caſe the Defendant would have performed his Part*; and the *Defendant maintained his Plea, abſque hoc quod fecerunt talia Arbitrium, & Judicium qualia* &c. and ſo to Iſſue, and it was Jeofail per Judicium Cur. For *thoſe Words Talia qualia, go only to the Matter, and not to the Time*, where *it ought to have been to the Time only*; and therefore he *ought to have ſaid abſque hoc that they awarded Modo & Forma*, or abſque

For in *Aſſiſe*, if the *Defendant pleads Feoffment of a Stranger*, and the *Plaintiff pleads Feoffment* made *to him by the ſame Stranger before the Feoffment to the Defendant*, it is a good *Repli-*

cation for the Defendant to ſay abſque hoc *that they awarded before the Day in the Bar*; Quod nota. Br. Traverſe per &c. pl. 24. cites 33 H. 6. 28.

as before *abſque hoc that he infeoff'd the Plaintiff Modo & Forma*; for *this goes to the Time and to the Matter alſo*, viz. it goes to all. But ſee Modo & Forma in Littleton. Contra in Abridgment thereof. Br. Traverſe per &c. pl. 24. cites 33 H. 6. 28.

5. Treſpaſs *of Shovelers and Herns taken*; the *Defendant ſaid that the Place* &c. *is* 20 *Acres, which the Plaintiff leaſed to him for* 20 *Years, and the Herns and Shovelers bred there*, and he took them. The *Plaintiff ſaid, That the Place is named the Park of D. which he leaſed to the Defendant, except the Woods and Underwoods, and the Herns and Shovelers bred in them*, and the Defendant took them, of which he brought his Action, *abſque hoc that he leaſed as the Defendant ſuppoſes* &c. Br. Traverſe per &c. pl. 112. cites 14 H. 8. 1.

6. In Replevin the Defendant made *Conuſance as Bailiff to E. for that the Place* where *was Parcel of the Manor of T. whereof the Archbiſhop of York, and others were ſeiſed* in Fee, *and* 3 *June* 11 *H.* 8. *by Deed inroll'd, granted a Rent-charge to H.* 8. *and* ſo *derived a Title under that* Grant, *and avow'd* the taking *for Arrears of Rent*; The *Plaintiff confeſs'd the Seiſin of the Archbiſhop* &c. *and ſaid that* 4 *Junii* 11 *H.* 8. *they made a Feoffment to F. who licenſed the Plaintiff* to put in his Cattle, *abſque hoc that they* 3 *Junii* 11 *H.* 8. *granted the Rent-charge to the King Modo & Forma, prout*; the Defendants *rejoin that they did grant to the King the Rent-charge Modo & Forma.* The Jury found that they were ſeiſed, and by their Deed dated 3 Junii, and inroll'd 7 Junii, granted the Rent to the King &c. and adjudg'd for the Defendant, becauſe the Iſſue was joined upon the Grant Modo & Forma, and not upon the Day, as was offered by the Traverſe; and the Matter found is generally as alleg'd, and Modo & Forma goes only to what is material, and nothing by the Verdict appears to be intervening after the 3d Day, and before the 7th when the Deed was inroll'd, and then it is a good Grant of the 3d of June. Hutt. 120. Mich. 8 Car. Hickes v. Mountford.

See (R) pl. 4. (L. b) *Traverſe upon a Traverſe*, Neceſſary or good or not.

Heath's Max. 123. cap 5. cites S. C.

1. PRæcipe quod reddat *againſt* 2, the *one pleaded Non-tenure, and the other Jointenancy with a Stranger*, abſque hoc *that the other named in the Writ any thing has*; the *Demandant ſhall ſay that both named in the Writ are Tenants, as the Writ ſuppoſes, abſque hoc that the Stranger any Thing has*, and ſo Traverſe upon Traverſe. Br. Traverſe per &c. pl. 351. cites 9 H. 6. 1. 2.

2. Where the *Tenants firſt have taken a Traverſe*, there is *no need for the Demandant to take other Traverſe*; for one Traverſe ſuffices to make the Iſſue. Br. Maintenance de Brief, pl. 2. cites 34 H. 6. 16.

3. Treſpaſs *of cutting Wood the* 1*ſt Day of Auguſt*, the *Defendant juſtified by Preſcription, that the Lords of the Manor of D. have uſed to have* 20 *Load of Wood there annually, between Michaelmas and Chriſtmas; and he being Lord of D. cut the* 20*th of October, between Michaelmas and Chriſtmas*, abſque hoc *that he is guilty before Michaelmas, and after Chriſtmas*; the *Plaintiff ſaid that he cut as in the Declaration, and travers'd the Preſcription of the* 20 *Load Modo & Forma.* And well per Cur. For *where the Defendant alleges Title, the Plaintiff* ſhall not be compell'd to maintain his Day, if the Defendant has no ſuch Title, and ſo he *has Election to maintain his Day, or to traverſe the Title of the Defendant.* And ſo ſee Traverſe upon Traverſe per &c. pl. 304. cites 10 E. 4. 2.

4. *Treſ-*

4. A Traverſe upon a Traverſe was adjudg'd *good*, *where the Place is material*; as in Falſe Impriſonment in the Ward of F. in London. The Defendant juſtified by Recovery in Debt, and Writ of Execution in Sandwich in Kent, and the Taking and Impriſonment there, Abſque hoc, that he is Guilty in London. The Plaintiff replied, that he is Guilty in London; abſque hoc, that there is ſuch Record in Sandwich. Mo. 350. pl. 469. Mich. 35 & 36 Eliz. Paramour v. Verwold.

Poph. 101. S. C. and per Cur. If the Special Matter alleged in the Foreign County is falſe, the Plaintiff may maintain his Action, and traverſe that Special Matter; and in ſuch Caſe a Traverſe on a Traverſe is good, when *Falſity* is *uſed to ouſt the Plaintiff of the Benefit which the Law gives him.*——Cro. E. 418. pl. 13. S. C. accordingly, per tot. Cur.——Mo. 603. pl. 834. S. C. but not S. P.——2 And. 151. pl. 85. S. C. but not S. P.

5. Traverſe upon a Traverſe, *is only where the Matter traverſed is but Inducement.* Hutt 97. per Cur. Hill. 3 Car. in the Caſe of Chichley v. Bp. of Ely and Thompſon.

6. There *never* ſhall be a Traverſe upon a Traverſe, *but where the Traverſe in the Bar takes from the Plaintiff the Liberty of his Action, for the Place or Time, or ſuch like.* There the Plaintiff may maintain his Action for the Place or Time, and may traverſe the Inducement to the Traverſe, and needs not to join with the Defendant in the Traverſe; but at his Pleaſure may do the one or the other. *But when the Inducement is made and concluded with a Traverſe of a Title ſhewn by the Plaintiff*, there the Plaintiff is enforced to maintain his Title, and not to traverſe the Inducement to the Traverſe. Arg. cites 10 Ed. 4. 3. & 49. 12 Ed. 4. 6. 2 Ric. 3. Title Iſſue 121. Dyer 107. And of this Opinion was the whole Court. Cro. Car. 105. Hill. 3 Car. C. B. in Caſe of the Lady Chicheſley v. Thompſon and the Biſhop of Ely.

S. C. cited Arg. 2 Mod. 184 in Caſe of Stroud v. the Bp. of Bath and Wells, and Horner.—— S. C. cited in Totidem Verbis, Arg. 2 Lutw. 1630. in the Caſe of Crane v. the Biſhop of Norwich, Reeve, and Dubourdieu.

7. *Treſpaſs* de Clauſe Fracto. The Defendant *juſtifies* his Entry *by the Command of J. S.* The Plaintiff *replies, that J. S. was ſeiſed in Fee, and let unto him at Will, and traverſes the Command* of J. S. The *Defendant maintains*, that J. S. commanded him to enter, and that he enter'd by his Command, *and traverſes the Leaſe at Will.* And hereupon it being demurr'd, 'twas adjudged for the Plaintiff, that the Command was traverſable; and that the Defendant's Rejoinder to make a Traverſe upon a Traverſe, as this Caſe is, was not good; wherefore Judgment was given for the Plaintiff. Cro. C. 586. pl. 5. Trin. 16 Car. B. R. Thorn v. Shering.——And cites Paſch. 38 Eliz. in **Parker's Caſe** adjudged, that the Command is traverſable.

8. A Traverſe ought not *regularly* to be taken upon a Traverſe. But *the Difference is where the firſt* Traverſe *is good, and taken to the material Point*, and goes to the Subſtance of the Action, then there ſhall be no other Traverſe taken after. *But where the firſt Traverſe is idle, and not well taken, nor pertinent* to the Matter, there, to that which was ſufficiently confeſs'd and avoided before, the other Party may well take another Traverſe, after ſuch immaterial Traverſe taken before. Per Saunders, Arg. Saund. 22. in Caſe of **Bennet v. Filkins**, and cited the Caſe of * Digby v. Fitzherbet.

Lev. 192. Mich. 18 Car. 2. B. R. S. C. * Mo. 869. pl. 1207. S. C.—— Hob. 101. S. C.—— S. P. per Cur. Ld. Raym. Rep. 121. Mich. 8 W. 3. in Caſe of **Serle v. Darford**, cites Co. Litt. 282. b. Cro. E. 99 Inglebath v. Jones, and 437. Bateman v. Spring.

9. In the Caſe of a *common Perſon* the Books are clear, that he *cannot take a Traverſe upon a Traverſe for theſe Reaſons.* 1ſt, If you will recover any Thing from another, you muſt not only deſtroy the Defendant's Title, but you muſt make your own better than his; for you muſt not

Vaugh. 360. S. C. the King v the Bp. of Worceſter, Jervis and Hunkley.

not recover by the Weakneſs of his Title, but by the Strength of your own. 2. If the Plaintiff ſhould make it appear, that the Defendant's Title is not good, and make no Title for himſelf, the Court could have no Inducement to give Judgment for him, Quia in æquali jure melior eſt conditio poſſidentis. 3. It would be to no End for the Plaintiff to ſet forth any Title at all, if he can force the Defendant to make out his Title, and is not bound to make good his own. And theſe Reaſons hold as well *in the Caſe of the King* as of a common Perſon; by Vaughan Ch. J. Freem. Rep. 7. pl. 6. Mich. 1670. in Caſe of the King v. Hinckley.

10. *Where a Traverſe is not good without a Special Inducement*, there a Traverſe may be to that Inducement; As in Treſpaſs, where the Juſtification is local by Virtue of his Office, or the like; and in Hobart in **Digby and Fitzherbert's Caſe**; per Hale Ch. J. 1 Vent. 248. Mich. 25 Car. 2. B. R. in Caſe of Hinchman v. Iles.

11. *Treſpaſs againſt A. B. C. D. and E. for breaking his Cloſe, and taking his Fiſh* in his ſeveral and free Fiſhery; *A. B. C. and D. plead Not guilty, E. juſtified*; for *that D. was ſeiſed in Fee of a Cloſe next the Plaintiff's* Cloſe, *and ſo preſcribes to have the ſole Fiſhing in the River which runs by the ſaid Cloſes, with Liberty to enter the Plaintiff's Cloſe the better to carry on the Fiſhing; and that he as Servant of D. and by his Command, did enter* &c. *abſque hoc that he was guilty Aliter, vel alio modo.* The Plaintiff *replied De injuria ſua propria, abſque hoc that D. his Maſter has the Sole Fiſhing.* It was argued that the Traverſe in the Plea was immaterial; for having anſwered the Declaration fully in alleging a Right to the Sole Fiſhing and Entry into the Plaintiff's Cloſe, it is inſignificant afterwards to traverſe that he is guilty Aliter vel alio modo. And the Plaintiff had Judgment by the Opinion of the whole Court; for the Traverſe in the Plea is naught, becauſe where the Juſtification goes to a Time and Place not alleg'd by the Plaintiff, there muſt be a Traverſe of both; and as to the Replication they held it good, and that the Defendant ought to have travers'd the Plaintiff's Free Fiſhery, as alleged by him, which not having done, the Plea is ill. 2 Mod. 67. Hill. 27 & 28 Car. 2. C. B. Wine v. Rider.

12. In *Qua. Imp.* the *Plaintiff alleged, that H. ſeiſed in Fee of the Manor of D. to which the Advowſon was Appendant, preſented J. S. and* then *granted the next Avoidance to the Plaintiff; and that J. S. being dead, it belongs to him to preſent.* The Biſhop claims nothing but as Ordinary; but the *Incumbent pleads, that at the bringing the Writ the Church was full by Collation of the Biſhop on a Lapſe.* The Plaintiff *replied, that H. ſeiſed* as before, *did Tali Die & Anno preſent him as Clerk, abſque hoc, that the Church was full by Collation.* The Defendant *rejoins* Proteſtando, that the Church was full Tali Die; for Plea ſaith, *that it was full of the Collation of the Biſhop tali Die, abſque hoc, that H. did tali Die* &c. *preſent the Plaintiff* &c. and ſo traverſed the Plaintiff's Inducement to his Traverſe. It was argued, that the Rejoinder was not good; for that when Defendant pleads a Matter in Bar, and the Plaintiff hath traverſed the ſame, the Defendant ſhould take Iſſue upon that Traverſe, and ſo maintain his Bar, which he has departed from by traverſing another Matter. And the Court held the Pleadings not good. 2 Mod. 183. Hill. 28 & 29 Car. 2. C. B. Stroud v. the Biſhop of Bath and Wells and Sir Geo. Horner.

13. *Where a Traverſe in the Bar is idle and frivolous, the Plaintiff may well traverſe the Subſtance of the Matter of the Bar.*—*As* in Debt on a Specialty, wherein the Defendant bound himſelf to pay the Plaintiff 200 l. when demanded, if he did not marry her; and aſſign'd the Breach, *that ſhe had tender'd herſelf to marry the Defendant, but that he refuſed, and after married another Woman.* The Defendant *pleaded, that* after giving the Specialty, *he offer'd to marry the Plaintiff, and ſhe refuſed;*

fuſed; abſque hoc, that he refuſed to take her for his Wife, before ſhe refuſed to take him for her Husband. The Plaintiff *replied*, that *ſhe tender'd herſelf to marry the Defendant, abſque hoc, that the Defendant offer'd himſelf to marry the Plaintiff*, & hoc &c. Upon Demurrer it was inſiſted, that the Traverſe in the Replication was ill, becauſe ſhe traverſed that which was Inducement of the Traverſe in the Bar; ſo that it is a Traverſe upon a Traverſe, which the Law will not allow. But it was anſwer'd, that the Traverſe in the Bar is ill, becauſe too large; it being of more than is alleg'd in the Declaration, viz. Abſque hoc, That he refuſed to take the Plaintiff for his Wife, before ſhe had refuſed to take him for her Husband, ſo that he intended to *make this Circumſtance of Time Parcel of the Iſſue*; whereas ſuch Circumſtance is *not alleged in the Declaration*, nor any Affirmation, that Defendant had refuſed before Plaintiff had; and ſo the Traverſe in the Bar being idle, the Plaintiff might well traverſe the Subſtance of the Matter of the Bar; and of this Opinion was the Court, and Judgment for the Plaintiff. Carth. 99. Mich. 1 W & M. in C. B. Croſſe v. Hunt.

14. Where a Traverſe is *merely Surpluſage*, and not neceſſary, *as* where one *traverſes a Thing which he had before confeſs'd and avoided*, the other Party may traverſe that Traverſe, and alſo the Inducement to it. Carth. 166. Mich. 2 W. & M. in B. R. Bradburn v. Kennerdale.

(M. b) *Two* ſeveral Traverſes, *or more.*

1. THREE Traverſes were ſuffer'd in one Plea *to a Preſentment of Nuſance, for not making a Bridge, by* 3 Abſque hoc's; for the King was Party, and ſo it is uſed in the Exchequer at this Day, where the King is Party; quod nota. Br. Traverſe per &c. pl. 301. cites 38 Aſſ. 15.

Br. Iſſues Joines, pl. 63. cites S. C. where the *Preſentment was, that the Abbot of D. Tertenant of* 40 *Acres in D. and his Predeceſſors, and the Tertenants of the* 40 *Acres, and thoſe whoſe Eſtate they have in the ſaid* 40 *Acres, have made ſuch a Bridge in D.* And the *Abbot came and traverſed the Preſentment*, and *ſaid, that W. N. and his Anceſtors, Tertenants of the Manor of W.* &c. *have uſed to make it Time out of Mind, abſque hoc, that the Abbot, or his Predeceſſors, or the Tertenants of the* 40 *Acres, or thoſe whoſe Eſtate the Abbot has in the Land, have uſed to repair it Time out of Mind* &c. prout &c. And the others e contra, and a good Iſſue; for theſe three Points ſhall be but one and the ſame Preſcription, and it was admitted without Exception.

2. Action upon the Statute of Marlbridge, Anno 12. *for diſtraining in the High Street* &c. *and detaining them till the Plaintiff made Fine*; where this *ſecond Point is not in the Statute*, and yet the Defendant was compell'd to anſwer to both; by which he *ſaid, that he took them in his Several Damage feaſant, abſque hoc, that he took them in the High Street*; *and* abſque hoc, *that he detain'd till he made Fine*; and the Iſſue taken upon both. Br. Traverſe per &c. pl. 135.

Br. Iſſues join'd, pl. 66. cites 39 E. 3. 20. and ſays, Quod nota, two Iſſues in one Action, and that the Reaſon ſeems to be, becauſe they are ſeveral Treſpaſſes; and ſo it was ſaid there, that the firſt Matter is by the ſaid Statute, and the other is by the Common Law, and yet the Joining both in the one Writ is good; for the one is purſuant to the other.

3. Ceſſavit that the Tenant *held of him a Houſe and* 20 *Acres of Land, and ceaſed* &c. Defendant pleaded, that *he held the* 20*th Part of a Houſe in the ſame Vill, which is Part of the Land in Demand by Fealty and* 2 *Pence*; *and another Parcel lying in a Croft call'd B. by Fealty, and a Penny for all Services*; *and another Acre in the ſame Vill, and Parcel of the ſame Land in Demand by Fealty and a Penny*, for all Services; *abſque hoc, that* the

the Premiſes *are held by an entire Service, and* abſque hoc, *that the reſt is held of him.* Br. Traverſe per &c. pl. 122. cites 4 H. 6. 29.

Heath's Max. 122. cap. 5. cites S. C.

4. In Treſpaſs upon 5 R. 2. the *Tenant pleaded Gift in Tail to his Father*, and gave *Colour* &c. And the *Plaintiff pleaded Recovery againſt the Tenant in Tail by the Defendant, upon a Voucher and Recovery in Value.* The *Defendant ſaid, that after the Gift in Tail, and before the Recovery, his Father Tenant in Tail diſcontinued, and re-took another Tail, of which Eſtate he was ſeiſed at the Time of the Recovery, and died before the Recoveror enter'd.* Abſque hoc, *that the Recoveror enter'd in the Life of the Father, and* abſque hoc, *that his Father had other Eſtate at the Time of the Writ and Recovery, unleſs by the ſaid ſecond Tail*; and abſque hoc, *that the Recoveror was ſeiſed as in the Replication, and ſo the Recovery falſe*, and faint in Law, and all the three Traverſes permitted. Br. Traverſe per &c. pl. 244. cites 12 E. 4. 14. 19.

(N. b) Parcel. Where *one Thing's being Parcel of another* Thing is traverſed, *How* it may be.

† And ſo the Deſcent is well anſwer'd. Br. Repleader, pl. 51. cites S. C.

1. IN Treſpaſs the *Defendant ſaid, that the Place is Parcel of ſuch a Houſe, of which W. was ſeiſed, and infeoff'd P. who had Iſſue C. and died ſeiſed; and C. as Son and Heir enter'd, and infeoff'd the Defendant,* and gave *Colour by the firſt Feoffor.* The *Plaintiff ſaid, that he himſelf was ſeiſed of a Lane of which the Place was Parcel, till the Defendant did the Treſpaſs,* abſque hoc, *that it was Parcel of the Houſe.* And the *Defendant ſaid, that it was Parcel in the Poſſeſſion of P.* and ſo to Iſſue, and well, notwithſtanding that he *did not ſay, that the Land deſcended to C. as Heir, and he enter'd*; for this is all one, and to ſay that it was not Parcel in the Seiſin of P. is as well as if he had ſaid, that it was not Parcel at the Time of the Dying Seiſed of P. for this † goes to all his Seiſin. Br. Traverſe per &c. pl. 358. cites 3 E. 4. 27.

See (L) pl. 9. (O. b) *Without making Title.* In what Caſe it may be.

See Vaugh. 64

1. HE, who will take a Traverſe againſt the King, ſhall make Title. Br. Aſſiſe, pl. 459. cites 50 E. 3. and Fitzh. Aſſiſe, 442.

For he *is to recover only Damages, and no Franktenement.* Br. Traverſe per &c. pl. 225. cites 10 E. 4. 8.

2. It was held by the Juſtices, that if *in Treſpaſs* the *Defendant pleads in Bar by Feoffment*, the Plaintiff may traverſe the Bar generally without making Title to himſelf, as *to ſay that he did the Treſpaſs, abſque hoc, that he enfeoffed him.* Br. Traverſe per &c. pl. 225. cites 10 E. 4. 8.

——— S. P. And ſo if the *Defendant intitles himſelf by Gift in Tail* or the like, per tot. Cur. except Brian. *Contra in Aſſiſe.* But the Law ſeems to be with Brian; for the *Defendant is in Poſſeſſion*, and therefore it ſeems that the Plaintiff ſhall make Title againſt him, as well in Treſpaſs as in Aſſiſe. Br. Traverſe per &c. pl. 354. cites 18 E. 4. 10.—Heath's Max. 123. cap. 5. cites 18 E. 4. 10.

If in Aſſiſe the Bar is not good, the Plaintiff may have the Aſſiſe without making Title; *but if he makes Title which is not ſufficient*, upon which

3. But *Contra in Aſſiſe*, where he ſhall recover Franktenement. Br. Traverſe per &c. pl 225 cites 10 E. 4. 8.

which the Aſſiſe is awarded, and the Seiſin and diſſeiſin found; the Plaintiff ſhall not recover; by the Opinion of all the Juſtices. Br. Repleder, pl. 63. cites 11 H. 7. 28.

4. In *Replevin* &c. 'tis ſufficient for the *Avowant* to *plead his Freehold*; but *if the Plaintiff will traverſe* it, *he muſt make a Title to himſelf*, per Cur. (Anderſon abſente.) But per Peryam, it is not ſufficient to make it of his own Seiſin; but it muſt be Paramount. Goldsb. 65. pl. 6. Mich. 29 & 30 Eliz. The Lady Rogers's Caſe.

5. In *Treſpaſs* againſt Husband and Wife; they *pleaded that J. S. was ſeiſed* &c. *and made a Leaſe to them for Years* &c. The Plaintiff *replied*, *De ſon tort demeſne, abſque hoc, that he leaſed* &c. And per Cur. the Traverſe is not good without the Plaintiff's making himſelf a Title. *Otherwiſe if the Defendant claims Common* or ſuch like, *and not Poſſeſſion of the Land.* Goldsb. 67. pl. 11. Mich. 29 & 30 Eliz. Foſter v. Pretty.

(P. b) *What Plea may be pleaded at the ſame Time.*

1. WHERE *the Party pleads a Plea and traverſes the other Matter, it is not material whether the Matter of the Plea be true or not*; for he cannot ſay any Thing but maintain the Traverſe. Br. Departure de ſon Ple. pl. 4. cites 11 H. 4. 81.

2. Note that a Man *cannot traverſe and alſo ſay Not guilty to one and the ſame Thing.* Br. Traverſe per &c. pl. 144. cites 37 H. 6. 37.

(Q. b) *Ill Traverſe. Aided* by what.

1. WHERE a Traverſe is *merely Surpluſage* and not neceſſary; as where one traverſes *a thing which he had confeſſed and avoided before*; This is merely Form and aided upon a General Demurrer. Carth. 166. Mich. 2 W & M. in B. R. Bradburn v. Kennerdale.

2. An ill Traverſe as the traverſing a void Leaſe is not helped by a *General Demurrer.* See Ld. Raym. Rep. 237, 238. Trin. 9 W. 3. Lambert v. Cook.

For more of Traverſe in General, ſee **Formedon, Jointenants, Nuiſance, Office found, Preſcription, Preſentation, Que Eſtate,** and other proper Titles.

(A) Treaſure trove.

3 Inſt. 132. cap. 58.

1. NOTHING *is* ſaid to be Treaſure trove but *Gold and Silver.* 2 Inſt. 577.

2. Treaſure trove cannot be *claimed* unleſs *by Grant*, and cannot paſs by the Word Leet. Br. Incidents, pl. 38. cites Itin. Cant. 6 E. 3.

3. It was preſented that J. S. had found 100 *Marks of Gold and Silver*, which came to the Hands of A. who came and ſaid that nothing came to his Hands, Priſt; And ſo ſee that Coin found, tho' it be not hid is Treaſure trove, as it appears here. Br. Preſentments in Courts, pl. 24. cites 27 Aſſ. 19.

* 3 Inſt. 132. cites 22 H. 6. Corone 446. and ſays, it is a certain Rule. —— Bract. 120. a. Lib. 3. Cap. 3. S. 4. ſays, it is Quædam vetus Depoſitio pecuniæ, vel alterius metalli, cujus non extat modo memoria, ut jam dominum non habeat, & ſic de jure naturali fit ejus qui invenerit, ut non alterius ſit. Alioquin ſi quis aliquid lucri cauſa vel metus, vel cuſtodiæ recondiderit ſub terra, non erit Theſaurus, cujus etiam furtum fit. Theſaurus fortunæ donum creditur, & nemo ſervorum opera Theſaurum quærere debet, nec propter Theſaurum terram fodere, ſed ſi alterius rei tunc operam ſumebat, & fortuna aliud dedit. Cum igitur Theſaurus in nullius bonis ſit, & antiquitus de jure naturali eſſet inventoris, nunc de jure gentium efficitur ipſius Domini Regis.——3 Inſt. 132, 133. cap. 58. Lord Coke ſays, that where of ancient Time it belong'd to the Finder, as by ancient Authors it appears, yet he ſays he finds, that before the Conqueſt Theſauri de terra domini regis ſunt, niſi in Eccleſiæ vel Cœmeterio inveniantur; & licet ibi inveniatur aurum, regis eſt, & medietas argenti eſt medietas Eccleſiæ ubi inventum fuerit, quæcunque ipſa fuerit, vel dives vel pauper.

4. *He to whom the Property is*, ſhall have Treaſure trove; and *if he dies before it be found, his Executors ſhall have it*; for *nothing accrues to the King, unleſs when no one knows who hid that Treaſure; As in Caſe of Ireland M. 22 H. 6. Br. Corone, pl. 198. cites the printed Book of Abridgment of Aſſiſe, fol. 61.

S. P. and ſuch Treaſure trove belongs to the King, or to ſome Lord, or other by the King's Grant, or Preſcription. The Reaſon of its belonging to the King is a Rule of the Common Law, That ſuch Goods whereof no Perſon can claim Property belong to the King, as Wrecks &c. Quod non capit Chriſtus, capit fiſcus &c. It is anciently call'd Fyndaringa, of finding the Treaſure. 3 Inſt. 132. cap. 58.

5. It was ſaid where *Money, Plate, Silver, or Bullion* is found, the Proprietor or Owner not known, this is Treaſure trove, and the King ſhall have it. But all Mines of Metal, except Mines of *Gold and Silver*, belong to the Owner of the Soil, and the Mines of Gold and Silver to the King, as appears Libro Raſtal, and by the Records of the Tower. Br. Corone, pl. 175.

If Treaſure be found in the Sea, the Finder ſhall have it. 2 Inſt. 168.— Kitch. of Courts, Tit. Treaſure trove, cites Britton, fol. 26.

6. If any Man happen to find *in the Sea, or Sea-ſhore, Precious Stones*, Fiſhes, or the like, which no Man was ever a Proprietor of, it becomes his own, becauſe he is the firſt Finder. Miege's Laws of Oleron 11. S. 33.

7. If any ſeek for *Gold or Silver loſt on the Sea-ſhore*, and finds it, he ought to reſtore it all to the Owner, without any Diminution thereof. Miege's Laws of Oleron 11. S. 34.

8. And if a Man *going along the Sea-ſhore* to fiſh, or do any Thing elſe, *happens to find Gold or Silver*, he is likewiſe obliged to make *Reſtitution*, yet he may pay himſelf for his Day's Work; and if he do not know whom to make Reſtitution to, he ought to give *Notice to the Neigh-*

Neighbourhood, where he found the ſaid Gold or Silver. In this Caſe he muſt adviſe with his Superiors; and if he be poor, they ought to conſider his Condition, and adviſe him to the beſt, according to true Godlineſs and a good Conſcience. Miege's Laws of Oleron 11. S. 35.

9. As to the *Place where* the Finding is, it ſeems not material whether it be of ancient Time hidden in the Ground, or in the Roof or Walls, or other Part of a Caſtle, Houſe, Building, Ruins, or elſewhere, ſo as the Owner cannot be known. See 3 Inſt. 132. cap. 58.

10. It appears by Glanvil and Bracton alſo, that *Occultatio Theſauri inventi fraudulosa*, was ſuch an Offence as was *puniſhed* by Death; but it has been reſolved that the Puniſhment of concealing Treaſure trove is *by Fine and Impriſonment*, and not of Life and Member. 3 Inſt. 133. cap. 58. cites 22 Aſſ. 99.

If Treaſure trove be taken and carried away, this is not Felony. St. Pl. C. 25. b. cap. 16. cites Fitzh. Tit. Corone, pl. 187. & 265. Becauſe Dominus ejus non apparet; and ſo it is uncertain who has any Right to it.—Hawk. Pl. C. 93. 94. cap. 33. S. 24. S. P. Before it has been ſeiſed by any Perſon having a Right thereto, and that it ſhall be puniſhed by Fine only &c.——The Puniſhment is by Fine and Impriſonment. Kitch. of Courts, Tit. Treaſure trove.

11. The *Charge* of Treaſure trove belongs to the Coroner, as appears by the Statute De Officio Coronatoris, Anno 4 E. 1. 3 Inſt. 133. cap. 58. And ſays the ancient Authors Bracton, Britton &c. agree hereunto.

12. The *King may dig* in the Land of the Subject for Treaſure trove; for he has Property. 12 Rep. 13. in the Caſe of Salt Petre.

13. It ſeems to be agreed, that *Seiſures* of Treaſure trove belonging to the King, may be *inquired in the Sheriff's Tourn; but it ſeems queſtionable* whether a Preſcription *in a Court Leet* to inquire of the *Seiſure* of ſuch Things *belonging to the Lord of it*, being a Subject, be good or not, ſince it is againſt the general Rule of the Law for the Court Leet to take Conuſance of Treſpaſſes done to the private Damage of the Lord, becauſe that would make him his own Judge. 2 Hawk. Pl. C. 67. cap. 10. S. 58.

For more of Treaſure trove in general, ſee **Prerogative**, and other Proper Titles.

* Trees.

* Trees are no Part of the Thing demiſed, but *are as Servants*; as if one has Piſchary in another's Land, the Land adjoining is as it were a Servant, viz. to dry the Nets. Arg. Godb. 117. pl. 136. Mich. 29 Eliz. C. B. in Caſe of Lewknor v. Ford.

(A) *Diſputes between Leſſor and Leſſee*, as to Trees.

1. WHERE a Man *leaſes a Wood which is only great Trees*, the Leſſee cannot cut it, but ſhall have only the Grain. Br. Waſte, pl. 126. cites 12 E. 4. 8.

2. *And* Per Fairfax and Jenny, if *Tenant for Years lops Trees, or cuts them*, the *Leſſor cannot take them, but ſhall have* Action of *Waſte*. Br. Waſte, pl. 126. cites 12 E. 4. 8.

S. C. cited Arg. Godb. 116. in Caſe of Lewknor v. Ford, and admitted by Walmſley Serjeant of the other Side, becauſe, as he ſaid, there is a Contract

of

of the Law, that if Leſſee cuts them down he ſhall have them, and the Leſſor ſhall have treble Damages for them.——But 11 Rep. 81. b. Paſch. 13 Jac. **Lewis Bowles's Caſe**, in the 5th Reſolution there, it was held that if Leſſee for Life or Years cuts Timber, the Leſſor ſhall have it; and that the ſame was reſolved the Term before in **Lifford's Caſe**, and that becauſe the Leſſor has the general Ownerſhip, Right, and Inheritance, and the Leſſee only a particular Intereſt; and therefore by whatever Means they are diſannex'd from the Inheritance, the Leſſor ſhall have them in reſpect of the general Ownerſhip, and becauſe they were his Inheritance.

But no *Covenant* lies, yet the Trees are demiſed with the reſt; Per Twiſden J.

3. If *Leſſor cuts a Tree* growing on the Land demiſed, and carries it out of the Land, *Leſſee ſhall have Treſpaſs*, and recover *treble Damages*, as the Leſſor ſhould recover againſt him in Waſte. Agreed Mo. 7. pl. 23. Paſch. 3 E. 6. Anon.

Vent. 45. Mich. 21 Car. 2. B. R. in Caſe of Pomfret v. Roycroft.

4. A. leaſes to B. for Life, and grants that it ſhall be lawful for B. *to take Fewel* on the Premiſſes, *Proviſo that he do not cut any great Trees.* Per Cur. If Leſſee cuts any great Trees, he ſhall be puniſhed for Waſte, but the Leſſor ſhall not re-enter, becauſe that Proviſo is not a Condition, but only a Declaration and Expoſition of the Extent of the Grant, and Leſſee for Life, or Years, by the Common Law cannot take Fewel but of Buſhes and ſmall Wood, and not of Timber Trees; but if the Leſſor in the Leaſe *grants Fireboot expreſsly*, if the Leſſee cannot have ſufficient Fewel as above, he may take great Trees. 3 Le. 16. pl. 38. Mich. 14 Eliz. C. B. Anon.

4 Le. 162. Arg. contra, cites 14 H. 8. 1. 2.—*Leſſee cannot* ſhred the Timber Trees. Arg.

5. *Leſſee for Years, the Trees being excepted, has Liberty to take the Shrowds and Loppings for Fireboot*, but if he cut any Tree, it ſhall be Waſte as well for the Loppings as the Body of the Tree; Per Hobart & tot. Cur. without Queſtion. Noy 29. Rich v. Makepeace.

Roll. Rep. 182.

6. Where Trees *are excepted on a Leaſe*, the Leſſor may *enter and take* the Trees, tho' there be not any *Clauſe of Ingreſs* or Regreſs; Per Foſter J. Godb. 173. pl. 239. Paſch. 8 Jac. C. B. in Caſe of Heydon v. Smith.

7. *Leſſee for Years* cuts down Timber Trees, and lets them lie, and after carries them away; ſo that the taking and carrying away be not as *one continued Act*, but that there be ſome Time for the diſtinct Property of a divided Chattle to ſettle in the Leſſor, an Action of Treſpaſs Vi & Armis will lie againſt the Leſſee; and in ſuch Caſe *Felony* may be committed of them, but not where they were taken and carried away at the ſame Time. Allen 82. 83. in Caſe of **Udall v. Udall**, cites it as the Caſe of **Bury v. Heard**, which commenced 20 Jac. and continued 7 Years.

8. A. *demiſed* Ground to B. which was *Paſture, except the Trees*; B. put in his *Cattle* to feed, which *barked the Trees*; A. cannot have Treſpaſs againſt B. Ruled by Holt Ch. J. upon a Point made and referr'd to him at the Aſſiſes at Bury in Lent 12 W. 3. upon hearing of Counſel ſeveral Times, tho' at firſt he was of a contrary Opinion. Ld. Raym. Rep. 739. Glenham v. Hanby.

(B) Diſputes between *Lord and Freeholders* &c. as to Trees.

1. KItchin of Court-Leets, 68. Tit. Ways, ſays he collects upon the Opinion of the Book of 2 E. 4. 9. and of 8 E. 4. 9. and of 27 H. 6. 9. and 6 E. 3. Way, 2. That where a *Lord* of a Manor *has Land upon both Parts of a High-way*, he ſhall have the Trees growing in the Highway;

Highway; and alſo where a *Way* is *over a Waſte of the Lord's*. But where a *Freeholder has Land of each Part of the Highway*, he ſhall have no Trees growing in the Highway; and where he has Land joining but upon one Part of the Way, he ſhall have no Trees growing upon that half of the Way. But ſays, that Britton, fol. 111. ſays, that a Freeholder ſhall have Trees, if it be not in the common Highway.

2. The *Cuſtom* was, that the Lord ſhould have *Quicquid valeret ad Maeremium*, and that the Freeholders ſhould have *Ramillos*. Per Hobart Ch. J. that contains all the Arms and Boughs; for whatever is not Maeremium is Ramillum. Godb. 235. pl. 326. Mich. 11 Jac. C. B. Biſhop of Chicheſter v. Strodwick.

3. And it was held in the Caſe above, that the *Non Uſe*, or Negligence in not taking the Boughs, did not extinguiſh or take away the Cuſtom, as it has been often reſolved in the like Caſe. Godb. 235.

4. *So* where the Lord by the Cuſtom is to have Maeremium, and that the Tenants ſhall have *Reſiduum*; this ſhall be intended the Boughs and Branches. Godb. 235. pl. 326. cited in the Caſe of the Biſhop of Chicheſter v. Strodwick.

5. To the *Owner of the Soil on both Sides the Way*, of common Right *belong* the Trees that grow in the Lane, whether he be Lord or Freeholder. The beſt Badge of Truth is the Uſage of taking the Profit of the Trees. Brownl. 42. Nota.

(C) Diſputes between *Tenants in Common*.

1. TWO *Tenants in Common*; one fells the Trees, and *lays them on his Freehold*. If the other enters into the Land, and carries them away, Treſpaſs Quare clauſum fregit lies againſt him, becauſe the taking away of the Trees by the firſt was not wrongful, but that which he might well do by Law; and yet the other Tenant in Common might have ſeiſed them before they were carried off the Land. Godb. 282. pl. 403. Mich. 18 Jac. B. R. in Polly's Caſe.

(D) Diſputes between *Tenant for Life and Remainder-man*, or *Reverſioner* in Fee.

1. LAND deviſed to A. for Life, Remainder to B. in Fee, he paying certain Legacies at the Times limited by the Will; but the Remainder, *on Non-payment* at ſuch Times by B. *was limited over to C.* &c. There was a great deal of Timber growing on the Land. B. brought a *Bill for Leave to cut down Timber to pay the Legacies*, and ſo prevent a Forfeiture of his Eſtate. The Tenant for Life and C. oppoſed it; but the Lords Commiſſioners decreed it; But B. to make Satisfaction to the Tenant for Life, for breaking the Ground by the Carriage &c. 2 Vern. 152. pl. 148. Trin. 1690. Claxton v. Claxton. Chan. Prec. 15. pl. 14. S. C. ſays it was decreed without Difficulty.

2. A. by Deed limits a *Term of 500 Years to Truſtees for Payment of Debts*, *Remainder to B. for Life*, *without Impeachment of Waſte*; Remainder to his firſt &c. Sons in Tail. A. died. The Debts were great, and the Truſt not like to determine ſoon. B. by Bill ſet forth the Limitations, and that there was much decaying Timber on the Eſtate, and that

he was reduced to great Want; that the Truſtees had no Power to cut the Timber, and pray'd Leave to cut, allowing what Damage he did. The Court decreed a Commiſſion to take Timber, not exceeding the Value of 500 l. for the Plaintiff's Relief and Support. 2 Vern. 218. pl. 199. Hill. 1690. Aſpinwall & al'. v. Leigh & al'.

(E) Diſputes between *Neighbours*.

1. IF *Trees grow in the Hedge*, and the *Fruit falls into another's Ground*, the Owner may go in and take it. Per Doderidge J. Poph. 163. in the Caſe of Millen v. Fandry, cites 8 E. 4.

S. P. per Croke J. 3 Bulſt. 198.

2. If the *Boughs* of your Trees *grow out into my Land*, I may cut them. Per Croke J. Roll Rep. 394. pl. 15. Trin. 19 Jac. B. R.

But if it grows *in a Hedge which divides the Land of A. and B.* and

3. A Tree grows in *A.'s Cloſe, and roots in B.'s*, yet the Body of the main Part of the Tree being in the Soil of A. all the Reſidue of the Tree belongs to him alſo. 2 Roll Rep. 141. Hill. 17 Jac. B. R. Maſters v. Pollie.

the Roots take Nouriſhment of both their Lands, it was adjudged they are Tenants in Common of it. 2 Roll. Rep. 255. Mich. 20 Jac. B. R. Anon.

(F) *Power of Truſtees*, as to cutting Trees.

1. A Seiſed of Lands in Fee demiſed the ſame for 500 Years to B. C. and D. *in Truſt to pay Debts, and for a Charity. B. purchaſed the Reverſion of A's Heir at Law*, and cut down 1800 l. worth of Timber; but left ſufficient for the Tenants for Repairs and Botes. The Demiſe was not without Impeachment of Waſte. Ld. C. King ſaid it was plain that B. as Purchaſor of the Reverſion, could not enter upon the Premiſes to cut down the Timber, and tho' C. another Truſtee, conſented to the Cutting down (which was a Breach of Truſt in C.) B. ought not to take Advantage of it; but ſomething ought to be paid to the Charity for their Leave. And on his Lordſhip's propoſing 220 l. both Parties agreed thereto; and ſo the Matter was compromiſed. 2 Wms's Rep. 397. Mich. 1726. Bays v. Bird.

(G) Stranger. Who ſhall have *Trees cut down by Strangers*. And what Remedy Leſſor or Leſſee has for the Cutting them down.

1. IF a *Stranger cuts down Woods in a Foreſt*, and there is no Fraud or Colluſion between him and the Owner of the Soil, the Owner of the Soil ſhall have them; and yet the Owner could not cut them down, but

but is to take them by the Livery of one appointed by the Statute. Godb. 99. pl. 113. Mich. 28 & 29 Eliz. C. B. in an Anonymous Case.

2. If a *Stranger cuts* down Trees, and *Lessee brings Trespass*, he shall recover but according to his Loss, viz. for lopping and topping. Arg. Godb. 117. in Case of Lewknor v. Ford.

3. A Stranger enter'd into Lands leased for Life, and cut down Timber Trees, and bark'd them; and the Lessor before Seisure brought *Trover for the Bark*, and had Judgment to recover, tho' the Cutting down and Barking was all at one time. Allen. 82. in the Case of **Udall** v. **Udall**, cited per Cur. as a Case commenced 20 Jac. and depended 7 Years between Bury and Heard.

4. If a Stranger cuts the Trees, *Lessee for Life without Impeachment of Waste*, shall have them. Poph. 193. Mich. 2 Car. Sacheverel v. Dale.

5. In Trespass brought by the *Plaintiff* for cutting down his Trees, the Plaintiff was *nonsuited*, *because* it appeared that he was *only Lessee*. Barnard. Rep. in B. R. 302. Hill. 3 Geo. 2. Odel v. King.

(H) *Grant of Trees* by whom, and How.

1. IF a *Man sells certain Trees growing, and aliens the Land to another before that the Vendee has cut* the Trees, yet the Vendee shall have them; per Newton. Markham said we can say no more. Br. Trespass pl. 400. cites 20 H. 6. 22.

2. Grant of all his *Woods which shall grow hereafter* or in time to come is not good, because 'tis not of a thing in Esse; per Harper J. 3 Le. 29. 15 Eliz. C. B. in an Anon. Case.

3. A demises to B. a *Manor* for 3 Lives and by the same Deed *in another Clause bargains and sells the Trees*. The Habend' is of the Manor only and limits Estate of that for 3 Lives without mention of the Trees. Per Winch J. they shall pass *as a Chattel* immediately on Delivery of the Deed before any Livery made thereon to pass the Manor, and if Livery never had been made, yet Lessee shall have the Trees. 2 Brownl. 193. Trin. 10 Jac. C. B. in Case of Rowles v. Mason, and 197. per Warburton J. accordingly, and 201. per Coke Ch. J. accordingly in S. C.

But by Grant of Manor and Trees Habend' the Manor for 21 Years without *mentioning of the Trees*, the Lessee can't cut and sell the Trees; for that was *all in one Sentence*, viz. the Grant of the Trees and the Demise of the Manor. Per Winch J. 2 Brownl. 193. cites D. * 379. 18. 23 Eliz.

* It should be 374. b. pl. 18.

4. The *Law doth not favour* Fractions and *Severances* of the Trees from the Freehold. 11 Rep. 48. Mich. 12 Jac. Liford's Case.

5. *Bargain and Sale of a Manor, and all the Trees* growing thereon, if the Deed is *not inroll'd*, the Trees shall not pass without the Manor. 11 Rep. 48. Liford's Case.

6. *Grant of all my Trees within my Manor* of G. to A. and his Heirs, A. shall have Inheritance in them without *Livery and Seisin*. 11 Rep. 49. b. Liford's Case.

7. A. seised in Fee Simple makes a *Lease, excepting the Trees*, and afterwards covenants to stand seised *de Tenementis prædictis cum pertin. superius dimissis &c.* The Trees pass with the Inheritance, as Things annex'd to it, notwithstanding they were not demised. 11 Rep. 50. b. Liford's Case.

8. By a Grant of Trees *by Tenant in Fee Simple*, they are absolutely pass'd away from the Grantor and his Heirs, and *vested in the Grantee*, and go to the Executors or Administrators, being in Understanding of Law divided as Chattles from the Freehold, and the Grantee hath Power

But otherwise in Case of Sale by a Tenant in Tail. 11 Rep. 50.

Mich 2 Jac. Liford's Caſe. Power incident to the Grant to fell them when he will, without any other ſpecial Licence. Hob. 173. Hill. 12 Jac. Stukely v. Butler.

Jones J. makes a *Difference* between a Tenant for Life without Impeachment of Waſte *by Grant*, and one who is ſo *by Indulgence of Law*, as Tenant in Tail after Poſſibility &c. that ſuch Things as a Man hath by the Law he can't reſerve to himſelf upon his Aſſignment; but in Caſe of a Grant he has a larger Liberty than the Law gives to him. But if ſuch Tenant by Grant *aſſigns over all his Eſtate*, he can't *except the Trees*; but where he has a Remainder 'tis otherwiſe. Poph. 195. in Caſe of Sacheverel v. Dale.

9. If Leſſee for Life without Impeachment of Waſte *aſſigns over all his Eſtate*, he may diſpoſe of the Trees. Poph. 193. Mich. 2 Car. B. R. Sacheverell v. Dale.

(I) *Windfalls*, Dotards &c. *Who ſhall have them.*

Godb. 118. Anderſon Ch. J. accordingly, but Rodes J. contra.——Per Anderſon in **Lewknor's** Caſe. 4 Le. 166.——S. P. reſolved in **Harlakenden's** Caſe, 4 Rep. 63. b. Paſch. 31 Eliz B. R. in caſe they have no Timber in them; but that if they have, then it is otherwiſe.——And in **Lewis Bowles's** Caſe, 11 Rep. 81. b. the Reſolutions in Harlakenden's Caſe were affirm'd for good Law——Mo. 813. 814 pl. 1099. Mich. 8 Jac. Per all the Juſtices of Serjeant's Inn in Fleet-ſtreet, S. P. in the Counteſs of Cumberland's Caſe.

1. LEſſor ſhall have the *Windfalls*. Arg. Godb. 117. cites Culpeper's Caſe 2 El. & 44 E. 3. Statham. and 40 Aſſ. 22.

Bendl. 217. pl. 251. S. C. adjudged for the Plaintiff.

2. Leſſee cannot juſtify cutting down *Pollards*, by ſaying that they were dry, hollow, and rotten, and not Timber fit for Building. Mo. 101. pl. 246. Mich. 15 & 16 Eliz. Sir Roger Manwood's Caſe.

3. If Trees are *excepted* &c. and they *become Dotards* during the Leaſe, yet that can't diveſt the Property of the Leſſor; Per Holt Ch. J. Cumb. 453. Trin. 9 W. 3. in a Nota to the Caſe of Park v. Fifield.

(K) *Timber Trees. What are*, and what ſhall be ſaid to be ſuch for a Collateral Reſpect &c.

2 Inſt. 643. cites S. C. and ſays that the whole Court upon deliberate Advice held it to be no Law, and that Beech, Horſebeche, and Hornbeam are Great Wood, becauſe they ſerve for Buildings or Reparation of Houſes, Mills, Cotages &c. And in the Margin there it is ſaid it was adjudged Paſch. 2 Jac. between Hall and Fettyplace.

1. GReat Wood ſpecified in the Act of 45 *E.* 3. is intended of Wood which conſiſts of Trees of Value, as of *Aſhes*, *Beeches*, *and Elms &c.* but not of *Hornbeams*, *Sallows*, *Haſels*, *Maples &c.* Pl. C. 470. b. Hill. 17 Eliz. Soby v. Molyns,

Mo. 812. pl. 1099. S. C. decreed, becauſe it appear'd that ſuch Trees, in the Country where they grew, were uſed and ſerviceable for building Sheep-houſes, Cotages, and ſuch mean Buildings; and all the Juſtices of Serjeant's-Inn in Fleet-ſtreet, upon a Conference had with them, were of Opinion, that in this Country they were Timber, and belong'd to the Inheritance, and could not be taken by a Tenant for Life.

2. *Birch-Trees* were decreed to be Timber-Trees. Toth. 151. cites 8 Jac. Counteſs of Cumberland v. Earl of Cumberland.

3. A. articled to ſell Land to B. for 20,000 l. and the Timber to be valued and paid for by B. over and above the Purchaſe-Money. Upon a Reference to the Maſter he made his Report, and eſtimated ſome Thouſands

Thouſands of *Saplings* at 12 d. or 18 d. a-piece, and alſo *Pollards*, ſome of which were rotten, or contained no Timber, and ſo of *Walnut-Trees* as worth 20 or 40 l. a Tree; alſo *Yew*, *Cherry*, *Crab*, *Lime*, and *Horſe-Cheſnuts*, were by him valued as Timber. And Exception being taken thereto, Ld. C. King ſaid, That it is the *Cuſtom of the Country* that makes ſome Trees Timber, which in their Nature, generally ſpeaking, are not ſo, as Horſe-Cheſnut and *Lime Trees*; and ſo of *Birch*, Beech, and *Aſp*. And as to Pollards, notwithſtanding what is ſaid in **Soby and Wolins's Caſe**, Pl. C. 470. that theſe are not Timber, and that Tithes are to be paid of their Loppings, (which could not be if Pollards were Timber) yet if the Bodies of them are ſound and good, he inclined to think them Timber; otherwiſe, if not ſound, they being in ſuch Caſe fit for nothing but Fuel. And his Lordſhip ſaid, that if a Timber Tree, not worth 3 or 4 l. ſhall be valued or paid for in the Purchaſe, why ſhall not Walnut-Trees, ſome of which may be worth 10 or 20 l. or even 50 l. a-piece? However, as they ſeem of a conſiderable Value, if the Parties cannot agree to lump the Valuation, and as it is the Cuſtom of the Country which aſcertains what are Timber-Trees, making ſome eſteem'd ſuch, which, in their own Nature, generally are not, eſpecially *in Countries where Timber is ſcarce*. His Lordſhip ſaid, he ſhould direct an *Iſſue to try whether any and which of thoſe Trees are, by the Cuſtom of the Country, to be accounted Timber*. Trin. 1731. 2 Wms's Rep. (603.) (606.) Duke of Chandos v. Talbot.

For more of Trees in General, ſee **Copyhold, Mareſme, Waſte,** and other Proper Titles.

Treſpaſs.

Fol. 545.

(A) With *Continuando*.

See (I) 1

1. **TReſpaſs lies with Continuando** by divers Days together, **and the Party ſhall not be compell'd to bring** ſeveral Actions. 29 E. 3. 35. **adjudg'd; for it is one Treſpaſs.**

(A. 2) *Aſſault*. What. [*And Menace*.]

1. **IF a Man** holds me by the Arm, **this is an Aſſault in Law. It ſeems** 3 H. 4. 9. **will warrant it; but there it ſeems it was juſtifiable.**

2. **If a Man** ſaith, that he will cut my Arm, **it is an Aſſault.** 37 H. 6. 20. **b.** 1 Hawk. Pl. C. 134.

3. **If a Man** ſaith to another, **that** if he will appeal him of Treaſon, he will defend himſelf by his Hands upon his Body, and rather cap. 62. S. 1. ſaith, that notwith-

ſtanding the many ancient Opinions to the contrary, it ſeems at this Day agreed, that *no Words whatſoever can amount to an Aſſault.*

than he ſhall kill him, he will kill him; **this is an Aſſault in Law.** * 37 H. 6. 3. **Curia.**

* (E) pl. 3. S. C.

Br. Treſpaſs, pl. 197. 37 H 6. 2. 3. [pag 2. b. and 3. and pag. 20. b. are both the ſame S. C.]

4. So **if a Man** calls me Traitor, and I ſay **to him** Mentiris in Capite tuo, and if he will appeal me of Treaſon, I will defend myſelf by my Hand upon my Body, during the Life of one of us. **This is an Aſſault, tho' it be upon a Condition precedent.** 37 H. 6. 3. 20.

——— See (E) pl. 3. S. C.

N. B. There is no pl. 5.

Br. Treſpaſs, pl. 197. cites 37 H. 6. 2. 3. Per Priſot.

6. So **if a Man** ſays to me, **that** if I will not ceaſe my Suit, **which I have againſt him,** he will beat me; **this is an Aſſault, tho' conditional.** 37 H. 6. 20. b.

Br. Treſpaſs, pl. 197. cites 37 H. 6. 2. 3. that it is a Menace, and not lawful.

7. So **if a Man** ſaith, in Preſence of the Court, or in a Church, **to another a falſe Matter, and** the other replies, that if he will come out **of the Court or Church** into the Field, and ſay ſo, * he will break his Bones, **this is an Aſſault.** 37 H. 6. 20. b.

——* Orig. is (Il luy naufrera.)

This was a *Suit* by Collector of the Fifteenths, *pro Rege & ſeipſo* of Aſſault and Battery, as he was collecting of the Fifteenths in D. and it was found, that the Defendant *rebuked the Collector in collecting the Fifteenths, ſo that he dared not ſtay in the Vill*, but did not beat him. And this was adjudg'd an Aſſault, but no Battery; and the Plaintiff recover'd Damages 100 s. Quære, if the King had not been Party. Br. Treſpaſs, pl. 246. cites S. C.

8. **If a Man** rebukes another with ill Words, by which he dares not ſtay in the Vill; **this is an Aſſault.** 27 Aſſ. 11. **adjudged.**

9. **Action of** Treſpaſs lies **for an Aſſault.** 40 E. 3. 40. 42 E. 3. 7. 45 E. 3. 24. b.

Br. Treſpaſs, pl. 336. cites S. C. per Thorpe.

10. **If a Man** ſtrikes at me with an Hatchet, **tho' he does** not touch me, **yet this is an Aſſault in Law.** 22 Aſſ. 60. **adjudged.**

And the Caſe was, that the Defendant came to a Tavern in the Night to buy Victuals, and the Doors being ſhut, he ſtruck upon the Doors with a Hatchet; and the Plaintiff, who kept the Tavern, putting his Head out of the Window, and bidding the other to leave off, he ſtruck againſt him with the Hatchet, but did not touch him.———S. C. cited by Doderidge J. 2 Bulſt. 339. Hill. 12 Jac. in Caſe of Wilſon v. Dodd.———Roll Rep. 177. S. C. cited by Doderidge, quod fuit conceſſum, per Coke Ch. J. in Caſe of Wilſon v. Dodd.——And Ibid. 328. Hill. 13 Jac. B. R. in Caſe of Curtis v. Dowtie.

S. P. Hawk. Pl. C. 133. cap. 62. S. 1. And ſo if a Man ſtrikes at me without a Weapon, it is an Aſſault.

S. P. And ſo if he *holds up his Hand againſt another, and ſays nothing*, it is an Aſſault. *But* if one *ſtrikes another upon the Hand, Arm, or Breaſt, in Diſcourſe*, it is no Aſſault, there being no Intention to aſſault. Mod. 3. pl. 13. Mich. 21 Car. 2. B. R. per Cur. in an anonymous Caſe.

11. **If a Man** delivers to another a Subpœna, **this is an Aſſault. Trin. 13 Jac. B. between** *Elpin and Hutton*, **per Curiam.**

2 Keb. 545. pl. 13. S. C. by the Name of **Turberbill v. Savage**, and ſays, that the Plaintiff

12. In Aſſault, Battery, and Wounding, the Evidence to prove a Provocation was, that the Plaintiff *put his Hand on his Sword, and ſaid, If it was not Aſſiſe-Time, I would not take ſuch Language from you.* Adjudg'd no Aſſault; for he declar'd he would not aſſault him, the Judges being in Town, and the Intention, as well as the Act itſelf, makes an Aſſault. Mod. 3. pl. 13. Mich. 21 Car. 2. B. R. Anon.

bent his Fiſt at the ſame Time that he laid his Hand on his Sword and ſpoke the Words; and the Court held it no Aſſault, as it would be without that Declaration. But it was further ſworn, that the Plaintiff *with his Elbow punch'd the Defendant*, which, if done in earneſt Diſcourſe, and not with Intent of Violence, is no Aſſault; nor then is it a Juſtification of Battery after a Retreat.

13. *Drawing*

13. *Drawing a Sword, and brandiſhing* it in a menacing Manner againſt the Plaintiff, but did not touch him, is Aſſault, but no Battery; and ſo ſhall have no more Coſts than Damages. Vent. 256. Paſch. 25 Car. 2. B. R. Anon.

2 Lev. 102. Paſch. 26 Car. 2. B. R. S. C. by the Name of Smith v. Aſſam; but that is only as to the Point of Coſts, but does not ſtate the Manner of the Aſſault.——3 Keb. 383. pl. 1. S. C. ſays it was, that a Woman ſhook a Sword in a Cutler's Shop againſt the Plaintiff, being on the other Side of the Street.

14. *Bailiff* being within Reach of Defendant, Defendant having a Fork in his Hand keeps off the Bailiff from touching him and retreats into his Houſe, Bailiff has no Remedy but an Action for the Aſſault; for the holding *up the Fork at him*, when he was within Reach, is good Evidence of that. 1 Salk. 79. Trin. 3 Ann. B. R. Genner v. Sparkes.

6 Mod. 173. S. C. and ſays that if the Defendant had *preſented a Gun at him at ſuch a Diſtance as the ſhot would reach him*, an Action of Aſſault would have lain againſt him.——S. P. Hawk. Pl. C. 133. cap. 62. S. 1.

15. Every *Battery includes an Aſſault*, therefore on an Indictment of Aſſault and Battery, in which the Aſſault is ill laid if the Defendant be found guilty of the Battery, it is ſufficient. Hawk. Pl. C. 134. cap. 62. S. 1.

(A. 3) * *Battery. What* ſhall be ſaid a Battery.

Fol. 546.

1. If a Juſtice of Peace makes a Warrant to J. S. to arreſt J. D. **and to bring him before himſelf** and J. N. comes in Aid of J. S. and †lays his Hands molliter upon the Shoulders of J. D. [and] ſays to J. S. this is the Man, **this is not any Battery. Hill. 12 Ja. B. R. between** ‡*Wilſon and Dodd* **by Coke.**

* *Any Injury* whatſoever, be it never ſo ſmall being actually *done to the Perſon* of a Man *in angry*, or revengeful, or rude, or inſolent *Manner* as by *ſpitting in his Face*, or any way *touching him* in Anger, or violently *juſtling him* out of the Way, are Batteries in the Eye of the Law. Hawk. Pl. C. 134. cap. 62. S. 2.

† S. P. Hawk. Pl. C. 134. cap. 62. S. 2.

‡ Roll. R. 176. pl. 15. Paſch. 13 Jac. S. C. but S. P. does not appear.——2 Bulſt. 335. S. C. but S. P. does not fully appear.

2. **If a Man** delivers a Subpœna **to another, this is not any Battery. Tr. 13 Ja. B. between** *Elpin and Hutton.* **Per Curiam.**

3. Upon Evidence in Battery, Popham, Fenner and Williams, directed the Jury, that if *A. aſſaults B.* and in fighting *A. falls* to the Ground and then there *B. beats and wounds him*, that this is an Aſſault in B. not juſtifiable. Noy. 115 Hudſon v. Crane.

So if *another had held A.* in his Arms, and then *B. ſtrikes* him, that Aſſault is a Battery in B. not juſtifiable &c. and the Jury found accordingly. But Yelverton and Tanfield on the Contrary, Becauſe it is but a Continuance of the former Aſſault. And that all is De ſon Aſſault Demeſne. Noy. 115. Hudſon v. Crane.

4. In Action of Aſſault and Battery, the Plaintiff counted that the Defendant *ſtruck the Plaintiff's Horſe*, whereby the Plaintiff fell; This was held good and no material Variance, becauſe licet ſæpius requiſitus is only Matter of Form. Arg. Hard. 41. in Caſe of Harris v. Ferrand, cites it as Mich. 15 Car. B. R.

5. The leaſt *touching* of another *in Anger* is a Battery. Ruled per Holt Ch. J. at Niſi Prius, 6 Mod. 149. Paſch. 3 Annæ in the Caſe of Cole v. Turner.

6. If *two or more meet in a narrow Paſſage and without* any *Violence* or Deſign of Harm the one touches the other gently, it is no Battery. Per Holt Ch. J. at Niſi prius. 6 Mod. 149. Cole v. Turner.

But if one uſes Violence againſt another to *force his Way in a Paſſage in a rude* inordinate Manner or if any ſtruggle about the Paſſage to that degree as to *do Hurt*, This

This will be a Battery. Ruled by Holt Ch. J. 16 Mod. 149. Paſch. 3 Annæ at Niſi prius in Caſe of Cole v. Turner.

7. *Spitting in ones Face* is a Battery. Per Holt Ch. J. 6 Mod. 172. Paſch. 3 Annæ B. R. The Queen v. Coteſworth.

(B) *Treſpaſs. Againſt whom* it lies, *in Reſpect of Intereſt.*

If A. has the *Cuſtody of* the Beaſts or Hoggs of B. and they are put into B's Yard, if theſe do a Treſpaſs to the Land of C. adjoining, A. ſhall be puniſhed in Treſpaſs, and this tho' B's Servant did wait upon 'em. Clayt. 32. Dawtry v. Huggins.

1. IF my Beaſts are in the Keeping of J. S. and during this time do Treſpaſs to another, he ſhall have Treſpaſs againſt me or J. S. at his Election; But he ſhall not have Satisfaction againſt both. 7 H. 4. 31. b.

If *agiſted Cattle* do a Treſpaſs, the Owner of the Soil where &c. ſhall anſwer for that Treſpaſs, cited in the Caſe of Dawtry v. Huggins. Clayt. 33. as Bateman's Caſe.

2. A Man ſhall not have Treſpaſs *againſt him who has the Franktenement as Diſſeiſor* &c. *before Regreſs* made upon him; per Newton where the Defendant pleads his Franktenement, there the Plaintiff in his Replication ought to ſhew a Regreſs, for Diſſeiſor has the Franktenement and ought to have the Profits, till it be reform'd by Entry or Action mixt or real. Br. Treſpaſs, pl. 127. cites 19 H. 6. 23.

3. If I *Bail Goods* and the *Bailee gives and delivers them*, I ſhall not have Treſpaſs; for he had lawful Poſſeſſion. Br. Treſpaſs, pl. 295. cites 2 E. 4. 4.

4. Note Finch's Law, li. 3. c. 6. That no Action of Treſpaſs will lie *for a Leſſee for Years againſt* the *Leſſor*, altho' he diſtrain without Cauſe. And ſee there the Reaſon. Q. per Holt Ch. J. 11 Mod. 209. pl. 13. cites 9 Rep. 76. Yelv. 148. Wing's Max. 1. 703.

See (A. 3) (G) (F. a)

(C) Treſpaſs of *Aſſault* and *Battery*. What will be a good Cauſe of *Juſtification.*

Br. Treſpaſs, pl. 235. cites S. C. but ſays nothing of the Beating being by Parents.

1. IF a Man be in a Rage and does great Miſchief, his Parents may juſtify the chaſtiſing and beating him with a Rod, to the Intent to reduce him into his good Senſes again. 22 Aſſ. 56.

Jo. 249. pl. 3. S. C. but reports that it was a Stander by and not A. the Perſon cheated that laid hold of the Cheat, and carried him

2. If A. plays at Dice with B. in the Houſe of a Juſtice of Peace, the which B. is a common Cheater, and there cheated A. of his Money; the Defendant in an Action of Battery may juſtify that he for the Cauſe aforeſaid put his Hands upon him to bring him before the ſaid Juſtice of Peace, and that he brought him accordingly; and the Juſtice bound him over to the Seſſions where he was indicted and found guilty of the ſaid Cheating. And this is a good Plea tho' the Defendant was not any Officer; for it concern'd himſelf and was for the Publick Good. Mich. 7 Car. B. R. between *Holleday and Oxenbridge*

bridge **adjudged upon a Demurrer, where the Juſtice was Sir Nicholas Carey in Surrey.** immediately before the Juſtice, was a good Juſtification. ———Cro. C. 234, 235. pl. 16. S. C. according to Roll, and Judgment for the Defendant by 3 Juſtices (abſente the Ch. J.) and they held it to be Pro Bono publico to ſtay ſuch Offenders.

2 Hawk. Pl. C. 77. Cap. 12. S. 20. cites S. C and ſays, that from the Reaſon of this Caſe it ſeems to follow, that the Arreſt of any other Offenders by private Perſons *for Offences in like Manner, ſcandalous and prejudicial to the Publick, may be juſtified.*

3. If A. incites a Dog upon B. an Infant, and **upon this** C. comes to A. and lay his Hands ſoftly upon him, to the Intent to ſtay his Hands, ſo that he ſhall not incite the Dog upon B. **this is lawful and juſtifiable in Action of Aſſault and Battery brought by A. againſt C. Mich. 10 Car. B. R. between** *Walter and Jones* **per Curiam upon a Demurrer, but adjourn'd upon the Pleading. Intratur Trin. 10 Car. Rot. 409. and after Iſſue taken by Conſent.**

4. In Treſpaſs of Battery and Wounding, the *Defendant ſaid that W. aſſailed the Defendant to have beat him with a Knife, and the Defendant took the Handle of the Knife in his Hand, and the Plaintiff came in Aid of W.* and *took the Blade of the Knife* in his Hand, *and cut his own Hand* with the Blade of the Knife, abſque hoc that he beat or wounded him, Priſt. The Plaintiff replied that he beat and wounded him as above, Priſt; and the others econtra. Br. Treſpaſs, pl. 235. cites 22 Aſſ. 56.

5. Treſpaſs of aſſaulting him and taking his Horſe, the *Defendant ſaid that J. C. had the Tithes of B. in Farm* for 6 Years, *and certain Barley was ſevered from the 9 Parts, and the Plaintiff took and carried them to D. and the Defendant came and found the Horſe there in the ſame Barley, Damage feaſant, and he* by Command of the Defendant *took the Horſe and the Barley, and the Plaintiff would have diſturb'd him*; ſo that the Ill which he had was De ſon Aſſault demeſne, and in Defence of the Goods, and a good Plea Br. Treſpaſs, pl. 134. cites 19 H. 6. 65.

6. A *Juſtification for a Battery* is *no Juſtification for wounding* &c. F. N. B. 86. (K) in the new Notes there (d) cites 21 H. 6. 27.

7. Treſpaſs of Aſſault and Battery; the *Defendant ſaid that at the Time* of the Treſpaſs *he was a Juſtice of Peace, and* the *Plaintiff made an Aſſault upon B. and for Conſervation of the Peace he came to the Plaintiff, and charged him to keep the Peace,* and *he ſaid that he would not, and* the *Defendant put his Hands upon him peaceably, and arreſted him to find Surety for his Good Behaviour* &c. which ſpeaking and putting of Hands are the ſame Aſſault and Battery of which &c. And the Court held it a good Plea, *without ſaying that he ſent him to Gaol,* and yet to make the Matter clear the Defendant alleg'd the Arreſt, as above, and that after he *eſcaped out of his Cuſtody* &c. Br. Treſpaſs, pl. 177. cites 9 E. 4. 3. *And* a Juſtice of Peace may arreſt a Man at his Diſcretion to find Surety of Peace, and tho' he permit him to go without Surety, the Party cannot puniſh him, becauſe he is a Juſtice of Record; Per Littleton Juſtice, quod non negatur. Br. Treſpaſs, pl. 177. cites 9 E. 4. 3.

8. There are ſome actual Aſſaults on the Perſon of another, which do not forfeit a Recognizance of the Good Behaviour, as where an *Officer having a Warrant againſt a Man, who will not ſubmit* to him, beats or *wounds him in the Attempt to take him,* or where a *Parent reaſonably chaſtiſes his Son,* or a *Maſter his Servant,* or a *Schoolmaſter his Scholar, or a Gaoler his Priſoner*; *or* as ſome ſay, a *Husband his Wife*; or where one in a proper manner confines and *beats a Friend who is mad* &c. or where one *forces a Sword from another, who threatens to kill a Man with it*; or where one *gently lays his Hands on another, and ſtays him from inciting a Dog upon a Man*; or where I *beat one* (without wounding him, or throwing at him a dangerous Weapon) *who wrongfully endeavours with Violence to diſpoſſeſs me of my Lands or Goods,* and will not deſiſt upon my laying my Hands gently on him, and diſturbing him; or where a Man *beats one who attempts to kill any other*; or where a Man *threatens to kill one who*

puts him in Fear of Death in ſuch a Place, where he cannot ſafely fly from him; or where one *impriſons thoſe whom he ſees Fighting, till the Heat be over*; or where a Man *beats*, or as ſome ſay, wounds or maims *one who makes an Aſſault upon his Perſon, or* that of *his Wife, Parent, Child, or Maſter*; *or*, as ſome ſay, where one beats another *in Defence of his Servant*. Hawk. Pl. C. Abr. 151, 152. S. 16.——Hawk. Pl. C. at Large 130, 131. cap. 60. S. 23, 24. And ſays that therefore theſe are juſtifiable, Ibid. 134. cap. 62. S. 3.

(D) *What Perſon* may juſtify it. [*In Defence of another* &c.]

Br. Treſpaſs, 1. pl. 134. cites 19 H. 6. 65.

THE Baron **may juſtify the Battery of another,** in Defence of his Feme; **for ſhe is your [his] Chattel,** * 19 H. 6. 31. b. 66.

——So in *Treſpaſs by Husband and Wife*, for an Aſſault and Battery on the Wife, the *Defendant pleaded ſon Aſſault Demeſne of the Wife*; The Plaintiffs *replied*, that *the Defendant was going to wound her Husband, and that ſhe Inſultum fecit to defend him.* Upon Demurrer, it was inſiſted that Inſultum fecit was naught, and that they ſhould have pleaded Molliter manus impoſuit. But the Court held, that a Wife may juſtify an Aſſault in Defence of her Husband, and if the Defendant was holding up his Hand to ſtrike the Husband, the Wife might make an Aſſault to prevent the Blow. And Judgment for the Plaintiff. 1 Salk. 407. pl. 2. Mich. 7 W. 3. B. R. Leeward v. Baſilee.——Ld. Raym 62. S. C. accordingly.

* S. P. Br. Treſpaſs, pl. 128. in the large Edition, cites 29 H. 6. 31. but it ſhould be 19 H. 6. 31. and ſo are the ſmaller Editions.

Br. Treſpaſs, pl. 34. cites 19 H. 6. 65. and pl. 189. cites 19 H. 6. 31. and 66. But cites 9 E. 4. 48. contra.—Ow. 150. in Caſe of **Seaman v. Cuppledick**, where in Treſpaſs of Aſſault and Battery the Defendant *juſtified in Defence of his Servant*, viz. that the Plaintiff had aſſaulted his Servant, and would have beaten him &c. Yelverton held the Bar good; for that otherwiſe he might loſe his Service, and cited 19 H. 6. 60. a. but Williams J. contra. And Coke ſaid that a Man may defend his Servant, but he cannot break the Peace for them; but that if another aſſaults the Servant, the Maſter may defend him, and ſtrike the other, if he will not let him alone.—A Maſter cannot juſtify in Defence of his Servant, becauſe he might have an Action per quod Servitium amiſit. Per Cur. 1 Salk. 407. pl. 2. Mich. 7 W. 3. B. R. in Caſe of Leeward v. Baſilee.——Ld. Raym. Rep. 62. accordingly in S. C.

2. **The** Maſter **may juſtify the Battery of another,** in Defence of his Servant; **for the Servant is in a manner his Chattel.** * 19 H. 6. 31. b.

* S. P. Br. Treſpaſs, pl. 128. in the large Edition, cites 29 H. 6. 31. but it ſhould be 19 H. 6. 31. and ſo are the ſmaller Editions.

S. P. And ſo of his *Miſtreſs*. Br. Treſpaſs, pl. 189. cites 9 E. 4. 48.

3. **The** Servant **may juſtify the Battery of another** in Defence of his Maſter. 11 H. 6. 16. **Quære.** 14 H. 6. 24. b.

——And he may *kill* a Man in ſaving the Life of his Maſter, if he cannot otherwiſe eſcape. Br. Treſpaſs, pl. 217. cites 21 H. 7. 39. Per Tremaile.

S. P. *And to take Bows, Arrows*, Gauntlets &c. with which the Party might ſtrike them, and *retain them* in their Keeping *till the Malice be aſſwaged*. Contrary of a Coat of Mail &c. with which the Party cannot ſtrike. Agreed. Br. Treſpaſs. pl. 37. cites 35 H. 6. 50, 51.

S. P. But Serjeant Hawkins ſays, it is ſaid that a Servant cannot juſtify beating another in Defence of his *Maſter's Son*, tho' he were commanded by the Maſter ſo to do, becauſe he is not Servant to the Son; and for the like Reaſon it is ſaid, that a Tenant cannot juſtify beating another in Defence of his *Landlord* &c. Hawk. Pl C 131. cap. 61. S. 24.——Ibid 134. cap. 62. S. 3.

2 Lutw. 1485. at the End of the Caſe of **Shingleton v. Smith**, is a Nota of the Reporter, that it was ſaid in that Caſe by Powell J. that a *Servant* may juſtify *in Defence of his Maſter, but* he can *not* juſtify a Battery in Defence *of the Goods of his Maſter*.

Fol. 547.

4. **If a** Lunatick **beats a Man, this ſhall not excuſe him in Treſpaſs, becauſe it is but to repair him in Damages; but otherwiſe it is in Caſe of** * **Felony, becauſe he cannot do it with a felonious Intent. Hobart's Reports** 181.

*4 Rep. 124. b. in a Nota of the Reporter's in Beverley's Caſe.——Hob. 134. pl. 179. in Caſe of **Weaver v. Ward**; and ſays that therefore no Man ſhall be excuſed of a Treſpaſs.

5. The

5. The *Father* cannot beat another *in Defence of his Son.* Br. Treſpaſs, pl. 189. cites 9 E. 4. 48. Per Catesby. *But* if the Father and another are

Combating, and the *Son* comes *in Aid of his Father*, and ſtrikes the other, this was held juſtifiable, tho' the Father began the Affray; but quære of that, but ſo it is holden; but here the other Party did begin upon the Father; therefore here it was held clearly juſtifiable. Clayt. 120. pl. 211. Greis's Caſe.

(E) Treſpaſs. *Aſſault.* What will be good Cauſe of *Juſtification.*

1. IF a Man comes to ſtop my River which runs to my Mill, I may well juſtify the holding of him by the Arm. 3 H. 4. 9. Br. Treſpaſs, pl. 79. cites 3 H. 4. 8 9. in the Written Book, S. C.

2. If a Man has Licence (by him who has Power to give it) to erect a Booth in a Fair, and when he is about making of it, another comes to break it down, he may well juſtify the holding of him by the Arm to ſtay him from the breaking it down. 11 H. 6. 23. See (G. 2) pl. [5] 6. S. C.

3. If a Man calls another Traitor, upon which he ſays that he mentitur in Capite, and that if he will appeal him of Treaſon, he will defend himſelf by his Hand upon his Body during the Life of one of them, according to the Form of the Law; this is a good Juſtification of the Aſſault. 37 H. 6. 3. 20. See (A. 2) pl. 4. S C.—Br. Treſpaſs, pl. 197. cites 37 H. 2. 3. accordingly per tot. Cur. the Plea had

But per Priſot, if thoſe Words (Secundum formam Legis) had been omitted, not been good, but the other Juſtices held it would have been good, notwithſtanding ſuch Omiſſion.

4. If a *Servant departs from his Maſter*, or if *an Heir in Ward departs from his Lord*, it is not lawful for the Maſter, nor for the Lord, to retake them with Force, nor to lay their Hands upon them, but require them &c. And if they refuſe, then to take their Actions. Br. Faux Impriſonment, pl. 37. cites 38 H. 6. 25. Per Markham, & nemo dedixit.

5. *Treſpaſs of Battery and Impriſonment.* The *Defendant juſtified inaſmuch as the Plaintiff lay in Wait at D. to rob the People, and made Aſſault upon A. and commanded him to deliver his Purſe, by which the Defendant took him and put him in the Stocks.* And the *Lying in Wait*, and the *Aſſault* upon A. is not double, becauſe ſome Act ought to be done, as where a Man juſtifies for Suſpicion; quod nota. Br. Double, pl. 138. cites 6 E. 4. 27.

6. In Action of Falſe Impriſonment, the beſt Opinion was, that it is a good *Plea, that the Defendant was a Watchman, and the Plaintiff was a Night-walker, and the Defendant caſt his Hands upon him peaceably to ſee his Viſage*, which was the ſame Impriſonment &c. Br. Faux Impriſonment, pl. 39. cites 4 H. 7. 2. Every Man may take *Night-walkers* who go by the Way; for it is for the

common Profit. Per Huſſey and Fairfax. Br. Faux Impriſonment, pl. 15. cites 4 H. 7. 18. at the End.

7. A. *takes B.'s Horſe.*—B. the ſame Day *requeſted A. to re-deliver* it, but A. refuſed.—B. *ſaid, if A. would not deliver* him, *he would take it in ſpite of his Teeth; and takes up a Stick lying on the Ground, and made towards A.* with the Stick. This is an Aſſault *juſtifiable.* Kelw. 92. pl. 4. 22 H. 7. Anon.

8. *Striking a Man's Horſe* is ſuch an Aſſault upon a Man's Goods, as will juſtify ſtriking the Perſon; and ſtopping the Horſe is ſtopping the Man. Clayt. 109. Booth v. Jenkinſon.

(F) Treſpaſs. Aſſault and *Battery*. What will be good Cauſe of *Juſtification* of Battery. *Aſſault to the Perſon.*

S. P. per Markham, quod Curia conceſſit; But Brooke ſays, it ſeems, that I may beat him, *if I cannot otherwiſe eſcape without Strokes or Mayhem*, as well as for Life. Br. Treſpaſs, pl. 71. cites S. C.

1. IF a Man aſſaults me, and I can eſcape with my Life, **it is not lawful for me to beat him.** 2 H. 4. 8. b. **Curia.**

2. [So] **If a Man aſſaults me,** I am bound to go from him as much as I can, **and not preſently to beat him.** 19 H. 6. 31.

Br. Treſpaſs, pl. 71. cites S. C. per Cokeyn; quod Curia conceſſit.——A Man may beat another in Defence of himſelf, per Cur. Br. Treſpaſs, pl. 128. in the large Edition, cites 29 H. 6. 31. but it ſhould be 19 H. 6. 31. and ſo are the ſmaller Editions.

3. [But] **If a Man aſſaults me,** I am not bound to attend till the other has given a Blow; **but I may beat him before in my Defence, for perhaps I ſhall come too late after.** 2 H. 4. 8. b. **Curia.**

4. In an Appeal of Maihem, De ſon Aſſault demeſne is **a good Juſtification.** 41 Aſſ. 21. **admitted by Iſſue,** 28 E. 3. 94. Fitzh. Corone, 141. Mich. 27 El. B. R. Rot. 38. **inter Communia inter** *John de Ives*, **Appellant, and** *Richard Skirben* **and** *Nicholas Taylor*, **Defendants. But the Defendants pleaded, that the Plaintiff aſſaulted them, & eos vulneravit & ad terram proſtravit ad interficiendum, & malum ſi quod &c. de Inſultu proprio querentis, & Iſſue de Injuria ſua propria. New Entries 52 d. Old Entries 45. Mich. 4 Car.** *Mitchell v. Brabant*, **B. R. ſo pleaded, and Iſſue join'd thereupon.**

5. Where a Man, *in his own Defence*, beats another, who firſt aſſaulted him &c. he may take an Advantage thereof upon an Indictment, as well as upon an Action; but with this Difference, that in the firſt Caſe he may give it in Evidence upon the Plea of Not Guilty, and in the latter he muſt plead it ſpecially. Hawk. Pl. C. cap. 62. pl. 3.

Fol. 548. See (C)

(G) Treſpaſs of Aſſault and Battery. *Juſtification. What* will be good Cauſe of Juſtification.

Hob 134. pl. 179. Paſch. 14 Jac. S. C.—Mo. 864. pl. 1192. S. C.——S. C. cited Raym. 423. per Raymond J. in Caſe of Lambert and Olliet v. Beſſey.——S. C. cited 2 Jo. 205.

1. **IT is no good Cauſe of Juſtification,** that all the **Companies** of Soldiers of London were commanded by the Privy Council to muſter, and that the Plaintiff and Defendant were under one Captain, and their Captain skirmiſh'd with another Captain, and the Defendant in this Skirmiſh diſcharg'd his Gun, the which caſually, againſt his Will, hurt the Plaintiff, (viz. becauſe it was diſcharg'd in his Face.) **Tho' this was in the Service of the Commonwealth, that is to ſay, in the Practice to make them able to defend the Realm; yet it will not excuſe, becauſe he does not ſay, that he could not do otherwiſe; As if he had ſaid, that the Plaintiff run croſs his Piece when he was diſcharging it, or had expreſs'd the Caſe with the Circumſtance, [and] ſo it had appear'd to the Court, that it had been** inevitable; **and that the Defendant had not been guilty of any Negligence to give Occaſion to the Hurt. Hobart's Reports** 181. **between** *Weaver and*

and Ward **adjudg'd, becauſe it is but to be repair'd in Damage for the Hurt.** in Caſe of Dickenſon v. Watſon.

So in Treſpaſs for an Aſſault, Battery, and Wounding, by *ſhooting out the Plaintiff's Eye.* The Defendant *pleaded* in Bar, *that he was a Collector of the Hearth-money; and for the better ſecuring the Money collected he rode with Fire-Arms, and having a Piſtol in his Hand, and intending to diſcharge it, to prevent Miſchief, he ſeeing none coming that way did diſcharge it; and* on his diſcharging it, the *Plaintiff caſually came that Way, and if he received any Harm, it was againſt the Will of the Defendant,* quæ eſt eadem tranſgreſſio. The Plaintiff demurr'd, and had Judgment; and upon a Writ of Error brought, Judgment was affirm'd, nothing being urg'd beſides the Plea, which the Court held inſufficient; for the *Defendant ſhall never be excuſed in Treſpaſs, unleſs upon an inevitable Neceſſity,* which was not ſhewn here. Beſides he did not traverſe Abſque hoc aliter vel alio modo, as was done in **Weaver and Ward's** Caſe, in the like Plea; and yet in that Caſe the Plaintiff had Judgment. 2 Jo. 205. Paſch. 34. Car. 2. B R. Dickenſon v. Watſon.

Serjeant Hawkins ſays, it ſeems, that a Man ſhall not forfeit a Recognizance for the Good Behaviour, by a Hurt done to another merely thro' Negligence, or Miſchance; as where one Soldier hurts another by diſcharging a Gun in Exerciſe, without ſufficient Caution; for notwithſtanding ſuch Perſon muſt, in a Civil Action, give the other Satisfaction for the Damage occaſion'd by his want of Care; yet he ſeems not to have offended againſt the Purport of ſuch a Recognizance, unleſs he be guilty of ſome wilful Breach of the Peace. Hawk. Pl. C. 131. cap. 61. S. 27.

(G. 2.) *Entry into Land.*

[1.] 2. **A Man may juſtify the Battery of another,** in Defence of his Poſſeſſion. **Trin. 3 Jac. B. demurr'd in Law.** One may *juſtify* an Aſſault and Battery in Defence, or for the Preſervation of his *Poſſeſſion of Lands or Goods.* 2 Inſt. 316.

[2.] 3. **If a** Man comes into the Foreſt in the Night, **the Foreſter cannot beat him before Reſiſtance made by him. Mich. 14 Jac. in the Star-Chamber, reſolved by the Chancellor and Judges in** *Haſtock's Caſe*, **and Haſtock had Recovery againſt him at the Common Law in Action of Battery.**

[3] 4. But if **the Party, who comes ſo into the Foreſt,** reſiſts the Foreſter, **he may juſtify the Battery of him, as was agreed in the Caſe aforeſaid.** The Statute of Maleſactors in Parks, of 21 E. 1. gives as much. See the Statute of 21 E. 1.

[4] 5. **A Man cannot juſtify a** Wounding in Preſervation of his Poſſeſſion. **P. 12 Ja. B. R. between** * *Butler and Auſtin*; **per Curiam. Mich. 9 Car. B. R. between** *Buckhurſt and Trowte*, **adjudg'd upon Demurrer. Intratur. Trin. 9 Car. Rot. 472.** * S. C. and S. P. But per Coke Ch. J. he may juſtify wounding in Defence of his Perſon. Roll Rep. 19. pl. 20.

[5.] 6. **If a Man** be making a Booth in a Fair by good Licence of the Owner, **and a** Stranger diſturbs him, and breaks it down without Cauſe, **yet he cannot juſtify the Battery of him.** 11 H. 6. 23.

[6.] 7. **A Man may juſtify the Battery of one who** will enter into his Houſe; **for it is his Caſtle. P. 7 Ja. B.** *Lawrence's Caſe*, **per Curiam.** Noy ſaid, that a Man cannot juſtify the *Wounding* another *to ſave his Houſe or Goods*, but can only ſtay the Party with his Hands in Defence of his Poſſeſſion. Lat. 20 in Caſe of Hall v. Gerard.

A Man can't juſtify an Aſſault in Defence of his *Houſe* or *Cloſe*. 1 Salk. 407. per Cur. in Caſe of Leeward v. Baſilee.—Ld. Raym. Rep. 62. S. P. accordingly, per Cur. in S. C.

[7.] 8. **If a** Man enters into my Cloſe, and there with an Iron Sledge and Bar breaks and diſplaces my Stones there being in the Land, being my Chattle, and I require him to deſiſt, **and he refuſes, and**

ſpeaks threatning Words, if I ſhall approach to him, and upon this I, to keep him that he ſhall not do more Damage to the Stones, not daring to approach him, caſt ſome Stones at him Molliter & molli manu, and they lay upon him molliter, yet this is not good Juſtification; for the Judges ſaid, that a Man cannot caſt Stones molliter, tho' it was confeſs'd by a Demurrer; and it would be perilous there to give Liberty to a Man to caſt Stones out of his Hand in Defence of his Poſſeſſion; for when a Stone is caſt out of the Hand, he cannot * guide it; and a Juſtification of Battery in Defence of Poſſeſſion, tho' it ariſes from the Poſſeſſion, yet the Concluſion is in Defence of the Perſon. P. 11 Car. B. R. between *Cole and Maunder* adjudg'd upon Demurrer. Intratur H. 10 Car. Rot. 502.

* Fol. 149.

8. There is a *Force in Law*, as in every Treſpaſs Quare Clauſum fregit; So if A. *enters into my Ground*, I *muſt requeſt him to depart*, before I can lay Hands on him to turn him out; for every Impoſitio Manuum is an Aſſault and Battery, which can't be juſtified on the Account of *breaking my Cloſe in Law*, without a Requeſt to be gone. And likewiſe there is an *Actual Force*, As in Burglary, in breaking open a Door or Gate; and in that Caſe it is lawful to oppoſe Force to Force; and if A. *breaks down the Gate*, or comes into my Cloſe Vi & Armis, I need not requeſt him to be gone, but may lay Hands on him immediately, for 'tis but returning *Violence with Violence*; per Cur. 2 Salk. 641. pl. 12.—Annæ, B. R. Green v. Goddard.

(G. 3) *In Defence of Goods.*

Ow. 150. per Coke, in Caſe of Seaman v. Cuppledike. [1.] 9. A Man may juſtify the Battery of another, in Defence of his Goods. * 19 H. 6. 31. b. Trin. 3 Jac. B. agreed.

———I may lay Hands on one that would take my Goods, and diſturb him, and *if he will not leave*, I may beat him, rather than he ſhall carry them away. Fin. Law. 8vo. 203.

* S. P. Br. Treſpaſs, pl. 128. in the large Edition, cites 29 H. 6. 31. but it ſhould be 19 H. 6. 31. and ſo are the ſmaller Editions. ———2 Inſt. 316. S. P.

If A. comes forcibly and takes away my Goods, I may oppoſe him without any more ado; for there is no Time to make a Requeſt; per Cur. 2 Salk. 641. pl. 12. ..... Ann. B. R. Green v Goddard.

[2.] 10. If a Man will take my Money out of my Purſe, I may juſtify the Battery of him in Defence thereof.

The Defendant *came manu forti to reſcue* a Diſtreſs from the Plaintiff; and it appear'd, that the *Plaintiff had not Time to requeſt him to forbear*, and this being pleaded was held a good Juſtification of the Aſſault. 11 Mod. 64. pl. 6. Trin. 4 Ann. B. R. Anon.

[3.] 11. If a Man takes the Beaſts of another Damage feaſant to his Corn, and a Stranger will take them out of his Poſſeſſion, he may well juſtify the Battery of him in Defence of them. 19 H. 6. 66.

4. A Man may juſtify a Battery *to preſerve his Dog*. Arg. Saund. 84. in Caſe of Wright v. Ramſcot, cites Raſt. Ent. 611. pl. 10.

5. In Aſſault &c. the Defendant *pleaded ſon Aſſault demeſne*. The Plaintiff *replied, that he was Servant to A. to take Care of his Horſes, and that the Defendant would have beaten one of them; whereupon he, in Defence of the Horſe, laid his Hands on the Defendant, and thereupon the Defendant aſſaulted him*. The Defendant *rejoin'd, that B. another Servant of A. was going to break the Hedge, and leap a Horſe of A.'s into Black Acre, a Cloſe of the Defendant's Maſter, whereupon the Defendant forbid him, and endeavour'd to hinder him; and thereupon the Plaintiff* came up and aſ-

ſaulted

ſaulted &c. *the Defendant, who defended himſelf; and traverſed, that he was guilty* &c. *but in Black Acre* &c. Exception was taken to the Replication, that it was only that the Defendant would have beaten the Horſe, and did not allege in Fact, that he did beat him. But notwithſtanding this Exception, the Defendant had Judgment. 2 Lutw. 1481. Hill. 11 W. 3. Shingleton v. Smith.

(G. 4) *Aſſault and Battery. Declaration. Good* or not.

1. TReſpaſs of Aſſault, that *he impoſed ſuch and ſo many Threats of his Life and maiming him, that he could not go about his Buſineſs in Publick*; and *did not ſay about his Buſineſs there*, and yet well; per Cur. Br. Brief, pl. 230. cites 37 H. 6. 2. 3.

2. In Treſpaſs the *Plaintiff counted, that the Defendant menaced him, by which his Buſineſs in this County, and in the County of S. was not done, and ſhew'd How*, viz. in Collecting Rents &c. Repairing ſuch Houſes &c. And the ſame where he ſays, that he dared not attend his Buſineſs, he ſhall ſhew in what Buſineſs. Br. Count, pl. 46. cites 37 H. 6. 19.

3. In Treſpaſs of Aſſault at D. & ipſum verberavit vulneravit, & Male tractavit, all ſhall be intended in the firſt Place; and yet it may be, that it was at divers Places. Br. Surmiſe, pl. 27. cites 5 H. 7. 17.

4. In Treſpaſs of *Aſſaulting him, nec non unum equum pretii 6 l. a Perſona ipſius* (the Plaintiff) adtunc & ibidem *cepit*. After a Verdict it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Plaintiff did not ſuppoſe any Property in the Horſe, but *ought to have ſaid, Equum ſuum*; for it might be the Defendant's, and then he might lawfully take her; or it might be the Plaintiff's, and then tortious; and the Conſtruction being indifferent, it ſhall be taken ſtrongeſt againſt the Plaintiff. And the Jury having aſſeſs'd intire Damages for both Treſpaſſes, and there being no Cauſe for one Treſpaſs, the Verdict is not good; quod fuit conceſſum per Fenner & Yelverton J. no other being in Court. Yelv. 36. Paſch. 1 Jac. B. R. Purcel v. Bradley.

5. In Action of Aſſault, the Plaintiff declared, *Quod cum the Defendant verberavit, without an expreſs Allegation* that the Defendant did beat him. Exception was taken, and cited the Caſe of **Sheriff and Bridges**, 39 Eliz. where ſuch a Declaration was adjudg'd void. But the Juſtices were of Opinion, that the Declaration was good, notwithſtanding the Judgment cited. Godb. 251. pl. 347. Paſch. 12 Jac. B. R. Sherloe's Caſe.

Roll. Rep. 55. pl. 30. S. C. by the Name of **Sherland v. Lauten**; And Coke Ch. J. ſeem'd to think it good, and inſtanced in an Ejectment, and alſo in Debt for Rent, that a Quod cum dimiſit is good. But it being moved at another Day, and the Caſe of **Shreene. v. Bridge**, Trin. 37 Eliz. cited as adjudg'd in Point in a Writ of Error to be good, tho' the Cuſtom, is to declare in ſuch Caſes with a De eo quod ipſe &c.. the Court (abſente Coke) held accordingly.——2 Bulſt. 214. S. C. and the whole Court declared they would be directed by Precedents, and accordingly Precedents were produced, and all (abſente Coke) were clear of Opinion that the Declaration was not good. And Man Secundary, inform'd the Court, that he had 2 Precedents directly in Point adjudg'd upon a Declaration to be inſufficient, being in this Manner as here with a Quod cum. But Croke J. ſaid, if the Declaration here had been Quod cum, he was in Pace Domini Regis, the other did aſſault and beat him contra Pacem, this had been good; for here is a good Relative to the Quod cum, which always pre-ſuppoſes ſome Matter ſubſequent to be depending upon it, which is not ſo here, and therefore the Declaration here not good; and ſo the Rule of the Court was Quod querens nil capiat per Billam.

6. After

6. After Verdict, Judgment was arreſted, becauſe *no Place* was *alleged where* the Battery was done. Lat. 273. Mich. 2 Car. Edſol v. Bengor.

7. Upon hearing Counſel on both Sides, 3 *Declarations in Aſſault, Battery, and Falſe Impriſonment*, were *order'd to be reduced into one*, appearing upon the Face of the Declaration to be all for one and the ſame Fact; and in each of the 3 the Plaintiff declaring againſt one of the Defendants for an Aſſault &c. Simul cum the other 2. Notes in C. B. 249. Hill. 7 Geo. 2. Catlin v. Elliot, Hunt, and Drew.

(G. 5) *Pleadings. Good* or not.

1. TReſpaſs of Battery, Wounding and Maihem, and it was demanded *Judgment of the Writ, inaſmuch as of the Maihem he ought to have Appeal of Maihem*, Et non Allocatur. Br. Treſpaſs, pl. 261. cites 43 Aſſ. 39.

Br. Appeal, pl. 138. cites S. C.

2. By which the Defendant *ſaid, that the Plaintiff at another Time, brought Appeal of Maihem of the ſame Act, and was nonſuited after Appearance*; and good clearly per Knivet Ch. J. And ſo ſee that Nonſuit in Appeal of Maihem is peremptory. Br. Treſpaſs, pl. 261. cites 43 Aſſ. 39.

Serjeant Hawkins ſays, that howſoever the Law may ſtand in Relation to this Matter; if ſuch Action be brought for the Battery only, without mentioning the Maihem he ſees not how it can be barr'd by ſuch a Nonſuit, becauſe it is generally holden, that in an Appeal of Maihem, no Conſideration can be had of the Battery, but only of the Maihem; and if ſo, it ſeems ſtrange that a Nonſuit in ſuch an Appeal ſhould bar an Action of a different Nature brought from a Matter which the Appeal had nothing to do with. However it ſeems clear that a Nonſuit in an Action of Treſpaſs is no Bar of an Appeal of Maihem; alſo he takes it for granted, that a Nonſuit in an Appeal of Maihem, before the Plaintiff has appear'd to it, is not a Bar of any other Appeal or Action, becauſe the Writ, for what appears to the contrary, might be purchaſed by a Stranger in the Name of the Plaintiff. 2 Hawk. Pl. C. 160. cap. 23. S. 26.

Br. Preſentments in Courts, pl. 4. cites S C.— * All the Editions of Brooke are (Defendant) but the Year-Book is (Plaintiff.)

3. In Treſpaſs, the Defendant *ſaid that he was Foreſter of the Foreſt of B. and the * Plaintiff was indicted* by the Foreſters and Verderors, Regarders and Agiſters, *for taking of Deer, by which he came* to him, *and pray'd him to find Pledges to anſwer before the Juſtices of the Foreſt, and he would not; by which he took and impriſoned him till he perform'd the Statute*, Judgment &c. And the Plaintiff ſaid, that De ſon tort Demeſne abſque tali Cauſa, and the was Iſſue received by the Court. And it was ſaid, that before Juſtices in Eyre, he ſhall not have Averment contrary to ſuch Preſentment of the Foreſters. Br. De ſon tort &c. pl. 7. cites 45 E. 3. 7.

4. Treſpaſs of Battery, the Defendant pleaded *Not guilty*, the *Plaintiff pleaded Eſtoppel, becauſe at another Time the Defendant being indicted* own'd the Treſpaſs before Juſtices of Peace, and upon this Proceſs iſſued againſt him to anſwer to the King, who came and pleaded that the Ill which the Plaintiff had, was de ſon Aſſault Demeſne, and ſo to Iſſue; *and before Verdict* the Defendant came and *confeſs'd the Treſpaſs*, and put himſelf in Grace of the King, and made Fine, and demanded Judgment, if he ſhall be received to plead Not guilty; and *the Record came in by Writ of the Chancery*: And the Court held that he ſhall not plead Not guilty, contrary to his Confeſſion, by which he pleaded De ſon Aſſault Demeſne. And the other demurr'd, inaſmuch as he pleaded it againſt the King, and after waved it, and confeſs'd the Treſpaſs. And after Writ was awarded to enquire of Damages; and ſo it ſeems that *he ſhall not plead contrary to his Confeſſion*. Br. Treſpaſs, pl. 96. cites 11 H. 4. 65.

5. Treſ-

5. Treſpaſs of Aſſault and Battery; the *Defendant ſaid that the Plaintiff came upon his Land, and would have occupied it, and the Defendant diſturbed him, and took him by the Hand, and charg'd him to go off*; which is the *ſame* Aſſault and Battery; and admitted for a good Plea. Br. Treſpaſs, pl. 413. cites 11 H. 6. 23.

6. Treſpaſs *of Battery of his Servant*, per quod ſervicium Servientis ſui prædicti &c. The *Defendant ſaid, that he was retain'd with him before that he beat him, and departed and came to the Plaintiff*; and yet it ſeems that it is no Plea; for he cannot retake him, nor beat him, without Requeſt to his ſecond Maſter. Br. Treſpaſs, pl. 139. cites 21 H. 6. 8. 8.

7. Treſpaſs of breaking his Cloſe, and Battery, Menace, and Wounding A. and B. his Servants *in N.* The *Defendant ſaid, that he was ſeiſed of 2 Acres in C. till diſſeiſed by the Plaintiff, upon which he enter'd and did the Treſpaſs, abſque hoc, that he is Guilty in N.* And a good Plea; *and to the wounding Not guilty*; for per Cur. *wounding cannot be juſtified*; and *to the Menace and Battery ſaid*, that *he was ſeiſed of the ſaid 2 Acres in C. till by the Plaintiff diſſeiſed, and the ſaid A. and B. Servants of the Plaintiff, came with the Plaintiff upon the Land, and the Defendant re-enter'd upon upon the Plaintiff, and found A. and B. upon the Land occupying to the Uſe of the Plaintiff, by which he put his Hands upon them peaceably, and ſaid, that if they would not go off the Land, he would purſue and chaſtiſe them according to the Law of the Land; which is the ſame* Menace and Battery, of which the Action is brought, *abſque hoc, that he is Guilty at N.* And a good Plea without the Traverſe; for *it is a Treſpaſs Tranſitory*. Br. Treſpaſs, pl. 143. cites 21 H. 6. 26, 27.

Treſpaſs of Aſſault made to his Servants at D. The *Defendant ſaid, that the ſaid Servants of the Plaintiff were cutting of the Graſs of the Defendant in C. by which he prohibited them, and laid his Hands upon them, and commanded them to go out of his Land*, abſque hoc, *that he is guilty of any Aſſault in D.* &c. And it was held a good Plea; and yet it is not like where a Man juſtifies by Aſſault made by the Plaintiff to the Defendant; Note the Diverſity. Br. Juſtification, pl. 4. cites 27 H. 6. 1.

8. In Treſpaſs of *Aſſault in the County of N. by which he loſt his Buſineſs in the County of N. and S.* it is no *Plea that he had not any Buſineſs, or did not loſe his Buſineſs in the County of S.* Br. Traverſe per &c pl. 136. 37 H. 6. 2, 3.

S. P. Br. Count. pl. 45. cites S C. and pl. 89. S. C.

9. *And if* he *ſays that by the Menace* of the Defendant *he could not gather in his Debts, nor plow his Land in S.* it is no Plea that he has no Debts there; for the *Aſſault or Menace is the Effect of the Matter*, and the *reſt is only to increaſe Damages*. Br. Traverſe per &c. pl. 136. cites 37 H. 6. 2, 3.

S. P. Br. Count. pl. 89. cites S C. But he ſhall anſwer to the Menace.

10. Treſpaſs by F. for Aſſault upon M. his Servant, and beating and wounding him, 5 *Auguſt* Anno &c. *and impriſoning him, and carrying him from L. to N. and there impriſoning him by* 3 *Days per quod ſervitium* &c. perdidit; the *Defendant ſaid, that* 4 *Auguſt he was robb'd of ſuch Goods, to the Value* &c, *at Midnight, by which he levied the Cry, and came to D. Conſtable of S. and to W. N. Bailiff of the Hundred, and ſhew'd the Matter, and pray'd them to ſearch for ſuſpicious Perſons*, and take and arreſt them; by which they there *ſearch'd accordingly, and found the ſaid Servant going and watching ſuſpiciouſly in the Street, in the Night, and would have arreſted him and he fled, and the Defendant purſued, took, and carried him to H. to have him carried to Gaol; and becauſe he was ſick, and could not be carried, they held him for* 3 *Days and after carried him to Gaol*; which is *the ſame* Aſſault, Battery, and Impriſonment &c. And no Plea, becauſe he makes not any Juſtification for himſelf. Br. Treſpaſs, pl. 297. cites 2 E. 4. 8.

And after he *ſaid* that *he, as Servant of the Conſtable, and by his Command arreſted him* &c. and ſaid, that he could not be carried *Abſque Corporis periculo*, which is as well as Abſque *Mortis* periculo quod nota; and the ſame upon a Return of *Languidus*. Br. Treſpaſs, 297. cites 2 E. 4. 8.

11. In Treſpaſs, the *Defendant ſhewed that the Plaintiff would have taken 6d. of the Money of the Defendant from him, and he put his Hands upon*

upon him, and did not ſuffer him. And by the Juſtices, if a Man takes my Goods, I may put my Hands upon him, and diſturb him, and if he will not leave may beat him rather than ſuffer him to carry them away, by which the Plaintiff ſaid that De ſon tort Demeſne abſque tali cauſa; and this was in Treſpaſs of Battery. Br. Treſpaſs, pl. 185. cites 9 E. 4. 28.

12. Treſpaſs of Menace, the *Defendant ſaid that the Plaintiff was indebted to him, and he ſaid to him that he would ſue for it by the Law, and impriſon him if he could,* which is the *ſame* Menace. And per Cur. this is no Plea; for the one is a Tortious Menace, and the other is a lawful Menace. Br. Treſpaſs, pl. 388. cites 16 E. 4. 7.

Br. Treſpaſs, pl. 389. cites S. C.

13. Treſpaſs Vi & Armis in D. *inſultum fecit,* verberavit vulneravit, & male tractavit, & tales, *& tantas minas* impoſuit quod &c. the *Defendant to the Vi & Armis pleaded Not guilty, and to the Reſidue of the Treſpaſs that at the Time of the Treſpaſs &c. the Plaintiff made an Aſſault upon him, and the Defendant prayed him to ſuffer him to be in Peace, and if not, that he would defend himſelf, and rather than he ſhould beat the Defendant, that the Defendant would beat him, and yet the Plaintiff would not ſurceaſe his Aſſault, by which the Defendant in his Defence beat him,* which is the *ſame* Aſſault and Menace of which the Action is brought; and a good Plea, and ſhall not be compell'd to ſay generally, that De ſon Aſſault Demeſne, and in his Defence; for then the Menace ſhall not be anſwered; Quod nota per Cur. Br. Treſpaſs, pl. 333. cites 16 E. 4. 11.

14. In Treſpaſs of Aſſault and Battery, the *Defendant ſaid that diverſe Felonies were committed in the Place where* &c. *and ſaid that he was watching in his Houſe, and came out into the Highway, and the Plaintiff came at the Hour of* 11 *in the Night, and the Defendant came and put his Hands upon him in a peaceable Manner, and look'd in his Face, and when he ſaw that he was a true Man he departed,* which is the ſame Aſſault and Battery of which &c. Per Keble, By the Statute of Wincheſter, cap. 3. Watchmen may arreſt Nightwalkers, but ſuch Watches ought to be aſſign'd by the Vill. And per Cur. Suſpicion is ſufficient Cauſe to arreſt a Man, and is traverſable. And per Huſſey, Watchmen may oppoſe Nightwalkers from whenceſoever they come; and Fairfax J. agreed thereto, and ſo a good Plea. Quære if double. Br. Treſpaſs, pl. 268. cites 4 H. 7. 1. 2.

15. Treſpaſs of Aſſault, Battery, and Wounding; the *Defendant ſaid that the ſame Place and Day he had a Warrant to arreſt the Plaintiff, by which he there put his Hands upon him peaceably, and arreſted him,* which is the ſame Aſſault, Battery, and Wounding &c. Per Fineux this is no Plea; for *this is no Aſſault, Battery, nor Wounding*; but if he had ſaid that he arreſted him by a Warrant at the Time &c. and the Plaintiff made Aſſault upon him, and the Ill which he there had &c. was De ſon Aſſault Demeſne &c. This had been a good Plea. Br. Treſpaſs, pl. 218. cites 21 H. 7. 39.

16. In Treſpaſs of Aſſault, Battery, and Wounding, the Defendants *juſtified by Warrant from the Mayor of S. to take the Husband, and* that when they were taking him *the Wife hinder'd them, whereupon they laid their Hands on her Molliter to make her deſiſt,* Quæ eſt eadem Tranſgreſſio &c. It was objected that they did not anſwer to the Battery, nor traverſe it. And it was held ill. Cro. E. 93. 94. pl. 3. Paſch. 3 Eliz. B. R. Jerome v. Phear.

17. In Aſſault, Battery, and Wounding, the Defendant *pleaded that he was Conſtable of D. and for ſuch a Miſdemeanor by the Plaintiff, ho laid his Hands on him, and put him into the Stocks, Quæ eſt eadem* tranſgreſſio; and upon Demurrer it was adjudged for the Plaintiff, becauſe the Defendant did not plead Not Guilty to the Wounding, or juſtify'd it; but if one pleads that the Hurt which the Plaintiff had was of his own Aſſault; this is a good Anſwer to all, and the Plaintiff had Judgment. Cro. E. 268. pl. 3. Hill. 34 Eliz. B. R. Pendlebury v. Elmer.

18. A

18. A *Boy preſs'd to get into a Cock-pit*, to ſee the Game, and *the Maſter of the Pit endeavoured to put him forth*; *the Boy reſiſted*, *the Maſter* thereupon *pull'd him by the Ear*, *ſo that it bled*; and the Boy by his Guardian ſues Action of Battery. And the Maſter pleaded Not guilty, and for this it was againſt him; but by Damport Judge, ſome Opinion was, that by good Pleading in this Caſe the Maſter of the Pit might have juſtified the Act well enough, but could not plead Not guilty. Clayt. 24. pl. 41. Rigg's Caſe.

19. In Aſſault and Battery, the Defendant *juſtified by Molliter manus* Impoſuit upon the Plaintiff, who entered his Cloſe. And the Opinion of the Court was, that he *ought to ſhew what Eſtate he had in the Cloſe, and that the Plaintiff came there and endeavoured to eject or diſſeiſe him.* Mo. 846. pl. 1142. Mich. 13 Jac. Smith v. Bull.

20. If a Battery be *outrageous*, ſo that a *Molliter manus* Impoſuit be not true, it ought to be *ſpecially ſhewn*, otherwiſe it ſhall be a good Juſtification. Skin. 387. pl. 22. Mich. 5 W. & M. B. R. King & Uxor v. Tebbart.

21. In Treſpaſs and Aſſault the Defendant *pleaded that he was riding in the Highway, and his Horſe being frightened ran away with him, and* that the Plaintiff and others were *call'd to* to *ſtand out of the Way, which they did not, and* that *the Horſe run upon the Plaintiff againſt his Will* &c. And upon Demurrer to this Plea it was adjudged ill, becauſe the Defendant had juſtified a Treſpaſs, and did not confeſs it; but if he had pleaded Not guilty, upon this Evidence he might have been acquitted. 2 Salk. 637. pl. 5. Paſch. 7 W. 3. B. R. Gibbon v. Pepper.

4 Mod. 404. S. C. adjudged for the Plaintiff; and there it was ſaid not to be like the Caſe of **Weaver v. Ward**, in Hob. 134.

becauſe there the Fact was confeſs'd; but the Battery is not anſwered here.——Ld. Raym. Rep. 38. S. C. and ſays that in this Caſe the Defendant *juſtified a Battery, which is no Battery.* And ſo was the Opinion of the Court; and Judgment for the Plaintiff.

22. One cannot plead his Poſſeſſion in Bar *without more*, except it be in the Caſe of Battery, where it may be *merely collateral*; and the true *Diverſity* is between a *Declaration* and a *Plea*, for one may count upon his Poſſeſſion without more, but not juſtify by Virtue of it; and you can never gave Poſſeſſion in Bar, without making a Title; Per Powell J. 12 Mod. 508, 509. Paſch. 13 W. 3. in Caſe of Pell v. Garlick

23. In Treſpaſs an Exception was taken, that the Plea was diſcontinued, becauſe the Declaration was of an *Aſſault, Taking, Arreſting, and Impriſoning*, and the Defendant pleaded to the Treſpaſs, Aſſault and Impriſonment, but *pleaded nothing as to the Arreſt.* But per Holt Ch. J. The *Impriſonment includes the Arreſt*; for Impriſonment cannot be without an Arreſt, nor an Arreſt without Impriſonment; for an Arreſt is an actual Impriſonment. And the Plaintiff had Judgment. 2 Ld. Raym. 1100. Hill. 3 Ann. Blackmore v. Tidderley.

2 Salk. 423. pl. 11. S. C. but not S. P. ——6 Mod. 240. S. C. but S P. does not appear. ——11 Mod. 38. pl. 2. S. C. but not S. P. of the Diſcontinuance.

24. In Treſpaſs, Aſſault and Battery, *laid 1ſt Octob. 3 Ann.* the *Defendant as to the Force pleads Not guilty, and as to the Reſidue* pleads, *that long before* &c. (viz.) *on September 13. a Stranger's Bull broke into his Cloſe, which he was driving out to impound him*; *and* that *the Plaintiff came into the Cloſe, and with Force hindered him, and would have reſcued the Bull*; *to prevent which the* Plaintiff *Parvum flagellum ſuper querentem molliter impoſuit, which is the ſame Reſidue of the Treſpaſs, and traverſed that he was guilty at any Time before the ſaid 13 Sept.* Exception was taken, becauſe the Defendant ſhould have required him to go out of his Cloſe before he beat him, and that Flagellum molliter imponere was repugnant, and that the Traverſe was ſhort, becauſe it did not anſwer the Treſpaſs after Sept. 13. Per Cur. The Quod eſt idem reſiduum is good without a Traverſe, and therefore not material tho' it be ſhort; for it goes only to the Time where

where the Quod eſt idem avers it to be the ſame. 2 Salk. 644. pl. 12. ... Ann. B. R. Green v. Goddard.

25. In Aſſault and Battery, the Defendant *pleaded that he was Servant to R. and that the Plaintiff having aſſaulted R. at a certain Time and Place, he did then and there aſſault the Plaintiff in Defence of his Maſter.* Exception was taken that a Servant could only juſtify defending his Maſter, and not aſſaulting the Plaintiff in the Defence of him; and cited 11 H. 6. 8. Beſides the Aſſault of [by] the Plaintiff might have been of a Time paſt; for the Words of the Plea are, That the Plaintiff *having aſſaulted* R. And the whole Court (abſente Lee) were of Opinion that the Plea was not good, and gave Judgment for the Plaintiff. 2 Barnard. Rep. in B. R. 327. Mich. 7 Geo. 2. 1733. Markweth v. Reynolds and Weſtwood.

(G. 6) *Juſtification.* *Good*, or not.

1. IN Treſpaſs of Battery *at D.* there, if he juſtifies *at another Place in the ſame County*, this is good *without alleging Continuance* of the Treſpaſs; Per tot. Cur. Br. Treſpaſs, pl. 37. cites 35 H. 6. 50, 51.

2. In Treſpaſs of *Battery*, *Ita quod deſperabatur &c.* it ſuffices to *juſtify the Battery, without anſwering to the Jeopardy of Life.* Br. Faux Impriſonment, pl. 3. cites 35 H. 6. 54.

3. Treſpaſs of Battery, the *Defendant ſaid that he is Serjeant, and arreſted him upon an Action, and pleaded all certain; and the Plaintiff made Reſcous, and the Serjeant purſued him, and he fled, and becauſe he could not otherwiſe take him he beat him*, which is the ſame Treſpaſs &c. Per Littleton, If I come to diſtrain, and the Party *chaſe the Cattle upon another's Land, or into another County*, I may purſue and retake; for when they are in my View they ſhall be adjudged in Law in my Poſſeſſion; The Reaſon ſeems to be inaſmuch as they are tranſitory. So where it is ſaid to a Man I arreſt you, and he flies, I may purſue him and take him, and this in another County. Per Markham Ch. J. Yet you cannot beat him when he flies; but if *he had been arreſted in Fact, and made* Reſcous, or would ſtand in his Defence upon the Arreſt, there he may beat him to take him. Br. Treſpaſs, pl. 296. cites 2 E. 4. 6.

4. Treſpaſs of Menace of Life and Member; a Man *cannot juſtify the Menace of Death*; by which he ſaid Not guilty, and to the reſt *ſaid that he menac'd him from going in his Way, and made Aſſault upon him; by which he ſaid to him that he would go in his Way, and would defend himſelf* in their Aſſault, *and rather than be mayhem'd himſelf that he would mayhem him*; and ſo to Iſſue. Br. Treſpaſs, pl. 319, cites 10 E. 4. 6.

5. Treſpaſs of Aſſault, Wounding, and Impriſonment by one Day; and the *Defendant juſtified the* Wounding, *becauſe the Plaintiff made an Aſſault upon him the ſame Day, Year, and Place*, and the Wrong which he had was De *ſon Aſſault Demeſne* in his Defence; and *to the Impriſonment he ſaid that he was Conſtable of the ſame Vill, and becauſe the Plaintiff made an Aſſault upon him and broke the Peace, he took and carried him to Gaol for Conſervation of the Peace*; And a good Plea per tot. Cur. tho' the Aſſault was made upon himſelf. Br. Treſpaſs, pl. 272. cites 5 H. 7. 6.

6. In Treſpaſs for an *Aſſault, Wounding, Taking, and Impriſoning*, the *Defendant quoad the Aſſault and Wounding pleaded Not guilty*, and *quoad the Taking and Impriſoning juſtified by a Warrant from the Lord Mayor, but ſhews neither Time or Place when or where it was made*, and *ſaid nothing as to the Aſſault*; and upon Demurrer the Plea was held ill, by Reaſon of omitting

Roll. Rep. 135. pl. 15. S. C. accordingly. And per Cur. A Place ought to be alleg'd.

omitting the Aſſault; and ſo it was a Diſcontinuance, and therefore ordered to begin again. 2 Bulſt. 335. Hill. 12 Jac. Wilſon v. Dodd. where the Warrant was made.

And Ibid. 136 S. C. accordingly, and the Point as to the Place was admitted by Coventry of Counſel for the Defendant. It was inſiſted by the Counſel for the Plaintiff, that where the Things to be anſwered are of diverſe Natures, there ought to be a particular Anſwer to each; but where the one includes the other, it is well enough, if he juſtifies that which includes the other, without anſwering the other, and ſo in this Caſe; for there cannot be an Impriſonment without an Aſſault, ſo that the Impriſonment which is juſtified includes the Aſſault; But Coke Ch. J. ſaid that there might be an Aſſault without an Impriſonment, and ſo they are diſtinct, as Wounding includes an Aſſault; but if he directs his Plea to the Wounding, it is no Anſwer to the Aſſault. And Doderidge ſaid the Plaintiff did not intend the Aſſault comprehended by Implication in the Impriſonment, but another diſtinct Aſſault.

7. It was objected, that the Traverſe De Injuria is not good, where the Juſtification is by Reaſon of a Freehold, or a Leaſe for Years; but notwithſtanding the Plaintiff ſhall have Judgment, becauſe the Juſtification is *not meerly in the Realty, but mixt with the Perſonalty*; and where it is mix'd with the Perſonalty, Injuria ſua propria is a good Traverſe, and he need not to traverſe the Title, as the Defendant pretends; and cites 8 H. 6. 34. Beſides, the Juſtification is not here upon the Leaſe, but upon the Aſſault upon him by laying his Hands Molliter upon him, to remove him from his Poſſeſſion; ſo that the Realty is not *Inducement* only *to the Juſtification*. Lat. 273. Paſch. 2 Car. Hall v. Gerrard.

8. In Treſpaſs of Battery and Impriſonment, the Defendant *juſtified as Bailiff, by Virtue of an Execution, and that he Molliter manus impoſuit* upon him, and arreſted and impriſoned him. It was objected that the Molliter manus impoſuit *did not anſwer the Battery*; and the Court inclined that it did not ſufficiently anſwer it, but that he ſhould have pleaded that the Plaintiff reſiſted him, by which he in his Defence beat him. 3 Lev. 403, 404. Mich. 6 W. & M. in C. B. Patrick v. Johnſon. Ibid. 404. The Reporter ſays, Quod mirror! For that all Juſtifications in ſuch Caſes are as here, and ſays, that upon this Exception and another Curia adviſare vult; and the Plaintiff being ſatisfied that the Exceptions would not help him, diſcontinued.——But ſee 2 Lutw. 929. where this Remark of Lev. 404. 405. is canvaſs'd and denied by Serjeant Lutwich in the ſame Caſe of Patrick v. Johnſon.

9. Where an *expreſs Battery is laid*, it is not enough to juſtify the Impriſonment upon legal Proceſs, which includes a Battery, but the *Defendant ought to* go on, and *ſhew that he arreſted the Plaintiff, and the Plaintiff offered to reſcue himſelf, and ſo the Defendant was compell'd to beat him*; for otherwiſe if it be not upon ſome Occaſion, a Man cannot juſtify a Battery in an Arreſt. And Judgment was given by the whole Court for the Plaintiff. Ld. Raym. Rep. 231, 232. Trin. 9 W. 3. in Caſe of Truſcott v. Carpenter and Man.

(G. 7) *De ſon tort Demeſne. Good* Plea, in what Caſes of Aſſault and Battery &c.

See (G. 5)

1. IN *Treſpaſs of Menacing*, it is no *Plea De ſon tort Demeſne* &c. For *if a Man aſſaults another, it is not lawful for the other to ſay that he would kill him, and to menace him of Life and Member; but if he*, upon whom the Aſſault is made, *flies, and the other purſues him ſo near that he cannot eſcape*, or if he has him under him upon the Ground, or has chas'd him to a Wall, Hedge, Water, or Dike, ſo that he cannot eſcape him, there it is lawful for him to ſay, that if he will not depart, he in Salvation of his Life will kill him &c. Per Priſot, quod non negatur. And Brooke ſays ſuch Manner of Form is good Se defendendo in an an Indictment upon the Death of a Man Se defendendo. Br. Treſpaſs, pl. 28. cites 33 H. 6. 18.

2. In Treſpaſs the Defendant *juſtified to ſee if Waſte be done in the Land which the Plaintiff held in Execution againſt the Defendant by Statute Merchant*; and the Plaintiff ſaid that De ſon tort Demeſne abſque tali Cauſa. And per Brian, where a Man *juſtifies his Entry by the Law*, and by no Perſon certain, as to enter to ſee Waſte, Entry into a Tavern for Victual, or the like, there De ſon tort Demeſne is no Plea, by which the Plaintiff waiv'd the Iſſue, and ſaid that he claim'd the Land to be his own Land; and a good Iſſue. Br. De ſon tort &c. pl. 49. cites 12 E. 4. 10.

But where a Man *juſtifies to arreſt N. for Suſpicion of Felony*, the Plaintiff may ſay that De ſon tort Demeſne &c. and yet he juſtified by the Law; for *the one is an Entry*, and the *other* is *an Excuſe in Law*. Br. De ſon tort &c. pl. 49. cites 12 E. 4. 10.

And it was ſaid there, That if a Man *juſtifies by Authority of the Plaintiff*, as by *Licence*, *Leaſe*, or ſuch like, there De ſon tort Demeſne abſque tali Cauſa is no Plea. Br. De ſon tort &c. pl. 49. cites 12 E. 4. 10.

3. In Treſpaſs of Aſſault and Battery, the Defendant *juſtified that J. S. was poſſeſs'd of a Dog ut de Bonis propriis, and delivered it to him to keep, and that the Plaintiff would have taken it from him*, in which he reſiſted him, *and in Defence* and Cuſtody *of his Dog he beat him*, and the Hurt which he had was De ſon tort Demeſne; and to this the Plaintiff was put to anſwer, and replied *De ſon tort* &c. which proves a Property in the Dog when he juſtifies the Beating of one in Defence of it. Arg. Cro. E. 126. in Caſe of Ireland v. Higgins, cites 13 H. 7. Rot. 35.

4. Where Defendant in Treſpaſs, Aſſault, Battery &c. *juſtifies in Defence of his Poſſeſſion*, the *Plaintiff may reply De ſon tort Demeſne*, becauſe the Title of the Land does not come in Queſtion; Per Powell J. Ld. Raym. Rep. 120. 121. Mich. 8 W. 3. Serle v. Darford.

See (G. 5) (G. 8) *De ſon Aſſault Demeſne*, a *good* Plea. In what Caſes.

1. IN Treſpaſs of Battery, the Defendant *ſaid that the Plaintiff beat W. to Death, and the Conſtable came to arreſt him, and he ſtood in Defence*, by which the Defendant came in Aid of the Conſtable &c. and the Ill which he had was De ſon Aſſault Demeſne; Judgment &c. The Plaintiff ſaid that De ſon tort Demeſne &c. Br. De ſon tort &c. pl. 11. cites 38 E. 3. 9.

2. *Battery againſt two* Defendants; they *pleaded Son Aſſault Demeſne*, and this was aſſign'd for Error, becauſe the Aſſault of the one could not be the Aſſault of the other; and therefore they ought to have pleaded ſeveral Pleas, but it was adjudged good, becauſe the Aſſault may be joint. Mo. 704. pl. 983. Penruddock v. Errington.

3. Tho' one cannot juſtify a Battery by *Son Aſſault Demeſne*, by pleading it to on *Indictment*, yet he may give it in Evidence on a Not guilty, and he may be thereupon acquitted; Per Holt Ch. J. 6 Mod. 172. Paſch. 3 Ann. B. R. The Queen v. Coteſworth.

11 Mod. 43. pl. 3. S. C. accordingly; and Holt ſaid that if a Man ſtrikes another who does not reſent it immediately after;

4. In Treſpaſs for an Aſſault, Battery, and *Maihem*, Defendant pleaded Son Aſſault Demeſne, which was admitted to be a good Plea in Maihem; but the Queſtion was, What *Aſſault* was *ſufficient to maintain ſuch a Plea* in Maihem? Holt Ch. J. ſaid that the Meaning of the Plea was, that he ſtruck in his own Defence; That if *A. ſtrike B.* and *B. ſtrikes again*, and *they cloſe immediately*, *and in the Scuffle B. maims A.* that is Son Aſſault; *but* if upon *a little Blow* given by A. to B. B. gives him a Blow that maims him, that is not Son Aſſault Demeſne. Powell J. agreed,

agreed, for the Reaſon why Son Aſſault is a good Plea in Maihem is, becauſe *it might be ſuch an Aſſault as indanger'd the Defendant's Life.* Salk. 642. pl. 13. Paſch. 3 Ann. B. R. Cockcroft v. Smith.

3 but takes his Opportunity, and *ſome Time after falls upon him*, and beats him, in this Caſe Son Aſſault is no good Plea, but in ſuch Caſe he ought to plead what is neceſſary for a Man's Defence, and not who ſtruck firſt, tho' this he ſaid had been the common Practice, but which he wiſh'd was alter'd; for Hitting a Man a little Blow with a little Stick on the Shoulder, is not a Reaſon for the other to draw a Sword, and cut and hew the other &c. And the Principal Caſe was, that the Plaintiff in a Scuffle ran his Finger towards the Defendant's Eye, who bit off a Joint.—— S. C. cited Ld. Raym. Rep 177. in a Note at the End of the Caſe of Cook v. Beal, ſays that Holt Ch. J. directed a Verdict for the Defendant, the firſt Aſſault being the Tilting a Form or Seat upon which the Defendant ſat, whereby he fell, and the Maihem was that the Defendant bit off the Plaintiff's Finger.——6 Mod. 230. & 263. S. C. but upon other Points.

(G. 9) *Replication* in Aſſault &c. *Good*, or not.

1. IN Aſſault and Battery, the Defendant *pleaded, that* at the Time &c. *he was ſeiſed of the Rectory of D. in Fee, and that Corn was ſever'd from the* 9 *Parts, and he came* into the Ground *to carry away the Tythes, and* in Defence thereof, and to hinder the Plaintiff from taking it, he *ſtood there to defend it, and the Hurt which he had was of his own Wrong*; The Plaintiff *replied, De injuria ſua propria abſque tali Cauſa*: And upon Demurrer the Plaintiff had Judgment, becauſe by his Declaration, he did not claim any Thing in the Soil or in the Corn, but only Damages for the Battery &c. which is collateral to the Title. Where the Plaintiff makes Title in his Count, and the Defendant pleads any Matter in Deſtruction of ſuch Title, or of the Plaintiff's Cauſe of Action, there the Plaintiff muſt reply ſpecially, and ſhall not ſay abſque tali Cauſa. Yelv. 157. Trin. 7 Jac. B. R. Tailor v. Markham.

Brownl. 215. S. C. and is much in the ſame Words with that of Yelv —Cro. J. 224. pl. 5. S. C. adjudged accordingly.

2. Treſpaſs of Aſſault, *Battery, and Wounding*, 1 *Aug.* 13 *Car.* the Defendant *pleaded Son aſſault Demeſne*, upon Iſſue the *Defendant gave in Evidence an Aſſault and Battery by the Plaintiff*, 2 *July* 13 *Car. and that it was in his own Defence, and produced Witneſſes to prove it*; the *Plaintiff ſhew'd that the Battery he* intended *was* 9 *July* 13 *Car. and produced alſo divers Witneſſes* to prove it. It was inſiſted for the Defendant that this was no Evidence; for the Plaintiff ought to have made ſpecial Replication, and ſhew'd that ſpecial Matter; but all the Court held that it was not requiſite; for *if he had ſhew'd another Day in the Replication it had been a Departure*; but *'tis ſufficient to ſhew* it *in Evidence, that there was an Aſſault*; for the *Day is not material*. Cro. C. 514. pl. 12. Mich. 14 Car. B. R. Thornton v. Liſter.

3. In Battery, the Defendant *pleaded Son Aſſault* Demeſne; the Plaintiff *replied that he was ſtanding at his Gate*, and that the *Defendant being on Horſeback offer'd to ride over him, whereupon he molliter aſſaulted the Plaintiff in Defence of his Perſon, qui eſt idem Inſultus* &c. and upon Demurrer, this Replication was adjudg'd ill, becauſe he had now confeſſed the firſt Aſſault; but he *ſhould have ſaid molliter Manus impoſuit upon the Plaintiff to hinder his riding over him.* Judgment for the Defendant, Lev. 282. Jones v. Treſillian. Hill. 21 & 22 Car. 2. B. R.

Mod. 36. pl. 86. S. C. but ſomewhat varying, viz. The Defendant pleaded De ſon Aſſault Demeſne; the Plaintiff *replies, That the Defendant would have forc'd his Horſe from him, whereby he* did *Molliter* inſultum facere upon the Defendant, *in Defence of his Poſſeſſion.* To this the Defendant demurr'd. Moreton ſaid, that Molliter inſultum facere is a Contradiction, ſuppoſe you had ſaid that Molliter you ſtruck him down. And Twiſden ſaid you cannot juſtify the Beating of a Man in Defence of your Poſſeſſion, but you may ſay that you did Molliter manus imponere &c. Keeling ſaid you ought to have replied, that you did Molliter manus imponere, quæ eſt eadem Tranſgreſſio. And per Cur. Quer' Nil capiat per Billam, unleſs better Cauſe be ſhewn this Term.—— Sid. 441. pl. 10. S. C. but ſtates it that the Defendant pleaded ſpecially in Defence of the Poſſeſſion of a Ship, and concluded his Plea Et ſic Molliter inſultum fecit,

fecit, where it ſhould be Manus impoſuit; and therefore the Bar was adjudged ill.——S. C. cited Ld. Raym. Rep. 62. Mich. 7 W. 3. in Caſe of **Leward v. Baſtly**, as Trin. 21 Car 2. Rot. 1841. but ſtates it differently from all the reſt, viz. that the Deferdant pleaded Son Aſſault Demeſne; the Plaintiff replied that he was poſſeſs'd of a Cloſe called Cupner's Cloſe; and that the Defendant broke the Gate, and chaſed his Horſes in the Cloſe, and the Plaintiff for defending his Poſſeſſion Molliter inſultum fecit upon the Defendant. And upon a Demurrer adjudged a bad Replication, for he ſhould have ſaid Molliter manus impoſuit; but he could not juſtify an Aſſault in Defence of his Poſſeſſion. And to this Caſe the Court agreed to be good Law.——2 Keb. 597. pl. 23. S. C. ſays the Plaintiff replied that in Defence of his Body and Poſſeſſion Molliter Inſultum fecit on the Defendant, who came riding againſt him ſtanding in his Cloſe; and the Court held it ill.

Sid. 444. pl. 2. the Replication was *Quod non moderate caſtigavit*, and Iſſue thereupon; and the Jury *found Quod non moderate caſtigavit*, and 20 l. Damages. It was moved,

4. Aſſault, Battery, and Wounding. The Defendant *juſtified, that he being Maſter of a Ship, commanded the Plaintiff to do ſome Service in the Ship; and on his refuſing*, he, the Defendant, *moderate caſtigavit eum.* The *Plaintiff maintain'd his Declaration, abſque hoc quod moderate caſtigavit.* After Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Iſſue was not well join'd; for Non moderate caſtigavit does not neceſſarily imply that he beat him at all, and ſo no direct Traverſe to the Juſtification, which immoderate Caſtigavit would have been; but de Injuria ſua propria abſque tali Cauſa would have been the moſt formal Replication. However, it was held good after a Verdict. Vent. 70. Paſch. 22 Car. 2. B. R. Aubrey v. James.

that this was *Negativum infinitum*, and ſo not a good Iſſue. And the Court held it would have been ill upon Demurrer, but is good after Verdict; becauſe here is an Affirmative and a Negative.——Gilb. Hiſt. of C. B. 124. cites S. C. and ſays, that it was rather a Traverſe of the Chaſtiſement, than of the moderate Manner of doing it; yet after Verdict it is good, becauſe the Injuria has aſcertain'd that he did beat him immoderately.

Comb. 227. **King & Ux. v. Dippard**, S. C. It was inſiſted for the Defendant, that there ought to be a Traverſe. But Holt Ch. J. ſaid, the Plaintiff

5. In Treſpaſs of Aſſault and Battery, the Defendant pleaded ſon Aſſault demeſne. The Plaintiff replied, that the Defendant *came into his Houſe*, and continued there after the *Plaintiff deſired him to depart*; upon which he *commanded his Wife to put him out* of the Houſe, *quæ molliter manus* ſuper the Defendant impoſuit, *& hoc* &c. but does *not ſay Quæ eſt eadem Tranſgreſſio.* And adjudg'd a good Replication; for it being *eodem Tempore quo*, it is good without ſuch a Concluſion; but if they *vary in Time*, then it is neceſſary to ſay Quæ eſt eadem Tranſgreſſio. Skin. 387. pl. 22. Mich. 5 W. & M. in B. R. King & Ux. v. Tebbart.

by the Replication ſhews it was a juſtifiable Aſſault, and ſo confeſſes and avoids, which is a full Anſwer without a Traverſe; and where the Replication is De Injuria ſua propria, it muſt conclude ad Patriam.——Carth. 280. **King & Ux. v. Phippard**, S. C. accordingly And per Cur. the Replication ought to be ſpecial as it is; becauſe the Matter could not be given in Evidence upon the General Replication of De Injuria ſua propria. And Judgment for the Plaintiff.

(G. 10.) *Judgment* and *Damages*. How. *And where ſeveral Defendants plead ſeveral Pleas*, and one or more is found guilty of the Battery, and the others of the Aſſault only.

1. TReſpaſs of Aſſault and Battery. They are at Iſſue, and 'tis *found that he aſſaulted him, but he had no Hurt*, and that he was not beaten; and tax'd Damages at *half a Mark*, and the Plaintiff recover'd by Judgment. Br. Damages, pl. 19. cites 42 E. 3. 7.

2. Treſpaſs for Aſſault *ſuch a Day*. The *Defendant pleaded Not Guilty*. The *Jury found the Aſſault on this Day, and another Day to the Damage of* 20 *l.* The Plaintiff ſhall have Judgment of the 20 l. for the Aſſault; and

and it is taken as one and the ſame Aſſault; quod mirum, and ſo Judgment pro Querente. Br. Damages, pl. 32. cites 45 E. 3. 24.

3. Treſpaſs *againſt* 4, de Verberatione & Vulneratione. The *one juſtified the Wounding, and the Blows by Aſſault of the Plaintiff, and are at Iſſue.* And the *other pleaded Not Guilty.* And per Cur. *If the Plea of him who juſtifies be found againſt him, he ſhall be charged of the entire Damages; and it ſhall be inquir'd how the others did, for they may make an Aſſault, and not wound him; and then of this the Damages ſhall be againſt all, and of the wounding againſt him who ſtruck only,* quod *mirum* For in Treſpaſs there is no Acceſſary, and he who came and did not ſtrike is Principal, if the others ſtruck. Br. Treſpaſs, pl. 278. cites 6 H. 7. 1.

(H) Treſpaſs. In what Caſes it lies. *Clauſum fregit.* [*Who ſhall have it. In reſpect of his Eſtate.*]

1. HE that has only the Herbage **of a Foreſt, or of a Cloſe, may have Treſpaſs Quare Clauſum fregit, as well as if he had the Land. Dy. 12. El. 285. 40.**

S. C. cited Mo. 302. pl. 453. Hill. 34 Eliz. in Caſe of Welden v. Bridgwater.——S. P. Ibid. 355. pl. 48. Paſch. 36 Eliz. per tot. Cur. in Caſe of Hoe v. Taylor.——Co. Litt. 4. b. S. P.——S. P. Arg. 2 Roll Rep. 356. in Caſe of Zouch v. Moore.

2. [So] **If A. ſeiſed in Fee of a Cloſe, grants the** Paſture of the Cloſe **to B.** for Years, **B. ſhall have Treſpaſs Quare Clauſum fregit for a Treſpaſs done to him; for the Cloſe itſelf is demiſed to Paſture, and not the Paſture to be taken by the Mouth of his Beaſts. Mich. 14 Car. by Barkley.**

Mo. 302. pl. 453. S. P. by Fenner and Gawdy J. in Caſe of Welden v. Bridgwater.——S. P. per tot. Cur. Mo. 355. pl. 480. in Caſe of Hoe v. Taylor.——S. P. by Doderidge J. 2 Bulſt. 88. in Caſe of Whittier v. Stockman.

3. Treſpaſs was brought *by the Leſſor againſt the Leſſee for Life for Cutting of Trees*, which were *reſerved upon the making of the Leaſe*; and it lay well, tho' the Leſſee had a Leaſe; therefore Quære, if by the Reſervation the Soil be not reſerved, for it was Quare Clauſum fregit, and awarded good by Reſervation of the great Wood. Br. Treſpaſs, pl. 55. cites 46 E. 3. 22.

4. Owner of Land contracts with others for the *Sowing it* &c. *at Halves*; the Owner only can have Clauſum fregit. Le. 315. pl. 439. Hill. 20 Eliz. C. B. Hare v. Okeley.

Cro. E. 143. pl. 10. Trin. 31 Eliz. C. B. S. C. accordingly, by the Name of Hare & al'. v. Celey.——Goldsb. 77. pl. 9. Hill. 30 Eliz. Hare's Caſe.

5. Treſpaſs was brought by *Grantee of the Proficuum of ſuch a Mead, viz. the Ear-Graſs.* The Jury found, that Ear-Graſs is ſuch Graſs as is upon the Land *after Mowing till Lady-Day.* Such Grantee cannot bring Treſpaſs Quare Clauſum fregit; but he may have Action for ſpoiling his Graſs. 3 Le. 213. pl. 282. Mich. 30 & 31 Eliz. B. R. Hitchcock v. Harvey.

6. He that has the *Crop and Veſture* of Lands as *Lot Acres*, to his Lot *every* 3 *or* 4 *Years*, ſhall have Treſpaſs *Quare Clauſum fregit.* Mo. 302. pl. 453. Hill. 34 Eliz. Welden v. Bridgewater.

Cro. E. 421. pl. 17. S. C. And this Allotment having been ſo made Time out of Mind, may be good by Preſcription; and by the Allotment it is the proper Soil and Freehold of him to whom it is allotted, and ſo may well maintain this Action.

So if a Man be outlaw'd in a Perſonal Action, and the King has the Profits of the Land, and lets the ſame to another, he ſhall have Treſpaſs Quare Clauſum fregit; per Clench J. which Shute granted. 3 Le. 213. pl. 282. Mich. 30 & 31 Eliz. B. R. in Caſe of Hitchcock v. Harvey.

7. *So* the King who has the *Profits by Outlawry*. Mo. 302. pl. 453. Hill. 34 Eliz. in Caſe of **Welden v. Bridgewater**, cites 15 H. 7. 2. 34 H. 6. 28.

So Partition, *That* the *one ſhall have it from ſuch a Day to ſuch a Day*, and the other for the Reſidue of the Year. Cro. E. 422. pl. 17. cites Tempore E. 1. Partition 21.

8. *Partition* was made *between Coparceners, that* the *one ſhall have the Manor of D.* for *one Year, and the other the Manor of S. and* that *every 2d Year they ſhall exchange.* Now each of them for their Time have a ſeveral Freehold, and ſhall have Treſpaſs alone Quare Clauſum fregit. Cro. E. 421. pl. 17. in Caſe of **Welden v. Bridgewater**, cites F. N. B. 62.

9. He that has a *Profit Apprender only*, and not the *Land itſelf*, cannot maintain this Action; As 5 H. 7. 10. he that hath a *Warren* only in another's Soil, or 15 H. 7. or 14 H. 8. of a Commoner only. Arg. Cro. E. 421. in Caſe of Welden v. Bridgwater.

Cro. E. 413. pl. 3. Mich. 37 & 38 Eliz. B. R. S. C.—— 4 Rep. 30. b. pl. 23. S. C.——

10. *Tenant by Copy of Underwood to be cut annually by* 4 *or* 5 *Acres*, may bring Treſpaſs Quare Clauſum fregit, notwithſtanding it was objected, that the Soil was not granted, and which the Court admitted. Mo. 355. pl. 480. Paſch. 36 or 37 Eliz. B. R. upon Error of a Judgment given in C. B. Hoe v. Taylor.

4 Mod. 186. S. C. per Cur. the like Action was brought in 46 E. 3. 11 for fiſhing in Libera Piſcaria; and it does not appear by the Book, but the Action was maintainable; but if 'tis a Fault 'tis cured by the Verdict; and it ſhall now be intended that they were the Plaintiff's own Fiſh.——2 Salk. 637. pl. 4. S. C. and Holt Ch. J. held as reported in Carth. But Salkeld ſays Nota that Carthew (who moved in Arreſt of the Judgment) ſaid that there were ſeveral Writs in the Regiſter againſt Law. — Skin. 342. pl. 9. S. C. ſays that Holt likewiſe cited 17 E. 4. 6. where ſuch Writ was brought, and therefore the Regiſter, and F. N. B. being ſo, and the old Book of 46 E. 3. 11. agreeing with it, they did not regard the Caſes cited, or 1 Inſt. but gave Judgment for the Plaintiff; Niſi.

11. Treſpaſs vi & armis, *Quare Clauſum vocat P. &c. fregit, and taking his Fiſh in his Free Fiſhery in Clauſo prædicto* &c. It was objected that the Action would not lie, for he is no more than a Commoner, and has only a Liberty of fiſhing with others, and not the entire fiſhing himſelf; for he has neither the Property or Poſſeſſion of the Fiſh in Libera Piſcaria, but only a Privilege of taking them there; and therefore cannot maintain Treſpaſs vi & armis, no more than he who has Common of Paſture. And Juſt. G. Eyres cited the Caſe of **Up-John v. Dawkins**, where the like Action was brought, and Judgment arreſted for the like Cauſe; Sed per Holt Ch. J. and Dolben, the Plaintiff had Judgment in Paſch. 1693. Eyre J. contra, and Gregory abſent. Holt Ch. J. grounded his Opinion upon the Authority of the Writ in the Regiſter, fol. 95. b. and F. N. B. 88. (G) But Dolbin J. ſeem'd to differ this Caſe from the Regiſter, becauſe here it was laid to be Libera Piſcaria *in Clauſo (of the Plaintiff) which amounts to ſeparalis Piſcaria.* Carth. 285. Mich. 5 W. & M. B. R. Smith v. Kemp & al.

Carth. 286. in the Margin, cites 1 Inſt. 122. a. Cro. Car. 553. and a Caſe adjudg'd between **Peak** and **Tucker**, Hil. 1 & 2 Jac. 2. B. R. where Judgment was arreſted upon the Motion of Mr. Pollexfen for this very Cauſe.

(I) Treſpaſs with *Continuando*. *Of what Thing* it may be.

1. IT lies of Graſs trampled. 46 E. 3. * 14. 20 H. 7. 3. Curia. 29 E. 3. 35. 2 R. 3. 15. b. Fitz. Na. 91. (L.)

So of Graſs fed Br. Treſpaſs, pl. 441. cites 20 H. 7. 2. per Cur. —— * This ſhould be (24.)

2. It does not lie of a Gorce, for it cannot be continued. 46 E. 3. 24.

Breaking of a Gorce, Houſe &c. which are done in an Inſtant, the Plaintiff ſhall

3. But it lies of a Houſe. 46 E. 3. 24. 3 H. 6. Treſpaſs. 19. Fitzh. Na. 91. (L) Dubitatur 20 H. 7. 3. Contra 46 E. 3. 24. 19 H. 6. 23. b. admitted.

not ſay Tranſgreſſionem illam Continuand', for theſe cannot be continued. Contrary of *Graſs fed* &c. In the one Caſe the Juſtification refers to the Day of the Breaking only, and in the other it refers to the Continuance of the Treſpaſs. Per Finchden Juſtice. Br. Treſpaſs, pl. 374. cites 46. Aſſ. 9. —— S. P. Br. Nuſance, pl. 6. cites 46 E. 3. 23.

* S. P. Br. Treſpaſs, pl. 441. cites 20 H. 7. 2. See pl. 9. ——

4. So Treſpaſs lies of a Cloſe broke with a Continuando. Fitzh. Na. 91. (L) Contra 2 R. 3. 15. b.

5. A Treſpaſs with Continuando is not good, quare ſuccidit & aſportavit 10 Arbores &c. for it cannot be continued for the ſame Trees. M. 9 Car. B. R. between *Hoskins and Jennings*, per Curiam, and Littleton Recorder of London, pray'd Leave to diſcontinue after Demurrer join'd. * 20 H. 7. 3.

S. P. Arg. Raym. 228. in Caſe of King v. ..... cites S. C. and Mich. 20 H. 7. 3. pl. 7. —— * Br. Treſpaſs, pl. 441. cites 20 H. 7. 2. S. C.

6. A Treſpaſs of Corn in the Blade may be with a Continuando diverſis diebus & temporibus by 2 Years, tho' there cannot be a Continuance of ſuch Treſpaſs by ſuch Time together. P. 5 Ja. B. *King's* Caſe.

S. C. cited Raym. 396 in the Caſe of Nappier v. Curtis.

7. A Treſpaſs of Goods carried away, that is to ſay 2 Load of Wheat, and 5 Load of Barley may be with a Continuando diverſis diebus & vicibus from ſuch a Day to ſuch a Day. 21 H. 6. 43. a. b. adjudg'd.

Br. Treſpaſs, pl. 149. cites S. C. —— It was reſolved that Treſpaſs

cannot be laid *of looſe Chattles* with a Continuando, *as* 100 *Load of Wheat* with a Continuando from ſuch a Day to ſuch a Day. And therefore per Powel J. no Evidence can be given, but of the taking at one Day. Ld. Raym. Rep. 242. in Caſe of Foltheroy v. Aylmer.

8. A Treſpaſs Quare Equum cepit, cannot be with Continuando. 20 H. 7. 3. for this cannot be continued.

Br. Treſpaſs, pl. 441. cites 20 H. 7. 2. S. C. —S. P. Arg. Raym. 228. in Caſe of the King v. .....

9. A Man may have an Action of Treſpaſs for *breaking of his Houſe or Cloſe*, and allege a Continuance of the Treſpaſs, and of the Breaking thereof, from ſuch a Day unto ſuch a Day, as well as he may for treading of his Graſs, or cutting of his Corn &c. F. N. B. 91. (L)

Treſpaſs *for entring his Houſe, and coming there divers Days* &c. and

after Verdict for the Plaintiff, it was moved that the Plaintiff had declared with a Continuando for breaking his Houſe, which he could not do; for the entring is one Act done and ended at the going out again: And therefore if he re-enter'd it is a new Treſpaſs, and the Continuando is only alleged for the Aggravation of Damages, and cited 2 R. 3. 15. 10 E. 3. 10. 16 E. 3. 24. That a Continuando cannot be for *breaking the Houſe*; but Dodderidge and Houghton J. the reſt being ſilent, thought it might be alleged with a Continuando; for altho' it might be that if he went forth and re-enter'd, it ſhould be a new Treſpaſs, but if upon his firſt Entry he continued divers Days, it might be alleged with a Continuando,

nuando, and cited F. N. B. 91. (L.) Brownl. 223, 224. Trin. 10 Jac. in Caſe of Sutcliffe v. Conſtable.

Where the Treſpaſs may be laid with a Continuando, *depends much upon the Conſideration of good Senſe*; therefore where Treſpaſs is brought for *breaking of a Houſe or a Hedge*, this may well be laid with a Continuando; for the pulling away of every Brick is a Breach, which may be done one at one Day and another at another Day, ſo one Stick may be pulled out of a Hedge one Day and another another; but Treſpaſs cannot be laid with Continuando for the *Proſternation of a Houſe*; for when the Houſe is once thrown down, it cannot be thrown down again. The ſame Law of the *throwing down of a Hedge*, per Treby and Nevil. But Powel J. was of Opinion that a Man may bring Treſpaſs for throwing down of a Houſe with a Continuando, becauſe one Part may be thrown down at one Day and another at another. The ſame Law of a * Hedge. Reſolved per Cur. Ld. Raym. Rep. 240. Trin. 9 Will. 3. in Caſe of Fontleroy. v. Aylmer.

* See pl. 11.

Br. Viſne, pl. 6. cites S. C. —— Br. De ſon Tort Demeſne, pl. 3. cites S. C.

10. In Treſpaſs of *Battery at D. in the County of Eſſex*, the Defendant *pleaded that the Plaintiff made an Aſſault upon him at B. in the County of Kent, and the Defendant fled, and the Plaintiff purſued him continually unto D.* aforeſaid, *at which Place the Defendant did defend himſelf*, and ſo the Hurt which the Plaintiff had was of his own Aſſault, and demanded Judgment if Action. The ſame is a good Plea without traverſing of the County; for a Battery may be continued from one County to another. Arg. 1 Le. 39. pl. 49. Mich. 28 & 29 Eliz. in the Exchequer. In Caſe of the Queen v. Ld. Vaux &c. cites 34 H. 6. 15, 16.

Freem. Rep. 347, pl. 432. King v. Roſe. Mich. 1673. ſeems to be S. C. but nothing was ſaid there as to this Point; but Ibid. 356. pl. 448. **Roſe v. King** ſays it was admitted that a general Clauſum fregit or domum fregit, lies not in Continuance, for they are not continued Acts. Per Cur; Pedibus ambulando lies in Continuance, and ſo does eating his Graſs; and ſo in this Caſe they reſolved, that breaking Fences may well be in Continuance, for a Fence may be a Mile long. Jud' pro quer'.

11. Treſpaſs Quare *Clauſum fregit pedibus ambulando and breaking down his Fences* continuando tranſgreſſion. præd. from ſuch a Day to ſuch a Day, ad damnum &c. And after Verdict upon Non culp. it was moved in Arreſt of Judgment, becauſe there can be no Continuando in breaking of Fences. Et adjournatur. Raym. 228. Mich. 25 Car. 2. B. R. King v. .....

Treſpaſs, *quod proſtravit* 20 *Perches of Fence*, with a Continuando. It was objected that it cannot be; for when they are once proſtrated it cannot be continued; otherwiſe *if it had not been ſaid* 2. *Perches*. Treby Ch. J. thought it was well enough; for if it were a total Proſtration it could not be continued, and then Damages were given for the reſt of the Treſpaſs; but if but a partial Proſtration, then it lies in Continuance, and well enough. But Powel J. ſaid, It muſt be intended, that 20 Perches were actually proſtrated, which cannot be continued; and if it be repugnant, the Verdict cannot help it; therefore in old Books they did always arreſt the Judgment where laid ſo: If the Verdict helps it, it helps it at Common Law as much as now. Treby ſaid, 'Tis a Bis petitum, and it would be ill upon Demurrer; but he thought the Oxford Act help'd it. Powel ſaid, That indeed the Oxford Act has been largely conſtrued .... Et Adjournatur. Comb. 426. Trin. 9 W. 3. in B. R. Anon.

6 Mod. 39, 40 Mich. 2 Annæ, B. R. it was ſaid, per tot. Cur. to have been adjudg'd, that Treſpaſs for proſtrating a Bench [which ſeems miſ-printed for Fence] with a Continuando, had been held good, [which ſeems to mean this very Caſe.] ——— See pl. 9. the laſt Note.

9 Mod. 38. Mich. 2 Annæ B. R. S. C. by Name of **Monkton v. Aſhly** adjudg'd for the Plaintiff. ——— 2 Ld. Raym. Rep. 974. S. C. argued; and Holt and Powel held as here, but it is not expreſsly mention'd there, that Judgment was given.

12. Treſpaſs for *entring his Cloſe, and hunting* ſuch a Day *continuando tranſgreſſionem quoad the hunting diverſis diebus & vicibus from the Day of the Treſpaſs alleged till ſuch a Day*; Holt Ch. J. held that of *Acts which terminate in themſelves*, and being once done cannot be done again, *as killing a Hare or 5 Hares, or cutting and carrying away* 20 *Trees*, it ought to be alleged that diverſis diebus & vicibus between ſuch a Day and ſuch a Day he kill'd 5 Hares &c. and where a Treſpaſs is laid with a Continuance that cannot be continued, Exception ſhould be made at the Trial, becauſe the Plaintiff ought to recover but for one Treſpaſs. And the Court held that hunting might be continued, as well as ſpoiling and conſuming or cutting his Graſs. And Judgment for the Plaintiff. 2 Salk. 638. pl. 7. Hill. 1 Annæ B. R. Monkton v. Paſhley.

(I. 2) Treſpaſs with a Continuando. *Pleadings.*

1. TReſpaſs of a Cloſe broken, and Goods carried away Contra Pacem Richard late King of England, & Contra Pacem noſtram, and *counted of Parcel of the Treſpaſs in the Time of King Richard, and Parcel in the Time of H.* 4. So that the Writ ſuppoſed in a manner Joint Treſpaſſes in the Time of both Kings, *and* the Count *ſuppoſed ſeveral Treſpaſſes*; and yet becauſe Treſpaſs may be continued, & *reddendo ſingula ſingulis*, the Writ is good, and therefore was awarded good. Br. Treſpaſs, pl. 91. cites 11 H. 4. 15.

2. In Treſpaſs, the Plaintiff counts that the Treſpaſs was *committed ſuch a Day &c. diverſis diebus & vicibus*, without ſhewing the Days of the Continuance of it, yet this Count is good. The *Continuance* of the Treſpaſs *is to be* proved *in Evidence* for the Increaſe of Damages. Jenk. 124. in Caſe 52.

3. Treſpaſs &c. for *taking* 10 *Loads of Wheat*, 10 *Loads of Barley*, *and* 10 *Loads of Oats* 1ſt April, Continuando the ſaid Treſpaſs from 1ſt April to the 1ſt June. After a Judgment for the Plaintiff, it was aſſign'd for Error, that the Treſpaſs being *laid 1ſt April, and ſo all one Day*, the Continuando muſt be ill; for what was done 1ſt April cannot be done at another Day. But Judgment was affirm'd; for tho' for the doing a ſingle Act, as Killing a Horſe &c. a Continuando is ill, yet where *diverſe Things may be done at ſeveral Times*, as in the principal Caſe, tho' the Treſpaſs be firſt laid to be done the firſt Day, the *Continuando ſhall make a Diſtribution* of them, (viz.) that Part was done on one Day and Part on another, within the Time declared. Lev. 210, Paſch. 19 Car. 2. B. R. Butler v. Hedges.

Sid 319. pl. 9. Hill. 18 & 19 Car. 2. B. R. S. C. and obſerves that a Man cannot carry away a vaſt Number of Loads in one Day, and therefore it may be with a Continuando.

4. In Treſpaſs *by Men and Beaſts* (with a Continuando) and found for the Plaintiff, and Damages pro Tranſgreſſione prædicta. It was mov'd in Arreſt of Judgment, that this cannot be; for Treſpaſs by Men cannot be with a Continuando. And Twiſden J. doubted, but the other Juſtices thought that Judgment ſhould be for the Plaintiff, and that the Damages ſhall be intended for this Part of the Treſpaſs, which may be with a Continuando. Sid. 379. pl. 8. Mich. 20 Car. 2. B. R. Pave v. Brown.

2 Keb. 407. pl. 24. Pain v. Brown, ſeems to be S. C. that *the Treſpaſs was laid the 1ſt of October, Continuando* the ſaid Treſpaſs, *a prædicto primo Septembris to a Year after.* It was moved in Arreſt of Judgment after a general Verdict, but this being but a Miſtake in the Aggravation of Damages, and the main Treſpaſs tried, the Court conceived it was well enough, and that the Continuando is void, and the Damages ſhall be intended for the principal Entry, the other being *repugnant and impoſſible*. Judgment for the Plaintiff.

5. In Treſpaſs for *Fiſhing in his ſeveral Fiſhery, and taking* 20 *Buſhels of Oyſters* &c. Continuando Piſcationem præd. from ſuch a Day to the Time of the Action brought, the Plaintiff had a Verdict. It was moved in Arreſt of Judgment, that the Fiſhing in the Continuando was altogether incertain, *not expreſſing the Quantity* or Quality of the Fiſh. And of this Opinion were Wylde and Jones J. upon the Authority of Playter's Caſe. But Hale Ch. J. ſeemed to think it well enough, and ſaid that that Caſe had not been well approved of late Years, as to the Neceſſity of expreſſing the Kinds of Fiſh, which has been ſince held needleſs. And the other Juſtices thought the ſame reaſonable, but thought themſelves tied up by the Authorities, and that Playter's Caſe had remained unſhaken. But adjornatur. Vent. 329. Trin. 30 Car. 2. B. R. Hovel v. Reynolds.

2 Jo. 109. Hovel v. Reynolds, S. C. ſays that Judgment was given by Twiſden, Wild, and Jones (Diſſentiente Scroggs) that the Plaintiff Nil capiat per Billam. —2 Show. 196. pl. 199. Howell v. Reynolds, ſays, that upon Motion in Arreſt of Judgment, it was held well enough,

enough, and that there might be a Continuance thereof.——2 Ld. Raym. Rep. 976. in the Caſe of **Wonkton v. Paſhley**, Holt Ch. J. ſaid that Treſpaſs was brought for taking Oyſters Continuando, which cannot be, and Judgment was arreſted, and that it had been ſo adjudged.

6. Treſpaſs for *breaking his Cloſe, and ſpoiling his Graſs, and trampling and eating other Graſs* (of the Plaintiff's) *with Horſes &c. and alſo with his Waggons &c. ſubverting and ſpoiling other Graſs, and the Soil of the ſaid Cloſe, and therein did dig and carry* 2000 *Load of Tobacco Pipe Clay*, to the Value of &c. *continuing the ſaid Treſpaſs diverſis Diebus & Vicibus.* And as to the trampling and eating the Graſs with their Cattle, and as to the Subverting and Spoiling of other Graſs with Waggons &c. and as to the Digging in the ſaid Cloſe from ſuch a Day to ſuch a Day, the Defendants demurr'd, becauſe the ſeveral Continuances of thoſe Treſpaſſes were ſeveral Treſpaſſes by themſelves, and ought not to be declared upon with a Continuando; but Curia contra. And it ſeems that theſe Words, Diverſis Diebus & Vicibus made the Action good. But adjornatur. Raym. 396. Trin. 32 Car. 2. B. R. Nappier & al' v. Curtis.

2 Jo. 194. Paſch. 34 Car. 2. B. R. S. C. by the Name of **Leighton v. Gillow**, ſays, That after Verdict the Continuando ſhall be applied to the Spoiling the Graſs only

7. Treſpaſs for *Breaking his Cloſe, Spoiling his Graſs, and Taking up and Carrying away* 200 *Poſts fix'd in the Ground*, Continuando tranſgreſſion' præd. to ſuch a Day; there was a Verdict for the Plaintiff, and intire Damages and Judgment for the Plaintiff. Error was brought, and ſaid that there could be no Continuando as to the Poſts; but Curia contra; for when the Continuando is De tranſgreſſion' præd' generally, and the Treſpaſſes conſiſt of diverſe Parts, ſome whereof may be with a Continuando, but others not, the Continuando * refers only to ſuch of which Continuando may be, and not to the others; but had it been of the Poſts particularly, it had been otherwiſe. And Judgment was affirm'd by all the Court. 3 Lev. 93. 94. Mich. 34 Car. 2. Gillam v. Clayton.

to which it is applicable, and not to the Poſts, which would be repugnant; and Judgment Niſi &c.—Skin. 42. pl. 12. **Clayton v. Gillam**, S. C. accordingly; but if it were on a Demurrer it would be otherwiſe.——2 Show. 196. pl. 198. S. C. accordingly.——Vent. 363. S. C. accordingly. And cites the Caſe of **Letchford v. Elliot**, which was Treſpaſs for Entring, and Feeding, and Laying Loggs &c. Continuando Tranſgreſſionem prædict. and yet good for the Reaſons afore mentioned.—S. C. cited accordingly 2 Jo. 194. in the ſaid Caſe of Leighton v. Gillow.——Sid. 224. pl. 16. Mich. 16 Car. 2. and 249. pl. 17. Paſch. 17 Car. 2. Lichford v. Elliot, is only of laying Loggs Continuando Tranſgreſs. prædict. without any Thing of Entring and Feeding, and that Judgment was ſtay'd, and that Keeling Ch. J. intended the Continuando ſhould be applied to the Laying the Logs upon the Land, and not to the Caſting them on it. But the others e contra, becauſe it is Continuando Tranſgreſs. quoad Ejectionem; but upon reading the Record, it was becauſe the Logs (Jecerunt) which as to this Purpoſe is an inſenſible Word, and ſo no Ejectment mentioned before, and there is Surpluſage, and ſhall be taken to be Tranſgreſs. prædict. generally; and therefore tho' it was twice moved, Judgment was given for the Plaintiff.——Raym. 396. Arg. in the Caſe of **Nappier v. Curtis**, cites S. C. and ſays if the Words Diverſis Diebus & Vicibus had been in, it had been good.

* 2 Salk. 639. S. P. in Caſe of Brook v. Biſhop.

8. Treſpaſs Quare clauſum fregit, and *pull'd down a Wall* 2 *April*, 2 *W. & M. with a Continuando to the* 20*th February* 1 *W. & M.* The Ch. J. and Eyres held, That the Continuando is void, becauſe it is impoſſible, and the Damages ſhall be intended for the Treſpaſs only. Comb. 193. Paſch. 4 W. & M. B. R. Horner v. Bridges

[As to the 20 Buſhels of Wheat making 4 Loads, I have been told formerly by a Husbandman of that Country

9. Treſpaſs for *breaking his Houſe, and taking Viginti modios triciti* (*Anglice*, 4 *Loads of Wheat*) *Continuando totam tranſgreſſionem, from* 27 *Octob. to* 27 *Novemb.* Judgment was given in C. B. by Nil dicit, and on Error in B. R. the Errors aſſign'd were, that Modius ſignifies a Buſhel, and that it is not poſſible to make 4 Loads of 20 Buſhels; beſides, the Continuando cannot be for a Month; for a Man muſt have ſome Time to reſt. It was anſwered that the Anglice was Surpluſage, and the Continuando ſhews the Taking not to be all at the ſame Time, but was only to

ſhew

ſhew how it was done; and that where a Continuando is not well laid, and intire Damages given, it ſhall be intended for that only which might have a Continuance. And ſo was the Opinion of the Court; for the Taking the Corn is laid to be on ſuch a Day, Continuando Tranſgreſſionem prædict' from that Day to ſuch a Day, which is inſenſible. If it had been Continuando *Tranſgreſſionem prædict'* generally, it had been well enough, but it is *Totam Tranſgreſſionem*, which cannot be for breaking the Houſe. The Judgment was affirm'd. 5 Mod. 178. Hill. 7 W. 3. Wilſon v. Howard.

where this Action is laid, viz. Hertfordſhire, that Sacks of Wheat, containing 5 Buſhels each, were in that Country called by the Name of Loads, and ſo 4 Sacks, containing 20 Buſhels, were there called 4 Loads of Wheat (diſtinguiſhing it from 4 Load, without an (s)].

10. Treſpaſs for *Breaking and Entring his Cloſe on the 2d of April, and Treading down his Graſs, and Taking and Carrying away* 10 *Poplars, and* 10 *Load of Underwood, the ſaid Treſpaſſes till 27 April diverſis Diebus & Vicibus continuando.* It was reſolved that the Continuance as to the Poplars and Underwoods was impoſſible, and could not be; and that where there is a Continuando of ſuch and ſuch Things in particular, and they lie not in Continuance, it is naught, even after a Verdict. 2 Salk. 639. pl. 8. Hill. 1 Ann. B. R. Brook v. Biſhop.

7 Mod 152. S C. And per Cur. The *right Way* in Treſpaſs *for repeated Acts* of Treſpaſs would be, *that on ſuch a Day, Et Diverſis aliis Diebus & Vicibus, between ſuch a Day and ſuch a Day, the Defendant did ſo and ſo*; and cites 20 H. 6. But in this Caſe the Continuando is impoſſible; and therefore no Damages could be given for it; and the only Miſchief poſſible would be that of giving other Acts of Treſpaſs in Evidence by Pretence of it; but that ought not to be ſuffered, and therefore not to be intended. —— Comb 427. in an Anonymous Caſe 1697. in C. B. adds a Note, that Powell J. ſaid the true Way of Pleading is as above; for otherwiſe if it be laid on a certain Day with a Continuando, they can give in Evidence but one Day, (tho' they may chuſe their Day;) for that which is done on one Day cannot be continued. And that Treby Ch J. agreed that they muſt either do ſo, *or make ſeveral Counts for the ſeveral Days* —— 2 Ld. Raym. Rep. 823. S. C. accordingly.

(K) Treſpaſs with Continuando. *At what Time it lies.*

Fol. 550.

1. IF a Man be diſſeiſed, he ſhall not have Treſpaſs with a Continuando, after the Diſſeiſin, before that he has re-enter'd; becauſe the Franktenement is in the Diſſeiſor at all Times after the Diſſeiſin. 19 H. 6. 27. b. 70, 71. b.

F. N. B. 91. (L) in the new Notes there (c) cites S C. — Fitzh Tit. Treſpaſs, pl. 37. ſays, Nota by all the Juſtices, that a Man ſhall have Treſpaſs of a Treſpaſs done by the Diſſeiſor without Entry; but of Treſpaſs done after the Diſſeiſin, he ſhall not have Treſpaſs unleſs he re-enters; for the Iſſues of the Land ought to be his who has the Franktenement, and that he ſhall puniſh the Treſpaſs &c.

2. But after his Re-entry he ſhall have Treſpaſs with Continuando, from the Diſſeiſin till his Re-entry. 9 H. 6. 27. b. admitted.

3. But if the Eſtate of a Man be determin'd by Limitation, or Act of God, after the Diſſeiſin or Ouſter, ſo that the Diſſeiſee cannot re-enter; there, for Neceſſity, he ſhall have Treſpaſs with Continuando for all the Time after the Diſſeiſin, without any Re-entry. 19 H. 6. 28. a. b.

4. As if Tenant pur Auter Vie be diſſeiſed, and after Ceſty que vie dies, he may after have Treſpaſs with Continuando for all the Time after the Diſſeiſin, without Re-entry, becauſe his Entry is taken away by the Act of God. 19 H. 6. 28. b.

3. So

S. P. And if one does me a Treſpaſs, and I alien the Land, yet I ſhall have Action.

5. So if Leſſee for Years be ouſted, [and] after the Term expires, he may have Treſpaſs with Continuando for all after the Ouſter without Re-entry, becauſe he cannot re-enter. 19 H. 6. 28. b.

Fitzh. Tit. Treſpaſs, pl. 37. cites 19 H. 6. 27. Per Aſcough, and Yelverton, and Fulthorp agreed.

If one be diſſeiſed, and then the Diſſeiſor is diſſeiſed, and the firſt Diſſeiſee releaſes to the firſt Diſſeiſor, yet the firſt Diſſeiſee may puniſh the firſt Diſſeiſor by Writ of Treſpaſs for all the Treſpaſs, becauſe this Releaſe countervails an Entry &c.

6. But if the Entry of the Diſſeiſee be taken away by his own Act, there he ſhall not have Treſpaſs with Continuando for the Treſpaſs by the Diſſeiſin, becauſe it was his own Folly to toll his Entry.

7. As if a Man be diſſeiſed, and afterwards releaſes to the Diſſeiſor, he ſhall not have Treſpaſs with Continuando after the Diſſeiſin till the Releaſe, becauſe it was his Folly to toll his Entry by this Releaſe; and this Releaſe ſhall not enure as an Entry and Feoffment in this Caſe. Contra * 9 H. 6. 28. b.

Fitzh. Tit. Treſpaſs, pl. 37. cites 19 H. 6. 27. Per Aſcough and Yelverton, to which Fulthorp agreed, but Newton denied it; but Aſcough held the Law as above.

* This ſeems miſprinted, and that it ſhould be (19)

8. P. brought Treſpaſs againſt W. and R. for *breaking his Cloſe, and eating his Graſs* 15 *Eliz. Continuando* the ſaid Treſpaſs diverſis diebus & vicibus, *until the Writ purchaſed*, which was 28 *Eliz.* Upon Evidence it appear'd, that W. and R. *had enter'd, and occupied for half a Year; and afterwards P. enter'd upon them, and occupied for a Time*; and after *R. enter'd*, and after that *P. enter'd*, and after *R. re-enter'd, and occupied it till the Day of the Writ* purchaſed. The Queſtion was, if this Entry by P. be not ſuch an Interruption of the Treſpaſs, that he ſhall be forced for every Treſpaſs to have ſeveral Actions, or that one Action with a Continuando will ſerve for all. And the Court held clearly, that *one Action of Treſpaſs with a Continuando will ſerve for all*; and it may well be brought with a Continuando. Cro. E. 182. pl. 2. Paſch. 32 Eliz. B. R. Sir Francis Willoughby, and Ralph Sacheveral, v. Patrick Sacheveral &c.

(L) Treſpaſs. Treſpaſs *in Foreſt, Park, Warren* &c.

1. TReſpaſs lies at Common Law for breaking his Park, and cutting his Trees. 46 E. 3. 12. b.

2. But Treſpaſs for breaking his Park, and taking his Savages, did not lie at Common Law. 46 E. 3. 12. b. admitted.

* See Park, (A) and the Notes there.

3. But in ſuch Caſe Writ is given by the Statute. 46 E. 3. 12. b. It ſeems it is the Statute. * Weſtm. 1. cap. 20.

4. If A. has a Free Warren in the Soil of B. A. ſhall not have Action of Treſpaſs Vi & Armis againſt B. Quare in libera Warrenna ſua latibula ejuſdem Warrennæ proſtravit & obſtruxit per quod Cuniculi de eadem Warrenna interierunt; but A. is put to his Action upon the Caſe againſt the Owner of the Soil for this Tort. Mich. 9 Car. B. between *Sir William Monſon* Knight Viſcount Monſon of Caſtlemain in Ireland, and others Plaintiffs, and *John Staples* and others Defendants, adjudged per Curiam. Intratur. Mich. 8 Car. Rot. 1727. *Moyle.*

5. Treſpaſs

5. Treſpaſs *Quare quandam Damam ſuam interfecit.* It was objected, that the Writ *ought to be Quare quandam Damam ſuam Domeſticam interfecit*; for of Savage Beaſts he ſhall not have Recovery, unleſs he ſuppoſes that he took them in his Cloſe or Park, or Warren or Chaſe. And afterwards the Writ was abated &c. Fitzh. Tit. Brief, pl. 564. cites Trin. 43 E. 3. 4.

6. Treſpaſs *Quare Warrennam intravit apud W. & Cuniculos cepit & aſportavit.* It was objected, that the Writ ſhould be Et in eodem Cuniculos cepit & aſportavit; As in Treſpaſs of Goods carried away, he ſhall ſay Et ibidem Bona ſua cepit; but the Writ was awarded good. Fitzh. Tit. Brief, pl. 563. cites Paſch. 43 E. 3. 13.

7. Treſpaſs *againſt 2 for Hunting in his Park, and killing 2 Deer*; both *pleaded Not Guilty*; and the *one was found guilty*, and the other *acquitted*. And the *Plaintiff pray'd Damages according to the Statute*; and the beſt Opinion was, that he ſhall not have it, becauſe he did not bring his Action upon the Statute. Br. Action ſur le Statute, pl. 6. cites 9 H. 6. 2.

8. In Treſpaſs for entering into a Park, Warren &c. it is *no Plea to ſay it is no Park or Warren*; but he muſt plead Non cul'. and give the Matter in Evidence. F. N. B. 86. (L) in the new Notes there (f) cites 10 H. 6. 16. 19 H. 8. 9. And ſays, that therefore it is held clearly, that *if one has a Warren, if he incloſe or impark without* the King's *Licence*, and another hunts there, and he *brings Treſpaſs de Parco fracto*, the other *may plead Non cul'.* and give this Matter in Evidence; for none may have a Park without the King's Grant, or by Preſcription. Note alſo, the Plaintiff in this Writ does not make any Title to the Park in his Count; and therefore it is no Plea, that he had no Park by Preſcription or by Licence; for how can Judgment be given on a Title where none is alleg'd, and cites 18 H. 6. 21.

(L. 2.) Treſpaſs *for taking of the Wife.* [And *Pleadings.*] Fol. 551.

1. **IN Treſpaſs de Uxore abducta cum bonis viri,** Never accoupled in lawful Matrimony, is no Plea; **becauſe it is not lawful to take her, if it be a Marriage in Facto.** 9 H. 6. 34. b.

2. But **the Defendant may ſay,** that the Feme was eſpouſed to him before ſhe was eſpouſed to the Plaintiff, by which he retook his Feme. 9 H. 6. 34. b.

3. *Weſtm.* 2. 13 *E.* 1. *cap.* 34. *Of* * *Women carried away with the Goods of their Husbands, the* † *King ſhall have the Suit of the Goods ſo taken away.*

At the *Common Law* the Husband might have had an Action of Treſpaſs De Uxore abducta cum bonis viri. 2 Inſt. 434.

This is alſo *prohibited by the Statute of Weſtminſter the* 1. *cap.* 13. and a further Puniſhment inflicted than was at the Common Law; and therefore in the original Writ de Uxore abducta cum bonis viri, it is concluded, Contra formam Statuti in Hujuſmodi caſu proviſi, meaning the ſaid Statute of Weſtm. 1. For this Act of Weſtm. 2. extends only to the Suit of the King; and if the Writ be brought at the Common Law, omitting theſe Words, Contra formam Statuti, then it is Si A. fecerit &c. tunc pone &c. quod ſit &c. But if Contra formam Statuti be added, then the Writ is Si A. fecerit &c. attachies B. ita quod eum habeas &c. 2 Inſt. 434.

The Statute of *W.* 1. 3 *E.* 1. *cap.* 13. *enables any Perſon to ſue within* 40 *Days*; *But if no one commences the Suit within that Time, then the King ſhall ſue*; *and ſuch as are found culpable ſhall ſuffer* 2 *Years Impriſonment, and make Fine at the King's Will*; *and if they have not whereof, they ſhall be puniſh'd by longer Impriſonment, as the Treſpaſs requires.*

Note, The Party ſhall not have the Puniſhment enjoin'd by the Statute, but where he is ſued by a Writ that makes mention of the Statute. F. N. B. 89. (203.) in the new Notes there (d) cites 9 H. 6. 2.

2 Hawk. Pl. C. 175. cap. 23. S. 72. ſays, that this Statute of 3 E. 1. cap. 13. is repeal'd.

* Tho'

* Tho' the Word in the Statute is (Mulieribus,) yet that is the ſame as to ſay (Uxoribus,) for of ancient Time Mulier was taken for a Wife. 2 Inſt. 434.

If the Wife be taken away, and *after is divorced, or* if ſhe *dies*, yet the *Husband ſhall have his Action* de Uxore abducta cum bonis viri; for in this Action he ſhall not recover his Wife, but Damages; and he cannot have an Action for taking her away as his Servant, becauſe the Law gives him an Action in another Form. 2 Inſt. 434.

Where a *Man marries a Wife before ſhe is of the Age of* 12 Years, and *after* ſhe comes to 12 Years, *and before ſhe aſſents or diſaſſents to it, a Man takes and carries her away*, the Baron ſhall ‡ not have Treſpaſs de Muliere abducta cum bonis viri; for it is not properly a Marriage till ſhe aſſents. Brooke makes a Quære of the Action; for it ſeems that it ſhall be intended a Marriage till ſhe diſaſſents. Br. Treſpaſs, pl. 420. cites 47 E. 3.

‡ S. P. mention'd 2 Inſt. 434. But Lord Coke ſays, he holds the Law to be contrary; for ſhe is Uxor till Diſagreement

The Plaintiff muſt in his Count *ſhew the Goods in certain.* 2 Inſt. 435.

Albeit the Words of the Writ be Rapuit, yet here it is taken for a violent taking away, and not when Carnal Knowledge is had; ſo as this Action may be brought againſt Women as well as Men. 2 Inſt. 435.——And it being aſſign'd for Error, becauſe it was ſaid (cepit & abduxit) where it was objected that it ought to have been (rapuit) and that ſo is the Regiſter of Writs brought in ſuch Caſes. The Objection was diſallow'd, becauſe it may be both Ways. And Judgment was affirm'd. Cro. J. 538, 539. pl. 6. Trin. 17 Jac. B. R. Hyde v. Scyſſor.

† And albeit the Words be, that the King ſhall have the Suit, yet may the Husband alſo have his Action, as is aforeſaid. 2 Inſt. 434.

4. Treſpaſs de Muliere abducta & rapta cum bonis viri aſportatis, *againſt Baron and Feme, and others*; and well againſt the Feme; for one *Feme may aſſent and aid to the Raviſhment of another Feme*, and may carry away the Goods; and there it is agreed, that *it is no Plea that the Plaintiff and the Feme are divorced*; for he is not to recover his Feme, but Damages; and if ſhe was Feme tempore &c. this ſuffices. Br. Treſpaſs, pl. 43. cites 43 E. 3. 23.

5. Treſpaſs of taking his Feme. Little ſaid, Actio non; for *a Debate was between the Plaintiff and his Feme, by which the Plaintiff gave Licence to the Defendant to take his Feme to his Houſe*, which he did accordingly, *to intreat the Feme to be amiable and well-diſpoſed to her Baron.* Judgment &c. Laicon ſaid, This is no Plea; for it is not lawful to take the Feme againſt her Will. But per Markham Ch. J. it is lawful againſt the Baron, Plaintiff, who gave the Licence. And ſo to carry his Feme from one Place to another, by which the other traverſed the Licence. Br. Treſpaſs, pl. 294. cites 1 E. 4. 1.

6. Treſpaſs of taking his Feme and Goods, and *ſaid, that the Feme pray'd him to put her upon the Horſe, and to carry her to Weſtminſter, to ſue a Divorce between her Baron and her, and he did ſo.* Per Conisby, This is a good Plea. And per Fineux, to ſue a Divorce is good Cauſe for Diſcharge of Conſcience. And adjornatur. Br. Treſpaſs, pl. 440. cites 20 H. 7. 2.

(L. 3.) In what Caſes it lies *for intermeddling* with the Feme.

1. A Man may *aid a Feme who falls upon the Ground* by a Horſe; and *ſo if ſhe be ſick*; and the ſame if her *Baron would murder her*; Per Conisby. And the ſame, per Rede, where the *Feme would kill herſelf.* And per Fineux, *a Man may conduct a Feme in a Pilgrimage.* Br. Treſpaſs, pl. 440. cites 20 H. 7. 2.

2. Treſpaſs *for carrying of his Feme, without the Aſſent of the Baron, to L. to ſue a Divorce.* Per Fineux, the Action does not lie, for it was lawful for the Defendant to carry her; for *it ſhall be intended, that there was Cauſe of Divorce.* Br. Treſpaſs, pl. 207. cites * 12 H. 1. 37.

* This is miſprinted, and ſhould be 21 H. 7. 13. a. pl. 17.

3. *And*

3. *And* where the *Feme is going to Market*, it is lawful for another to *ſuffer her to ride* behind him upon his Horſe to Market; Per Fineux. Br. Treſpaſs, pl. 207. cites * 12 H. 1. 37. * See the Note to pl. 2.

4. *And* if a Feme ſays, that ſhe is in Jeopardy of her Life by her Baron, and prays him to *carry her to a Juſtice of the Peace, to obtain a Warrant of the Peace*, he may lawfully do it; and a Man may lawfully ſue to have Judgment in the Law; Per Fineux. Br. Treſpaſs, pl. 207. cites ‡ 12 H. 1. 37. ‡ See the Note to pl. 2.

5. *And* a Man may lawfully purſue *to reverſe a Judgment*; per Fineux. Br. Treſpaſs, pl. 207. cites † 12 H. 1. 37. *So* if a Feme be outlaw'd, and deſires a Man to *aid her to reverſe the Outlawry*, it is lawful for him to aid her; Per Fineux. Br. Treſpaſs, pl. 207. cites † 12 H. 1. 37.

† See the Note to pl. 2.

6. Where *my Feme* is out of her Way, it is not lawful for a Man to take her to his Houſe, *if ſhe was not in Danger of being loſt in the Night, or of being drown'd with Water*; per Brudnell. Br. Treſpaſs, pl. 213. cites 21 H. 7. 27.

(L. 4.) *Quare Filium & Hæredem rapuit &c. or other Injuries* done to a Child.

See Father and Son (A) See Guardian (X)

1. TReſpaſs de Filio & Hærede querentis abducto, & capto vi & armis. Skrene pray'd Judgment of the Writ; for it is not ſaid *Cujus maritagium ad ipſum pertinet*. Per Hanke, It is intended by the Law, that the Marriage belong'd to him; and adjornatur. But it ſeems, that he ſhall ſay as Skrene ſaid, for *otherwiſe it may be that the Father had married him before the Taking*. Nota. Br. Treſpaſs, pl. 101. cites * 12 H. 4. 16. S. P. per Seton. Ibid. pl. 252. cites 29 Aſſ. 35. * Br. Garde, pl. 77. cites S. C. where it ſaid, that Hank utterly denied that the Writ ſhall be Cujus maritagium ad ipſum pertinet. And adjornatur.

2. Treſpaſs againſt W. T. quare R. Filium ſuum & Hered' apud T. inventum *rapuit* & abduxit. Yelverton *proteſtando, That he ſuch a Day deliver'd the Infant to his Father, pro Placito dicit, that it was* * *noiſed* in the Country *that the Plaintiff was dead*, and his Feme was dead in Fact; *by which the Defendant, as Uncle and Prochein Amy of the ſaid R. came to T. to ſee the ſaid R. and found the ſaid R. of the Age of one Year, ill govern'd, and out of his Ward, by Negligence of his Nurſe, by which he took him*, as lawfully he might. Per Paſton, If a Man ſees an Infant in the Street in Peril of Death, and takes him and delivers him to his Father, this is no Tort. But per Newton, If a Man raviſhes my Son, and after re-delivers him, it does not excuſe the Rape; but the Caſes are not alike. And per Portington, It is not lawful for any to take an Infant out of the Cuſtody of a Nurſe to whom he was put by the Father. But Newton ſaid, That if an Infant is put to Nurſe, and I ſee him in Peril of a Dog, or of a Horſe, and I take and deliver him to the Father, this is no Tort, by which the Iſſue is good above, and therefore it ſtood; quod nota. Br. Treſpaſs, pl. 141. cites 21 H. 6. 14. * The other Editions are (il fuit nurſe,) but ſeem by the Senſe to be miſprinted.

3. Every *Anceſtor, Male or Female*, ſhall have Treſpaſs, or Writ of Raviſhment of Ward, *againſt every Stranger* who, of his own Tort, raviſhes the Heir Apparent of any Perſon, *be the Heir Male or Female*; and the Writ ſhall ſay, Cujus maritagium ad ipſum pertinet; *and it matters not of what Age* the Heir Apparent is in ſuch Caſe. 3 Rep. 38. b. Hill. 34 Eliz. B. R. Ratcliff's Caſe.——Cites 32 E. 3. 2 Wms.'s Rep. 116. S. C. cited per Lords Commiſſioners, in Caſe of Eyre v. Lady Shaftſbury.

4. *But*

4. *But* ſuch Action did *not* lie *againſt Guardian in Chilvalry, but only for the Father*; who might have Action againſt ſuch Lord, where his Son and Heir Apparent was raviſh'd by him. Ibid. cites Litt. S. 114. and 18 E. 3. 25. 30 E. 3. 17. 29 E. 3. 7. & 19.

5. In Treſpaſs for *thruſting one on his Son, an Infant*, under the Age of Diſcretion, *and breaking his Thigh-bone, whereby the Plaintiff was at great Labour and Charges in the Cure* &c. Upon Not Guilty pleaded, the Plaintiff had a Verdict, and Damages 5 l. It was moved in Arreſt of Judgment, becauſe the Plaintiff ſuſtain'd no Wrong, and he was not compell'd to expend any Money, or procure his Son's Cure. Raymond J. thought the Action did not lie for the Father, it *not* being *laid per quod Servitium amiſit*, nor that the Child was leſs capable of procuring a Fortune with a Wife; but that the Child ſhould have brought the Action. But Mountague Ch. B. and Atkins clearly for the Plaintiff, and Judgment was given for him. Raym. 259. Paſch. 31 Car. 2. in the Exchequer. Hunt v. Wotton.

(L. 5.) *Threatning* the Plaintiff's *Tenants*, ſo as they depart. *And Pleading.*

But the Action does not *lie but of the Tenants at Will*, and not of the Tenants for Years, by all the Juſtices. The Reaſon ſeems to be inaſmuch as the one may depart at his Will, and the other not; ſo againſt the one lies Debt or Diſtreſs, and econtra againſt the other. Br. Treſpaſs, pl. 144. cites 21 H. 6. 31.

1. IN Treſpaſs *Quare tales & tantas minas Tenentibus ſuis impoſuit ita quod de Tenuris ſuis receſſerunt*, the Plaintiff *ought to declare their Tenures*, and *how much Land they held*, and *of what Value*, by reaſon of the Recovery of Damages; per Cur. Br. Treſpaſs, pl. 144. cites 21 H. 6. 31.

2. In Treſpaſs of menacing his Tenants, per quod receſſerunt a Tenementis ſuis, it ſuffices to *juſtify the Menacing, without anſwering if they receſſerunt a Tenementis ſuis* &c. Br. Faux Impriſonment, pl. 3. cites 35 H. 6. 54.

3. Action upon the Caſe *Quare Servientes, or Tenentes ſuos Verberavit, per quod a Servitio, or Tenuris ſuis receſſerunt*, is a good Writ, *without ſhewing the Names* of the Servants or Tenants, where it is *plurally*. Contra if it were Servientem or Tenentem ſingularly; Per Choke. Br. Brief, pl. 375. cites 14 E. 4. 7.

4. Treſpaſs *of Menace of his Tenants at Will* of Life and Member, ita quod receſſerunt de Tenuris ſuis of the Plaintiff, to the Damage of the Plaintiff 10 l. Yaxley ſaid, The *Defendant was ſeiſed till by the Plaintiff diſſeiſed*, who leaſed at Will; and the *Defendant re-enter'd, and ſaid to the Tenants, That if they would not depart, that he would ſue them as the Law wills*, which is the ſame Menace &c. and to the Menace of Life and Member, Not Guilty. And *this Menace to ſue them*, if they would not depart, *is a good Plea*; per tot. Cur. For *he does not menace them to ſue them for their Poſſeſſion, which they had before his Regreſs*; and therefore this is in Nature of Menace; and to the Life and Member he pleads Not Guilty, and ſo the Plea is good in toto. Br. Treſpaſs, pl. 285. cites 9 H. 7. 7.

(L. 6) *Beating*

(L. 6) *Beating Servants. And taking them* out of their Service. *And Pleadings.*

1. TReſpaſs of taking his Servant Vi & Armis; It was objected that he *had not counted How the Servant was out of his Service*; and yet well; It ſeems that *this ſhall come in Evidence.* Br. Treſpaſs, pl. 196. cites 39 E. 3. 38.

2. In Treſpaſs of *retaining his Servant who departed* &c. the being *in the Service* of the Plaintiff is not traverſable, but the *Retainer* in Service. Br. Traverſe per &c. pl 319. cites 41 E. 3. 20.

3. Treſpaſs *of his Servant and certain Sheep taken* Vi & Armis; *the Defendant ſaid that he found him Vagrant and retain'd him.* The Plaintiff ſaid, that he retain'd him firſt by a Year, within which Term the Defendant procur'd him to depart, which he did, and the Defendant retain'd him; and the Opinion of the Court was that the Replication is contrary to the Writ. And this is not Treſpaſs Vi & Armis; by which the Plaintiff ſaid, that he procured him Priſt. Trem. ſaid, you ought to traverſe the Vagrancy, & non Allocatur, by which the *Defendant maintain'd his Bar abſque hoc, that he took him*, and ſo to Iſſue. And per Thirn and Culpeper the Writ lies well. Contra Hank and Hill. Br. Treſpaſs, pl. 92. cites 11 H. 4. 23.

4. *Treſpaſs of taking a Servant retain'd*; the *Defendant ſaid that before he was retain'd with the Plaintiff he was retain'd with him, by which he found him Vagrant, and took him*; and the *Plaintiff ſaid that he was not firſt retain'd with the Defendant.* And per Martin this is not good Pleading; for the Plaintiff ſhall ſay *in his Replication, that ſuch a Day he was retain'd with him, before which Day he was not retain'd with the Defendant.* And Rolf. did ſo. Quære of this Manner of Pleading. Br. Iſſues joines, pl. 2. cites 3 H. 6. 31. Br. Jours. pl. 4. cites S. C.

5. Treſpaſs of *Battery of his Servant, & quod Servitium Servientis ſui* prædicti per magnum tempus *amiſit.* Yelverton pray'd Judgment of the Writ; for it ought to be *per quod* Servitium &c. and not *& quod* Servitium &c. Et non Allocatur, for *'tis all one.* Br. Treſpaſs, pl. 21. cites 20 H. 6. 14.

6. Where a Man *beats him who ſerves me at Pleaſure*, or an Infant whoſe Covenant is void, yet I ſhall have an Action upon the Caſe for for the Battery for the Loſs of my Service. And the ſame Law where I retain a Man who is beat &c. And here it lies for the Maſter *Vi & Armis.* Br. Action ſur le Caſe, pl. 35. cites * 21 H. 6. 8. and 9. and the Regiſter 102. and 182. F. N. B. 91. (H) in the new Notes there (a) cites 11 H. 4. 2. per. Hull accordingly. ——

* Br. Labourers, pl. 29. cites S. C. ——— In Treſpaſs of beating his Servant, the *Plaintiff need not to Count of Retainer*; for if a Man ſerve me at his Pleaſure, and he is beaten by which I loſe his Service, Treſpaſs lies by me; quod nota. Br. Treſpaſs, pl. 157. cites 22 H. 6. 43.

In Treſpaſs for beating his Servant, it was held not neceſſary, that he be a hired Servant as the Statute of 5 Eliz. declares &c. to have this Action; but if *hired for any Time certain*, it ſuffices; and note the *Servant* in this Caſe was *only to help to load Corn, and* was not entertain'd in the Plaintiff's Houſe, but *went to his own Houſe every Night.* And holden the Action not maintainable for beating ſuch a Servant, Clayt. 133, 134. pl. 241. Summer Aſſiſes 1649. before Thorpe J. Linley v. Baxter.

And Serjeant Widrington ſaid, a Man may be ſaid a hired Servant within the Statute 5 Eliz. though the hiring be for *leſs* Time *than a Year.* Ibid.

7. In Treſpaſs of Battery of his Servant, per quod Servitium ſuum amiſit &c. It is no *Plea that Non amiſit Servitium Servientis prædicti*, for by this the Battery is confeſs'd, and then the Law implies that the Maſter In Treſpaſs of a Servant taken, it is a good Plea

that he was *not*; *his Servant at the Time.*

is damnified. But is a good * *Plea that he was not his Servant at the Time.* Br. Traverſe per &c. pl. 378. cites 31 H. 6. 12.

Br. Treſpaſs, pl. 326. cites 12 E. 4. 7. —S. P. ibid. pl. 393. cites 5 H. 7. 3. per Cur.

* S. P. Treſpaſs, pl. 34. cites 34 H. 6. 28. 43.

*In Treſpaſs for breaking his Cloſe, and beating his Servant; upon Not guilty pleaded, the Plaintiff had a Verdict, and the Jury aſſeſs'd intire Damages; and becauſe the Plaintiff had no Cauſe of Action for Battery of his Servant, he *not* having *averr'd that he loſt his Service*; it was ruled that the Plaintiff Nil capiat per Billam. 5 Rep 108 in Sir H. Conſtable's Caſe, cites it as adjudg'd, Mich. 14 & 15 Eliz. B. R. Pooly v. Osburn.——— S. C. cited 10 Rep. 130. b. in James Osborne's Caſe. ——— S. C. cited 2 Bulſt. 112.——— S. C. cited by Bridgman Ch. B. Trin. 12 Car. 2. Hard. 166. in Caſe of Rochel v. Stedle.

8. The Maſter ſhall not have Treſpaſs of Battery of his Servant, if he does not ſay * *Per quod Servitium* Servientis ſui amiſit &c *Contrary* of Battery *of Feme Covert or Villein*, for there the Baron and Lord ſhall have Action. Per Frowike, Kingſmill, and Fiſher, Juſtices. Br. Treſpaſs, pl. 442. cites 20 H. 7. 5.

Bendl. 157. pl. 217. S. C. accordingly, that the Writ was abated; And ſays, that the Reporter was of Counſel with the Defendant. — And. 13. pl. 28. S.C. accordingly, but as to the Declaration not mentioning Men, the Reporter ſays Quære of this Reaſon; for Homines is a Word which contains in it as well the Female as the Male, but what theſe Words Homines ſuos intend, and what ſhall be the Senſe thereof, Quære.

9. W. A. brought Treſpaſs againſt W. S. and others, and the Writ was Quare Clauſum fregerunt *& in Homines & Servientes ſuos inſultum fecerunt* &c. and counted that the Defendants in Homines & Servientes ſuos, *viz. in Quoſdam W. A. filium Querentis ac Urſulam Clerk & Winifrid Coppin Servientes ſuos* inſultum fecerunt &c. It was found for the Plaintiff. And it was moved that the *Declaration varies from the Writ*; becauſe the Writ is in Homines &c. inſultum fecerunt, and the Declaration is of one Man only, and the Writ was abated. Bendl. at the End of Kelw. 211. b. pl. 30. Mich. 8 & 9 Eliz. Armſteed v. Steedman.

Gilb. Hiſt. of C. B. 107. cites S. C. and ſays, the Defendant had Judgment, becauſe the Gift of the Action being for the Loſs of the Service, is not Ex Neceſſitate Rei relative to the Battery; and the Plaintiff having laid a different Month from the Battery, there is nothing in the Record to determine the Court to the 20th of January, and to reject the Word March as repugnant, and if the Loſs of the Service ſtands on the Month of March, viz. 17 March following, it takes 3 Months of the Time elapſed, after the Time of the Action brought, for which the Jury was not authorized to give Damages.

10. Treſpaſs by Bill filed Hill. 18 Jac. *that the Defendant* 20 *Jan.* 17 *Jac. aſſaulted and wounded his Servant per quod Servitium amiſit per magnum tempus ſcilicet a prædicto* 20 *Martii* 17 *ſupradicto uſque. Martii tunc prox' ſequent' perdidit*; Upon nihil dicit, a Writ of Inquiry found Damages 10 l. It was moved that the 20 March was a Miſpriſion, and ſhould have been 20 Jan. till the 1 March. But the Court held it not good, nor aided by Intendment. And here the Loſs of the Service is the Point of the Action which ought to be certainly ſhew'd; for that only enables him to the Action; and if the Time be not expreſſed therein, the Count is not good, and therefore *the Scilicet* and what comes after it is *material*; which being ill alleg'd, the Count is not good. And adjudg'd for the Defendant. Cro. J. 618. bis. pl. 8. Mich. 18 Jac. B. R. Hanbury v. Ireland.

11. Treſpaſs Quare Vi & Armis J. S. being the Plaintiff's Servant *cepit & abduxit* at D. in Eſſex; the Defendant *pleaded that J. S. was Vagrant in the ſame County, and that not having Notice that he was another's Servant, he retain'd him* &c. Hobart ſeem'd to think the Plea good, and Winch ſeem'd to agree; and by Hobart and Hutton, an Action for receiving and entertaining a Servant may not be ſaid to be Vi & Armis. Winch 51. Mich. 20 Jac. C. B. Anon.

12. No

12. No Action of Treſpaſs lies for the taking away a Man *(a Negroe)* generally. But there may be a ſpecial Action of Treſpaſs for taking his Servant, *per quod Servitium amiſit.* Per Cur. And Judgment was given accordingly. 5 Mod. 191. Paſch. 8. W. 3. Chamberline v. Harvey.

(M) Treſpaſs. Who ſhall have the Action, [*In Reſpect of* Special or General *Property.*]

1. **He that** has Goods to agiſt **may maintain a Treſpaſs for taking of them.** 48 E. 3. 20. b. Br. Brief, pl. 514. cites S. C. ——

Br. Treſpaſs, pl. 67. cites S. C. and the Defendant ſaid, that the Beaſts were the Property of J. N. who ſued a Replevin and had Deliverance; the Plaintiff replied that J. N. agiſted them to him before the taking. It was objected that the Writ ſhould be in Cuſtodia veſtra exiſtent'. but it was anſwer'd that there is no ſuch Writ in Chancery, tho' the Writ of Execution ſhall be ſo, and that in this Caſe neither the one or the other may have the Writ; but per Perſey, when the one recovers, the Action of the other is gone; and afterwards Iſſue was join'd whether they were agiſted to the Plaintiff or not.

2. **He who** has Beaſts for a Year to feed his Land, **may have General Treſpaſs againſt a Stranger, if he takes them within the Year.** 11 H. 4. 24. b.

3. So **he ſhall have Treſpaſs** againſt the Leſſor himſelf, if he takes them within the Year. **Contra.** 11 H. 4. 23. b. He that has a *Special Property* of the Goods at a certain Time, ſhall have a General Action of Treſpaſs *againſt him that has the General Property*; and upon the Evidence Damages ſhall be mitigated. 13 Rep. 69. in Caſe of **Heydon v. Smith,** cites 21 H. 7. 14.

4. So againſt his Alienee. **Contra** 11 H. 4. 23. b. See pl. 1. S. C. and the Notes there.

5. **The** Agiſtor **of the Goods may have Treſpaſs for the taking of them.** 48 E. 3. 20. b.

6. **If the** Lord ſeiſes the Goods of his Villein, and leaves them in his Poſſeſſion to his Uſe, and after **the Goods** are taken out of his Poſſeſſion, **he ſhall not have Treſpaſs, becauſe they are the Goods of the Lord.** 11 H. 4. 1. b. (**It ſeems becauſe he is not chargeable over.**)

7. **The** Bailee of Goods to keep, **ſhall have Treſpaſs againſt any who takes them out of his Poſſeſſion.** 14 H. 4. 28. b. 13 Rep. 69. cites 14 H. 4. 23. ——

Clearly the Bailee, or he that has a ſpecial Property, ſhall have a general Action of Treſpaſs *againſt a Stranger*, and ſhall recover all in Damages, becauſe he is chargeable over. 13 Rep. 69. cites 21 H. 7. 14 b.

8. **If a Man** takes my Servant out of my Service with my Goods, **Treſpaſs lies of Goods carried away, and Servant taken.** 14 H. 4. 32. b.

9. Where a *Thing certain is deviſed*, and a Stranger takes it, the *Deviſee ſhall have Treſpaſs before the Livery of the Executors.* But *contra of a Thing incertain*, as a 3d Part of the Goods &c. Br. Treſpaſs, pl. 25. cites 27 H. 6. 8.

10. If 2 *Executors* are, and the *one has the Goods*, and *a Treſpaſſor takes them*, and the *Executor from whom they were taken dies*, the *other Executor ſhall have Treſpaſs*; for the Poſſeſſion of the one Executor is the Poſſeſſion of both. Br. Treſpaſs, pl. 346. cites 20 E. 4. 18. Per Tremail Juſtice.

11. If I *bail Goods to a Man who gives or ſells them to a Stranger*, and the Stranger *takes them without Delivery*, I ſhall have Treſpaſs; for *by the Gift or Sale the Property is not chang'd, but by the Taking*; but *if the Bailee delivers them* to the Stranger, I ſhall not have Treſpaſs; Per Fineux and Tremail

Tremail Juſtices. Br. Treſpaſs, pl. 216. cites 21 H. 7. 39. but Rede contra. Ibid.

12. *And* if *an Infant gives or ſells the Goods, and delivers them*, Treſpaſs does not lie. Contrary if the other takes them by the Gift or Sale without Delivery; Per Fineux and Tremail Juſtices. Br. Treſpaſs, pl. 216. cites 21 H. 7. 39.

But where a Servant is *only intruſted* with Goods, he has neither general nor ſpecial Property in them, and he ſhall have no Action of Treſpaſs, if they are taken away; Per Anderſon. Goldsb. 72. pl. 18. Mich. 29 & 30 Eliz. Bloſſe's Caſe.

13. *A Servant* who is *commanded to carry Goods to ſuch a Place*, ſhall have an Action of Treſpaſs or Appeal. 13 Rep. 69. in Caſe of **Heydon v. Smith**, cites 1 H. 6. 4. 7 H. 4. 15. 19 H. 6. 34. 11 H. 6. 28.

14. A. in London gives Goods to me which are in York, and before my Poſſeſſion B. does a Treſpaſs to them; I ſhall have Treſpaſs, becauſe *Property draws Poſſeſſion in perſonal Things*; Per Doderidge J. Lat. 263. in Caſe of Hodſon v. Hodſon.

15. *Maſter of a Ship* may have Caſe or Treſpaſs for Seiſing and Detaining the Ship, and declare on his Poſſeſſion, and recover for his particular Loſs; Per Holt. 1 Salk. 11. pl. 4. Paſch. 12 W. 3. B. R. Pitts v. Gaince &c.

(N) Treſpaſs. What Perſon, *in reſpect of Eſtate*, ſhall have the Action.

He ſhall have the Action in reſpect of his Poſſeſſion. 13 Rep 69. Per Cur. in Caſe of **Heydon v. Smith**, cites 30 H. 6. Treſpaſs 10. ——— [But the Senſe ſeems not right there] and Fitzh. Tit. Treſpaſs, pl. 10. which cites S. C ſays he cannot have the Action, becauſe he cannot intitle himſelf to the Land by ſuch Sufferance; for he cannot make Iſſue.

1. TEnant at Sufferance **ſhall maintain Action of Treſpaſs** againſt a Stranger. **Contra 9 H. 6. 43. b. Admitted.**

Fitzh. Tit. Treſpaſs, pl. 10. cites Trin. 30 H. 6. that he may. ——— 13 Rep 69. Per Cur. in Caſe of **Heydon v. Smith**, 21 H. 7. 15. and 11 H. 4. 23. That he may have ſuch Action.

2. If Tenant at Will **be ouſted by a** Stranger, **he may maintain a Treſpaſs againſt him.** 18 H. 6. 1. **Contra** 11 H. 4. 90. **Dubitatur.** 21 E. 3. 34.

Treſpaſs in B. R. *of a Cloſe broken, and Graſs ſpoil'd*, Tranſgreſſion' prædict. *continuand' by 8 Years.* The *Defendant pleaded his Franktenement*, the *Plaintiff ſaid that before that the Defendant any Thing had, J. was thereof ſeiſed in Fee, and leaſed to A. for* Term of Life, *and A. leaſed to H. all his Eſtate, and H. leaſed to the Plaintiff at his Will, by which he was poſſeſs'd till the Defendant ouſted him, and diſſeiſed H. and did the Treſpaſs, upon whom the Plaintiff re-enter'd, claiming his Eſtate, and brought the Action of Treſpaſs, and averr'd the Life of H.* The *Defendant maintained the Bar, and travers'd the Diſſeiſin*, and ſo to Iſſue, and *found for the Plaintiff*; and the *Tenant alleg'd in Arreſt of Judgment, inaſmuch as the Tenant at Will who is ouſted cannot re-enter; for by the Diſſeiſin the Will of the Leſſor is determined, and the Leſſee cannot have any Action* to recover his Intereſt; for he cannot have Aſſiſe, nor Ejectione firmæ, *becauſe his Eſtate is not certain*, and alſo he has not averr'd the Life of H. his Leſſor, and yet the Plaintiff recovered by Award. And ſo it ſeems that Tenant at Will, who is *ouſted by Diſſeiſin, may have Diſſeiſin without Commandment of his Leſſor*, and that the Life of H. ſhall be intended without Averment, and if H. be dead, then the Plaintiff is an Occupant. But by the Reporter the Life of H. ought to be averr'd, but Dubitavit after. And ſee that this Action was not only for the firſt Entry, but for the Continuance of the Treſpaſs after the Entry; for it is Tranſgreſſion' prædict. continuand' by 8 Years. Br. Treſpaſs, pl. 22. cites 38 H. 6. 27.

So if *Leſſee at Will be ouſted, and the Eſtate of his Leſſor determines* by his Death, now the Leſſee ſhall have Treſpaſs with a Continuando without Regreſs; for when he *may not enter*, the Law ſupplies it, and the mean Profits and Emblements belong to him; Per Gawdy J. Goldsb. 145. pl. 60. Hill. 43 Eliz. cites 38 H. 6.

Leſſee

Leſſee at Will may have Treſpaſs *againſt Wrong-doers, but not* againſt *any one that enters by Colour of Title.* Sid. 347. pl. 13. Mich. 19 Car. 2. B. R. in Caſe of Geary v. Barecroft.

3. If a Man ſubverts the Land in Leaſe at Will, the Leſſee may have a Treſpaſs againſt him, and ſhall have Damages for the Profits, and the Leſſor may have other Treſpaſs, and ſhall recover Damages for Deſtruction of the Land. 19 H. 6. 45. Br. Treſpaſs, pl. 131. cites S. C.

4. If Trees are cut upon the Land of Tenant at Will by the Cuſtom, he may have Action of Treſpaſs. 2 H. 4. 12. And the Lord alſo other Treſpaſs. Br. Treſpaſs, pl. 73. cites S. C.——Br. Tenant per Copy, pl. 2. cites S. C. and he ſhall recover his Damages by Judgment, tho' the Franktenement be another's.

5. The ſame Law is of a Leſſee for Years. 2 H. 4. 12.

6. Leſſee for Years ſhall have Treſpaſs for Treſpaſs done upon the Land. 18 H. 6. 1. 21 E. 3. 34.

7. If a Man beats my Servant, I ſhall have Treſpaſs, and the Servant another Treſpaſs, Diverſis Reſpectibus. 19 H. 6. 45. Fol. 552. Br. Treſpaſs, pl. 131. cites S. C.

8. If Baron leaſes for Years the Land of the Feme, and after Feme dies, the Heir of the Feme ſhall not have Treſpaſs againſt the Leſſee before Entry. (For the Leſſee is Tenant at Sufferance.) 9 H. 6. 43.

9. A Commoner ſhall not have Action of Treſpaſs of Graſs trodden and ſpoil'd, becauſe tho' he has Common there, yet the Graſs is not his. 22 Aſſ. 48. Curia. Nor Treſpaſs Quare Clauſum fregit; Per Doderidge J. 2 Bulſt. 88. in Caſe of Whittier v. Stockman, cites 12 H. 8. 2. in Simon de Harecourt's Caſe.——Arg. Cro. E. 421. in Caſe of Melden v. Bridgwater, cites 14 H. 8.

But the Commoner *may diſtrain and avow for Damage feaſant.* Br. Treſpaſs, pl. 174. cites 15 H. 7. 13. and herewith agrees 24 E. 3. Ibid.

If Beaſts are *taken in a Common, or* other *Land which does not belong to the Owner of the Beaſts,* yet he ſhall have Treſpaſs Vi & Armis, but not Quare Clauſum fregit. Br. Treſpaſs, pl. 421. cites 3 M. 1.

10. Where the *King has the Profits of any Land by Reaſon of Outlawry in Action Perſonal,* and Damage is done in going over the Graſs or Corn, he ſhall have Action of Treſpaſs; for *he has an Intereſt* in the Land, and *yet he has not the Land itſelf.* Br. Treſpaſs, pl. 172. cites 15 H. 7. 2.

11. *Guardian in Knight Service,* who has Cuſtodiam Terræ, ſhall have Treſpaſs of cutting down the Trees of the Heir that has the Inheritance. 13 Rep. 69. Per Cur. in Caſe of Heydon v. Smith, cites 2 H. 4. 12.

12. Treſpaſs Vi & Armis does not lie for *Locking or Breaking a Seat in the Chancel,* in which the Plaintiff claims no Intereſt, but only Sedere there; but otherwiſe if he conveys to himſelf therein; By the Opinion of all. Palm. 46. Mich. 17 Jac. B. R. Dawtrie v. Dee. 2 Roll. Rep. 140. S. C. and S. P.

13. It has been much doubted whether a *Bargainee before Actual Entry* can maintain an Action of Treſpaſs. Arg. Vent. 361. Hill. 33 & 34 Car. 2. B. R. in the Caſe of Perry v. Bowes.

14. Treſpaſs is founded only on the Poſſeſſion; ſo that *he in Reverſion* ſhall not have Treſpaſs againſt a Stranger for drowning the Land and rotting the Trees. 3 Lev. 209. Hill. 36 & 37 Car. 2. and 1 Jac. 2. C. B. Biddlesford v. Onſlow.

15. If a Perſon *preach* in a Pariſh Church *without Leave of the Parſon,* he is a Treſpaſſer; Per Holt Ch. J. 12 Mod. 420. Mich. 12 W. 3. B. R. Anon.

See (G. a) Sheriff (B. a)

(O) Treſpaſs. *Againſt whom* it lies. In what Caſes againſt *Sheriff, or other Officer of a Court.*

Br. Office and Officer, pl. 8. cites S. C.

1. IF a Bailiff of a Court upon Summons to him directed, attaches the Party by the Goods of another Man, Treſpaſs lies againſt him; for he ought to take Conuſance of the Goods of the Party. 11 H. 4. 91.

Br Treſpaſs, pl. 99. S P cites 11 H. 4. 90.

2. So if he attaches the Servant by the Goods of his Maſter. 11 H. 4. 90. b. 91. b. adjudged, being in Poſſeſſion of the Servant. 13 H. 4. 2. b. adjudged Same Caſe.

Br. Office and Officer, pl. 8. cites S. C.

3. The ſame Law, if a Sheriff upon an Execution takes the Goods of a Stranger. 11 H. 4. 90. b.

4. But if he attaches the Defendant by the Goods of another Man being in his Poſſeſſion, it is juſtifiable. 11 H. 4. 90. b. for he is chargeable over.

Br. Office & Officer, pl 8. cites S. C.

5. If the Sheriff takes one Man for another, Falſe Impriſonment lies againſt him. 11 H. 4. 91.

Br. Office & Officer, pl. 10. cites S. C. —He muſt take Notice whether the Beaſts are the ſame, on Pain of rendring Damages. Br. Notice, pl. 23. cites 14 H. 4. 24.

6. If the Sheriff, upon a Replevin ſued by J. D. delivers the Beaſts of a Stranger, upon ſhewing of J. D. the Owner of the Beaſts may have Action of Treſpaſs againſt him. 14 H. 4. 25.

Fitzh. Tit. Replication, pl. 11. cites S. C.

7. If the Sheriff comes to make Replevin of Beaſts impounded in another Man's Soil, if the Place be incloſed, and has a Gate open in the ſame Incloſure, he cannot break the Incloſure and enter thereby, where he may enter by the open Gate. 20 H. 6. 28.

8. But if the Owner hinders him, ſo that he cannot go by the open Gate for fear of Death, he may break the Incloſure, and enter there. 20 H. 6. 28.

9. If the Sheriff makes a Warrant to the Baily of a Franchiſe, to take the Goods of a Man in Execution, and he miſtakes the Goods, and takes the Goods of another Man, the Bailies are Treſpaſſors, and not the Sheriff. M. 7. Ja. Per Coke.

Sheriff made a Warrant to his Bailiffs on a *Ca. Sa.* Afterwards a *Superſedeas* was deliver'd *to the Sheriff, unknown to the Bailiff*, who takes the Party, lets him eſcape, and after 20 Days retakes him. Falſe Impriſonment lies; for having Time by Intendment to have Notice from his Maſter, he ought at his Peril to take Notice of the Superſedeas. Cro. E. 918. pl. 10. Hill. 45 Eliz. B. R. Prince v. Allington. ——— Mo. 677. pl. 921. ſays, that the Bailiffs had Notice.

10. If a Man be arreſted by the Bailies of the Sheriff, and thereupon he ſhews to them a Superſedeas to diſcharge him, and the Bailies refuſe it, and detain him after in Priſon, he ſhall have Falſe Impriſonment againſt the Bailies, and not againſt the Sheriff. Trin. 17 Ja. B. Per Curiam.

11. If *Execution be executed* upon Goods by Force of a Judgment, and after *the Judgment is vacated*, yet neither the Sheriff or his Aſſiſtants ſhall be puniſh'd by Treſpaſs; tho' the contrary was adjudg'd in the Caſe of Turner v. Felgate. 2 Sid. 125. But this Judgment was afterwards diſallow'd. See 1 Sid. 272. in Caſe of Baily v Bunning, and Lev. 95. where the Caſe of Turner v. Felgate is cited by Twiſden and Windham J. who ſaid they remember'd it to be adjudg'd.

(P) Treſpaſs *and Falſe Impriſonment. Againſt whom,* as aiding, or Aſſiſtant *to Officers.*

1. IF a Man ſues a Plaint in a Court, and upon the Attachment the * Bailiff takes the Goods of a Stranger, without the Shewing or Procurement of the Plaintiff, Treſpaſs does not lie againſt him; for he is no Party to the Tort. 11 H. 4. 91. 13 H. 4. 2.

* Fol. 553. But the Bailiff is a Treſpaſſor by ſo doing. Br. Office and Officer, pl. 8. cites S. C.——Br. Treſpaſs, pl. 99. cites S. C. accordingly.

2. The ſame Law it is, where one Man is taken for another by the Sheriff ut ſupra. 11 H. 4. 91. b. Falſe Impriſonment does not lie. 13 H. 4. 2. b.

Br. Office & Officer, pl. 8. cites 11 H. 4. 90. S. P.——Br. Treſpaſs, pl. 99 cites S. C. accordingly.——C. brought Falſe Impriſonment againſt L. who *juſtified, becauſe he had a Warrant to arreſt J. D. and he demanded of C. what his Name was, and he anſwer'd* that his Name was *J. D.* by which he arreſted him. And the Plaintiff demurr'd, and it was adjudg'd for the Plaintiff, becauſe the Defendant ought at his Peril to have taken Notice of the Party. Mo. 457. pl. 629. Trin. 38 Eliz. Rot. 495. Coote v. Lighworth.

So where *Commiſſion of Rebellion* iſſued *againſt Thurbane*, but one *Green appear'd before the Commiſſioners, and affirm'd himſelf to be the Perſon*; whereupon *they apprehended him* by Virtue of their Commiſſion, and in reſiſting he ſnatch'd the Commiſſion from them, and tore it in Pieces. Upon an Affidavit of this Matter, an Attachment was pray'd againſt Green. Hale Ch. Baron, ſaid, If a wrong Man be taken, tho' he affirm himſelf to be the Perſon againſt whom the Commiſſion was awarded, yet that will not excuſe the Commiſſioners from Falſe Impriſonment, becauſe they had no Warrant to take him. But an Attachment was granted, Niſi &c. Hard. 323. pl. 2. Paſch. 15 Car. 2. in the Exchequer, Thurbane's Caſe.

3. But otherwiſe it is if he procures the Bailiff to take thoſe Goods, or ſhews them to him. 11 H. 4. 9.

Br. Office & Officer, pl. 8. cites 11 H. 4. 90 and ſays, that in ſuch Caſe both are Treſpaſſors. [And the (9) here ſeems miſprinted for (90)]—Br. Treſpaſs, pl. 99. cites S. C. accordingly.

4. So it is if he procures the Sheriff to take one Man for another, or ſhews him to him. 11 H. 4. 91. 13 H. 4. 2. b.

Br. Treſpaſs, pl. 99 cites 11 H. 4. 90. that they are both Treſpaſſors.——Br. Office & Officer, pl. 8. cites S. C. accordingly.

5. So in a Replevin, if the Plaintiff ſhews the Beaſts of a Stranger for his own Beaſts, and the Sheriff takes them, Treſpaſs lies againſt the Plaintiff. 14 H. 4. 25.

See (O) pl. 6 S. C. Br. Treſpaſs, pl. 104. cites S. C.—Ibid. pl. 99. cites 11 H. 4. 90. that both are Treſpaſſors.—Br. Officer & Officer, pl. 8. cites S. C. accordingly.

6. The Plaintiff in a Replevin may juſtify the Entry into the Cloſe of the Defendant, to ſhew the Beaſts to the Sheriff to make Deliverance. 3 H. 6. 37. b.

Br. Treſpaſs, pl. 11. cites S. C.

7. Treſpaſs againſt *Baron and Feme of taking of a Horſe*, it was *ſaid for the Baron that he brought Plaint in the Court of C. againſt the Plaintiff, and the Bailiff attach'd the Horſe, and he came in Aid of the Bailiff*; *and* for the *Feme* 'twas ſaid that ſhe *came in Aid of the Bailiff*; and held a good Plea for the Feme as well as for the Baron, by which the Plaintiff ſaid that they took De ſon tort Demeſne, abſque tali Cauſa; and the others e contra. Br. De ſon tort &c. pl. 4. cites 41 E. 3. 29.

8. Treſpaſs; the Defendant juſtified *the Impriſonment by Virtue of a Precept to arreſt the Plaintiff*, which he did, and the other Defendant came in Aid of him; Quod Nota, the coming in Aid of an Officer is a good Plea

If the *Sheriff arreſts a Man*, another may

juſtify to come in Aid of him without Precept. Plea by a Stranger to the Precept. Br. Treſpaſs, pl. 133. cites 19 H. 6. 43. 56.

Br. Faux Impriſonment, pl. 23. cites 8 E. 4. 14.

(Q) Treſpaſs. *Who ſhall be* ſaid *the Treſpaſſor.*

But where a Servant puts Beaſts into his Maſter's own Land, and they eſcape into the Land of another next adjoining for Want of *Fences, which the other ought to make*, the Maſter only is to be charg'd as Treſpaſſor, and not the Servant. But where the Servants put in his Maſter's Beaſts into another's Land, and juſtifies for *Common* of his Maſter, which is a Confeſſion of his putting them into another's Soil, there the Servant is the Treſpaſſor. Br. Treſpaſs, pl. 155. cites 22 H. 6 36.

1. IF my Servant without my Notice puts my Beaſts in another's Land, **my Servant is the Treſpaſſor, and not I. becauſe by the voluntary putting of the Beaſts there without my Aſſent,** he gains a ſpecial Property for the Time; **and ſo to this Purpoſe they are his Beaſts.** 12 H. 7. **Kell.** 3. **b.**

2. But **it ſeems,** if my Wife **puts my Beaſts into another's Land, I myſelf am Treſpaſſor, becauſe the Feme cannot gain a Property from me. Contra** 12 H. 7. *Kelloway* 3. **b.**

3. If *ſeveral come*, and the *one does the Treſpaſs, and the others do nothing but come in Aid*, yet all are principal Treſpaſſors, and ſhall render Damages, and ſhall be impriſoned; Nota. Br. Treſpaſs, pl. 232. cites 22 Aſſ. 43.

Br. Ejectione &c. pl. 3. cites S. C.

4. If a *Man enters into Land as Diſſeiſor or Treſpaſſor to my Uſe*, and *I agree* to it, As *by taking of Profits after, or by granting of it over* &c. I am by this principal Treſpaſſor, and Action lies againſt me leaving out the other, and there the Plaintiff ſhall recover; Quod nota. Br. Treſpaſs, pl. 256. cites 38 Aſſ. 9.

S. P. As in Ejectment of Ward *againſt the Biſhop of W.* who *ſaid that he did not eject*; and it *was found by Niſi Prius, that J. who was Bailiff of the Biſhop, ſeiſed to the Uſe of the Biſhop, and the Biſhop manured the Land, and took the Profits, and alien'd the Ward over, and ſo agreed, but knew not whether J. ejected by Commandment of the Biſhop*; and the Biſhop was condemned, and the Plaintiff recovered. Br. Ejectione &c. pl. 5. cites S. C.

5. He who *commands a Treſpaſs to be done, or agrees to a Treſpaſs, Entry* &c. *done to his Uſe* by any *without his Command*, is principal Treſpaſſor; for in Treſpaſs there is not any Acceſſary. Br. Treſpaſs, pl. 113. cites 38 E. 3. 18.

S. P. So where a Servant takes a Sheep for an Amercement, and the Maſter agrees, he is equally liable to an Action of Treſpaſs as the Servant. Clayt. 5. Farrer v. Eaſtwood.

6. *Hue and Cry* is a good Cauſe to take a Man upon Suſpicion of Felony, and *if it be made without Cauſe he who made it ſhall be puniſhed*, and not the other who arreſted the Man. Br. Treſpaſs, pl. 213. cites 21 H. 7. 27.

.7 A. brought an Action of Treſpaſs againſt B. Pedibus ambulando; the Defendant *pleads* this ſpecial Plea in Juſtification, viz. *That he was carried upon the Land* of the Plaintiff *by Force* and Violence *of others, and was not there voluntarily*, which is the ſame Treſpaſs for which the Plaintiff brings his Action. The Plaintiff demurs to this Plea; in this Caſe Roll J. ſaid, that *it is the Treſpaſs of the Party that carried the Defendant* upon the Land, and not the Treſpaſs of the Defendant; As he that drives my Cattle into another Man's Land is the Treſpaſſor againſt him, and not I who am Owner of the Cattle. Styl. 65. Mich. 23 Car. Smith v. Stone.

(R) Treſpaſs.

(R) Treſpaſs. *Againſt whom* it lies.

1. **Baron may have Treſpaſs againſt a** Feme and others for Raviſhment of his Feme; **for ſhe may be** aſſenting. 43 E. 3. 23. Fitzh. Tit. Action ſur le Statute, pl. 12. cites S. C.——Ibid. pl. 22. cites 44 Aſſ. 13. in the ſame Words with pl. 12. and cites 44 Aſſ. 13. but it is a Miſtake; for that it is quite a different Point.

2. He that has a *ſpecial Property* of the Goods at a certain Time, ſhall have a general Action of Treſpaſs *againſt him that has the general Property*, and upon the Evidence Damages ſhall be mitigated. 13 Rep. 69. Per Cur. in the Caſe of **Heydon v. Smith**, cites 21 H. 7. 14. b.

3. Treſpaſs lies againſt a *Servant* who is *intruſted with his Maſter's Goods*, if he takes them away; and if he imbezzles them it is Felony; Per Anderſon. Goldsb. 72. pl. 18. Mich. 29 & 30 Eliz. Bloſſe's Caſe. Le. 87. pl. 110 S. C. by Name of **Gloſſe v. Layman**; and the Court were clear of Opinion, that Treſpaſs Vi & Armis lies againſt ſuch Servant.——Ow. 52. S. C.——See Maſter and Servant (M. 2) pl. 3.

4. There is a *Difference* between an *Intereſt and Authority*; for if a Man has Authority to do a Thing in general, an Action of Treſpaſs lies; but where a Man has an Intereſt during ſuch Time, his *Miſfeaſance* ſhall not be puniſh'd by a general Writ of Treſpaſs. But in Caſe of a *Tenant at Will*, if he *cuts down the Trees*, or pulls down the Houſes, a *general Action of Treſpaſs* lies; for thereby his Intereſt is determined, and he is become a Stranger; for that he voluntarily had done ſuch an Act which could not be done by his Intereſt, and determines his Will; Per Popham Ch. J. and Judgment accordingly. Cro. E. 784. pl. 22. Mich. 42 and 43 Eliz. C. B. in Caſe of the Counteſs of Salop v. Crompton.

(R. 2) Againſt whom. *Commander, or Servant, or both.*

See (Q) pl. 5. (U) pl. 2.

1. IF a Man *commands another to do a Treſpaſs*, and he does it, and dies, Action lies againſt the Commander for the Treſpaſs, and he might have join'd both in one and the ſame Writ of Treſpaſs. Br. Treſpaſs, pl. 148. cites 21 H. 6. 39. S. P. That it lies againſt the Commander; Per Mombray. Br. Bille, pl. 20. cites 3 Aſſ. 14.

2. If I *command my Servant to diſtrain* for me, which he does, and brings to me the Diſtreſs, *and I work* or occupy *it*, Treſpaſs lies againſt me, but not againſt the Servant. Br. Treſpaſs, pl. 211. cites 21 H. 7. 22. *But if* I command him to diſtrain, and *he diſtrains a Horſe, and rides upon it*, Treſpaſs lies againſt him, and not againſt me; for Treſpaſs does not *lie againſt him who does only a lawful Act*, but againſt him who does unlawfully, or treſpaſſes. Br. Treſpaſs, pl. 211. cites 21 H. 7. 22.

(R. 3) Againſt whom. *After Treſpaſſors.*

S.P. And ſo of Lands. Contra in Appeal againſt a ſecond Felon, as appears elſewhere; for a Felon does not claim Property as a Treſpaſſor does; Quod Nota. Br. Treſpaſs, pl. 256. cites 38 Aſſ. 9.

1. IF a *Man takes my Horſe with Force, and gives it to S. or if S. takes it from him with Force*, in this Caſe I ſhall not have Treſpaſs againſt the 2d Offender; for the 1ſt Offender had gain'd Property by the Tort; Per Brian J. and his Companions. Br. Treſpaſs, pl. 358. cites 21 E. 4. 74.

See (T)

(R. 4) Againſt whom. Diſſeiſor or his Feoffee &c. *Perſons in by Title.*

1. IN Treſpaſs, the Defendant *juſtified, becauſe the Prince ſeiſed the Body and Land of the Plaintiff, as Guardian by Chivalry, and granted to the Defendant, by which he entered and did the Treſpaſs*; and the *Plaintiff ſaid that his Father held of the Prince in Socage*, Priſt, and ſo De ſon tort Demeſne &c. And per Cur. Becauſe the Plaintiff acknowledges the holding of the Prince in Socage, therefore if he ſeiſed, as Guardian, and granted to the Defendant who did the Treſpaſs, Action of Treſpaſs does not lie againſt the Grantee, by which he ought to anſwer to the Grant made to the Defendant; quod nota. Therefore it ſeems that without *Regreſs* Treſpaſs does not lie no more than againſt Feoffee of Diſſeiſor. Br. Treſpaſs, pl. 46. cites 44 E. 3. 18.

S. P. ibid. pl 436. cites 13 H. 7. 15. by all the Juſtices, except Wood and Vaviſor.

2. If a *Man diſſeiſes me, and makes a Feoffment*, and *I re-enter*, I ſhall not have Treſpaſs againſt the *Feoffee*; for he *is in by Title, and no Treſpaſſor* to me, by the beſt Opinion. Br. Treſpaſs, pl. 35. cites 34 H. 6. 30.

——Where *Diſſeiſor makes a Feoffment, and ſo over*, the *Diſſeiſee* ſhall have Treſpaſs againſt the 20th Feoffee if he re-enters; per Forſcu & Danby; quod Littleton & Spilman, omnino negaverunt; and that Treſpaſs lies againſt the Diſſeiſor only, and againſt no Feoffee, but the Diſſeiſee ſhall recover for all the Time; quod Pole conceſſit. For before *the Statute of Glouceſter*, *Damages* were not given in Aſſiſe, but *againſt the Diſſeiſor only*, and *not againſt the Tenant.* Br. Treſpaſs, pl. 202. cites 37 H. 6. 35.

3. *So of the ſecond Diſſeiſor*, by ſome. Quære inde, for he is in by Tort. Br. Treſpaſs, pl. 35. cites 34 H. 6. 30.

4. *But* where *Diſſeiſor commands his Servant to do an Act upon the Land*, and I re-enter, Treſpaſs lies againſt the Servant, by the beſt Opinion. Quære. Br. Treſpaſs, pl. 35. cites 34 H. 6. 30.

5. If the *Diſſeiſee enters upon the Feoffee or Leſſee of the Diſſeiſor*, he ſhall not have an Action of the Treſpaſs for the ſame Treſpaſs againſt the Feoffee or Leſſee, becauſe they come in by Title. And at Common Law, before the Statute of Glouceſter, no Damages for mean Occupation againſt the Feoffee or Leſſee; by all the Juſtices. Het. 66. Hill. 3 Car. C. B. Symons v. Symons.

(S) Treſpaſs. What ſhall be *ſufficient Poſſeſſion* to maintain the Action. [*Of Land.*]

1. A Man who has a Franktenement in Law, if he has not the actual Poſſeſſion, cannot have Action of Treſpaſs.

2. As the Heir ſhall not have Treſpaſs againſt the Abator, before he has enter'd. 19 H. 6. 28. b.

3. If a Man be diſſeiſed, he may have a Writ of Treſpaſs for the Treſpaſs done in the Diſſeiſin, without Re-entry; for he himſelf was ſeiſed at the Time of the Diſſeiſin, which is ſufficient Poſſeſſion to maintain the Action. 19 H. 6. 28. b. All agreed.

4. But if a Man be diſſeiſed, he ſhall not have Writ of Treſpaſs for any Treſpaſs done by the Diſſeiſor before Re-entry, becauſe then the Franktenement was in the Diſſeiſor, and not in the Diſſeiſee. 19 H. 6. 28. b.

5. So he cannot have Treſpaſs againſt any Stranger for any Treſpaſs done by him after the Diſſeiſin without Re-entry, becauſe he had not any Poſſeſſion at the Time. 19 H. 6. 28. b. Fol. 554.

6. If a Man dies *inteſtate*, and the *Biſhop ſequeſters the Goods, and J. N. diſturbs him*, the Ordinary ſhall have Treſpaſs by reaſon of his Poſſeſſion. Br. Treſpaſs, pl. 83. cites 7 H. 4. 18. Br. Ordinary, pl. 5. cites S. C.

7. *But* where he ſequeſters *by Office or Contumacy*, there he has no Poſſeſſion, and there he ſhall not have Treſpaſs. Note, the Diverſity. Br. Treſpaſs, pl. 83. cites 7 H. 4. 18. S. P. that there he has no Poſſeſſion, but this ſhall go to the Spiritual Court; for the Ordinary, by the Poſſeſſion as above, ſhall have Treſpaſs; but he ſhall not have Debt; and yet he to whom he commits the Adminiſtration ſhall have Debt; for this is by Statute, which gives it to the Adminiſtrator, and not to the Ordinary, as it ſeems elſewhere. Br. Ordinary, pl. 5. cites S. C.

8. In Treſpaſs the Defendant ſaid, that A. and B. were ſeiſed in Fee to the Uſe of the Plaintiff, and that the *Plaintiff ſold the Land to the Defendant for 20 l. by which he enter'd and made a Feoffment*; and did not ſay whether he paid the Money, nor whether a Day of Payment was agreed between them, and then no Bargain, per Yaxely, and then this does not change an Uſe. But, per Fineux, it is a good Bargain, by reaſon that the *Vendee enter'd and took the Land*, and made a Feoffment. But Brooke queries of his Opinion, becauſe *it is not deliver'd to him:* Nevertheleſs he ſays it ſeems to him, that if a Man pleads that he has *bought* any Thing, it ſhall be *intended a lawful Buying*, without ſpecial Matter ſhewn to the contrary, by theſe Words Emiſſet &c. for if it be not a perfect Bargain, then Non emebat. Br. Contract &c. pl. 18. cites 21 H. 7. 6.

9. If *Tenant for Life ſurrenders to him in Reverſion out of the Land*, to which *he agrees*, the Franktenement by this is immediately in him, and he is Tenant to the Action to be brought by Præcipe quod reddat, without Entry; but he ſhall not have Treſpaſs without Entry. Br. Surrender, pl. 50. cites 21 H. 7. 7.

10. If *Leſſee for Life or Years cuts Timber and ſells it*, the *Leſſor* may have Action of Trover or Treſpaſs, tho' he never was poſſeſs'd of them. See Maereſme (A) pl. 3.

11. A. levies *Fine to B. ſur Conuſance de Droit* &c. Now the Conuſee has Poſſeſſion in Law, but not in Fact; and if *before the Entry of Conuſee J. S. enters, and dies ſeiſed*, he has no Remedy, for he had no Poſſeſſion in Fact, ſo as he might have Aſſiſe or Treſpaſs. 2 Le. 147. pl. 182. in Caſe

Caſe of **Berry v. Goodman.** Per Coke Arg. and he ſaid, that ſo the Law is now taken.

12. If *A. intrudes upon the Poſſeſſion of the King*, and *B. enters upon him*, A. ſhall not have Treſpaſs for that Entry; for he who is to have and maintain Treſpaſs ought to have a Poſſeſſion which in ſuch Caſe A. has not, for every Intruder ſhall anſwer to the King for his whole Time, and *every Intruſion ſuppoſes the Poſſeſſion to be in the King*; Per Anderſon Ch. J. which all the other Juſtices agreed, except Periam, who doubted of it; and Rhodes J. ſaid, and vouch'd 19 E. 4. to be that he cannot in ſuch Caſe ſay, in an Action of Treſpaſs, Quare Clauſum Suum fregit. 4 Le. 184. pl. 284. Mich. 30 Eliz. in C. B. Anon.

13. He that *claims* an Eſtate *by Virtue of the Statute of Uſes* ought to have an *actual Poſſeſſion* before he can have Treſpaſs, per Walmſley and Glanvil. Noy. 73. Green v. Walwyn.

14. There is an *Actual Poſſeſſion in Law*, *and* an actual Poſſeſſion *in Fact*. As if a Man bargains and ſells Lands, preſently the Bargainee hath actual Poſſeſſion; he may ſurrender, aſſign, attorn and Releaſe; yet he cannot upon this Poſſeſſion bring a Treſpaſs, and ſo he hath no ſuch actual Poſſeſſion, but the actual Poſſeſſion which gives him Power to bring an Action for the Profits. Per Bridgm. Ch. J. Cart. 66. Paſch. 18 Car. 2. C. B. in Caſe of Geary v. Bearcroft.

(T) Treſpaſs *by Relation.* What ſhall be *ſufficient Poſſeſſion* to have the Action by Relation [*and after Reſtitution for Treſpaſs done Meſne.*]

Br. Relation, pl. 46. cites S. C. — A. made a Will and the Plaintiff Executor;

1. AN Executor **ſhall have Treſpaſs for** Treſpaſs done **to the Goods of the Teſtator** Meſne between the Death of the Teſtator and the Probate **of the Teſtament; for the Intereſt was in the Executor before Probate.** 18 H. 6. 22. b.

Adminiſtration was granted to the Defendant, who took the Goods; the Plaintiff proves the Will and then brings Treſpaſs againſt the Defendant, for taking of theſe his Goods; for now by the Probate it is a Will, and the Plaintiff Executor from the Death of the Teſtator. And by the whole Court clearly, an Executor ſhall have Treſpaſs Vi & Armis before Seiſin, becauſe he has a Property by being made Executor; and this Action well lies, otherwiſe an Adminiſtrator may trick any Executor, by getting the Goods into his Hands before Probate of the Will. And ſo Judgment for the Plaintiff. 2 Bulſt. 268. Mich. 12 Jac. Fiſter v. Young.

Br. Relation, pl. 34. cites S. C. —— Ibid. pl. 46. cites S. C. — S. C. cited Mo. 132. pl. 278. in Caſe S. C. —— Br.

2. [So] **an** Adminiſtrator **ſhall have Action of Treſpaſs for Treſpaſs done to the Goods of the Teſtator after his Death,** before the Adminiſtration granted to him; **for the Relation may ſettle the Poſſeſſion Ab initio, ſo that he may have the Action.** 36 H. 6. 8. **Dubitatur.** 18 H. 6. 22. b.

of Boſvil v. the Corporation of Bridgwater. —— Fitzh. tit. Adminiſtrators, pl. 2. cites Relation, pl. 13. cites 36 H. 6. 8. S.P.

3. **If a** Man abates after the Death of the Anceſtor, after the Heir has entred he ſhall **not have Treſpaſs againſt the Abator for the Treſpaſs done before his Entry, for it cannot ſo relate to ſettle the Poſſeſſion in him Ab initio, where he had not any before. Contra** 19 H. 6. 28. b.

4. **If the Teſtator dies inteſtate poſſeſs'd of** Goods **which** after his Death comes to **the hands of** a Stranger who converts them, and after Adminiſtration is granted, **yet the** Adminiſtrator **may have a Trover** and

and Converſion for thoſe Goods upon this Matter ſhewn, becauſe the Adminiſtration relates to ſettle the Property of the Goods in him from the Death of the Teſtator. P. 11 Car. B. R. between *Whittingſtall and Sir Miles Sands*, adjudg'd this being moved in Arreſt of Judgment after Verdict for the Plaintiff, where it was alleg'd the Teſtator died the firſt of Auguſt 3 Car. and the Converſion the 3 Auguſt 3 Car. and the Grant of the Adminiſtration Sept. 5 Car. But it was alleg'd that Sept. 5 Car. the Adminiſtration was granted, and that after ſcilicet 3 Aug. 3 Car. the Defendant converted, and ſo that which comes after the Scilicet will be void. But the Court did not inſiſt upon it, but upon the other Matter before, Scilicet the Relation. Intratur Tr. 10 Car. Rot. 702. P. 11 Car. it was affirm'd per Curiam in Writ of Error, in the Exchequer Chamber.

5. If a Man be diſſeiſed, after his Re-entry he may have Action of Treſpaſs againſt the Diſſeiſor for any Treſpaſs done by him after the Diſſeiſin; for by his Re-entry his Poſſeſſion is reſtored Ab initio, and all Times after. 19 H. 6. 28. b.

He who does a *Treſpaſs after the Diſſeiſin ſhall not be puniſh'd by the first Diſſeiſee*; per Cur. Br. Treſpaſs, pl. 348. cites 20 E. 4. 18.

6. So after his Re-entry, he may have Action of Treſpaſs againſt any Stranger for a Treſpaſs done after the Diſſeiſin. 19 H. 6. 28. b.

7. As if B. diſſeiſe A. and C. diſſeiſe B. and after A. re-enters, he ſhall have Treſpaſs againſt C. for his firſt Entry, for he has by this Re-entry reduced the Poſſeſſion to him Ab initio. H. 39 El. B. R. agreed between *Holcombe and Rawlins*. Contra Co. 11. *Liford* 51.

Ow. 112. S. P. Gawdy, to which Popham and Fenner agreed, but Clench Contra. Paſch. 38 Eliz. B. R. in Caſe of Holcombe v. Rawlins. — Cro. E. 540. pl. 3. S. C. accordingly.

8. So if a Diſſeiſor leaſes for Years, or Life, or gives in Tail, or enfeoffs B. upon whom the Diſſeiſee re-enters, he ſhall have Treſpaſs againſt the Leſſee for his firſt Entry, tho' he comes in by Title, becauſe by Relation, the Diſſeiſee has been always ſeiſed of the Land. H. 39 El. B. R. between *Holcombe and Rawlins*, adjudg'd upon Demurrer. Contra Co. 11. *Liford* 51. Contra 13 H. 7. 15. b. 16.

Mo. 461. pl. 644. S. C. accordingly agreed upon Argument by all the Juſtices. — Ow. 111. S. C. adjudg'd. — Cro. E. 540. pl. 3. S. C. accordingly.

9. In Writ of Damages, it was ſaid that *for any Treſpaſſes done upon the Land after the Judgment given*, the Party may have Action of Treſpaſs; Quære how this is to be underſtood, for if it be *in Plea of Land, where his Entry is toll'd*, he ſhall not have Treſpaſs before Execution; But if he was *in Poſſeſſion*, and a Man enters and does Treſpaſs, which continues pending the Writ, it ſeems that there he may have Treſpaſs for Treſpaſs done after the Judgment. Br. Treſpaſs, pl. 312. cites 7. E. 4, 5.

10. Where *a Man was attainted by one Parliament and after was reſtor'd by another Parliament, as if no ſuch former Act had been.* [The Queſtion was] Whether the Patentee ſhall puniſh a *Treſpaſs done meſne between the Attainder and the Reſtitution.* Per Brian he ſhall not have Treſpaſs for the meſne Treſpaſs; but Vaviſor and others Contra. Br. Treſpaſs, pl. 270. cites 4 H. 7. 10.

S. P. Br. Treſpaſs, pl. 425. cites 10 H. 7. 22. Where the *Patentee brought Treſpaſs* againſt him who was attainted and reſtored; and he pleaded the Act, and the Plaintiff demurr'd; and it was adjudg'd that the Plaintiff ſhould take nothing by his Writ.

After *Attainder* annull'd by Parliament, the Party attaint ſhall puniſh *meſne* Treſpaſſes. Mo. 132. pl. 178. in Caſe of Boſvil v. the Corporation of Bridgwater cites 3 H. 7. and 13 H. 7. Saintleger's Caſe.

11. *And if a Man recovers erroneouſly, and he who loſt does a Treſpaſs upon the Land and after reverſes the Judgment*, he who recover'd firſt ſhall not

But where a Man *reverſes a*

Judgment for Error, and has Reſtitution with the meſne Profits, yet he who loſt

not have Treſpaſs; per Fineux and Rede; for per Rede, it ſhall be recoup'd in the Reſtitution of the Profits, as where a Lord diſſeiſes his Tenant, the Tenant brings Aſſiſe and recovers, the Rent due to the Lord, ſhall be recoup'd in the Damages. Br. Treſpaſs, pl. 270. cites 4 H. 7. 10.

ſhall have Treſpaſs of the meſne Treſpaſs. But per Brian this is becauſe he is charg'd to reſtore the meſne Profits. Br. Treſpaſs, pl. 270. cites 4. H. 7. 10.

Fol. 555.

(U) *What Act* or Thing ſhall be ſaid a Treſpaſs *of Battery.*

IF A. comes in Aid of B. who beats me, tho' A. does nothing againſt me, yet he is a Treſpaſſor as well as B. 22 Aſſ. 43 adjudg'd. 27 Aſſ. 4.

Qui facit per Alium, facit per ſe.

2. If a Man commands another to beat me, and he does it accordingly, he is a Treſpaſſor as well as he who did it. 22 Aſſ. 59.

(X) Treſpaſs. *What Act* ſhall be ſaid a *Treſpaſs.*

But not if he that enters be the Landlord, and comes in to ſee if Waſte be done.

1. IF a Man enters into my Houſe againſt my Will, it is a Treſpaſs, tho' the Door be open. 11 H. 4. 75. b.

Br. Treſpaſs, pl. 97. cites S. C.——Br. Replication, pl. 12. cites S. C.

So if a Man buys Beaſts in a Market, and in driving them along the Street they enter my Houſe, this is a Treſpaſs, tho' the Doors are open; for I am not bound to keep my Doors ſhut; Per Danby and Choke. 10 E. 4. 7. b. pl. 19.

2. If a Man has *Land adjoining to the King's Highway*, and another *drives Cattle in the Way which enter the Cloſe in Default of Incloſure* of the Owner, which he and thoſe Que Eſtate &c. have uſed to incloſe Time out of Mind, and they are freſhly purſued and chas'd back, this is not a Treſpaſs puniſhable. 10 E. 4. 7. a. pl. 19.

3. If *Grain* grows *in a common Field near the Way*, and the *Beaſts feed*, the Defendant ſhall render Damages; for there the Plaintiff is not bound to incloſe; Per Danby and Littleton. Br. Treſpaſs, pl. 321. cites 10 E. 4. 7.

As where a Man *ſhooting at Butts kills*

4. The *Intent* ſhall *not* be *conſtrued in Treſpaſs. Contra in Felony*; Per Rede Ch. J. Br. Treſpaſs, pl. 213. cites 21 H. 7. 27.

T. N. it is not Felony; Per Rede Ch. J. Br. Treſpaſs, pl. 213. cites 21 H. 7. 27.

So where a *Tyler drops a Stone which kills a Man not knowing it.* Br. Treſpaſs, pl. 213. cites 21 H. 7. 27.

But in thoſe Caſes, *if they* lame or *hurt a Man Treſpaſs lies*; for there the Intent is not to be conſtrued. Br. Treſpaſs, pl. 213. cites 21 H. 7. 27.

And where *Executor takes of the Goods of J. N. amongſt the Teſtator's*, Treſpaſs does not lie; for the Executor, prima facie, cannot know the Goods of the Teſtator from another's Goods; Per Rede Ch. J. Br. Treſpaſs, pl. 213. cites 21 H. 7. 27.

5. *If another's Sheep are amongſt my Sheep*, I may *chaſe them* to a Strait, ſo *that I may ſever them*; for they cannot be ſever'd but at a Strait; Per Rede Ch. J. Br. Treſpaſs, pl. 213. cites 21 H. 7. 27.

5. Every

6. Every *Continuance* of a Treſpaſs is a *New Treſpaſs.* See D. 319. b. pl. 17. **Moor v. the Lady Browne,** where in Treſpaſs on the Caſe the *Turning of a Water-cock* put into a main Pipe, which carried the Water to the Houſe of another, and which Water-cock was *put into the Pipe by a Predeceſſor of the Defendant,* was adjudged a New Diverſion. See Nuſance (L) (M)

7. Note for a Rule, that in all Treſpaſſes there *muſt be a voluntary Act, and alſo a Damage,* otherwiſe Treſpaſs does not lie. Per Doderidge J. Lat. 13. in Caſe of Millen v. Hawtry.

8. *Cauſing a Superfluity of Water by pulling down the Defendant's own Wear to drown or overflow the Land or Fiſhery* of the Plaintiff, is a plain Treſpaſs. Ld. Raym. Rep. 272. 274. Mich. 9 W. 3. Courtney v. Collet. Carth. 436. S. C.

9. If a *Dog breaks a* Neighbour's *Cloſe,* the Owner will not be ſubject to an Action for it; Per Holt Ch. J. Ld. Raym. Rep. 608. Mich. 12 W. 3. in the Caſe of Maſon v. Keeling.

10. *Diſturbing H. in the Uſe of his Franchiſe,* is a Treſpaſs. 2 Salk. 594. pl. 3. Trin. 6 Ann. B. R. in Caſe of The Queen v. Soley, cites 29 E. 3. 18. 11 Mod. 115. S. C. & P. by Holt Ch. J. in delivering the Opinion of the Court, cites 29 E. 3. 74.

(X. 2) Where Treſpaſs lies, tho' for an Act in itſelf lawful. *Want of Care &c.* to avoid it.

1. TReſpaſs Quare Vi & Armis Clauſum ſuum [fregit &c. & herbam ſuam] pedibus ambulando conſumpſit *in 6 Acres,* the *Defendant as to all, except the 6 Acres, pleaded Not guilty, and to the 6 Acres Actio non;* for he *ſaid he had an Acre in which a Hedge of Thorns is adjoining to the ſaid Acre, and at the Time of the Treſpaſs he cut his Thorns, and they Ipſo Nutu fell into the Acre of the Plaintiff, and the Defendant came freſhly into the Acre, and took them,* which is the *ſame* Treſpaſs &c. and the Plaintiff *demurr'd.* And by the beſt Opinion, and almoſt all, it is no Plea; and per Choke J. it is no Plea that Ipſo nutu they fell upon the Land of the Plaintiff; for *he ought to ſay that he could not do otherwiſe, or that he did all that he could to ſave them out.* Br. Treſpaſs, pl. 310. cites 6 E. 4. 7.

2. *But* where *the Wind blows my Tree upon the Land of my Neighbour,* I may take it, and this is no Treſpaſs; for this is the Act of the Wind, and not of me; Per Choke Juſt. Br. Treſpaſs, pl. 310. cites 6 E. 4. 7. S. C. cited Arg. Lat. 13. in Caſe of Millen v. Hawtry.

(X. 3) Treſpaſs or Treſpaſſor. What, or who. By *Conſent, Agreement, or Sufferance* &c. See (Q) pl. 5.

1. IF *a Man ſays that he will diſſeiſe J. N. to my Uſe,* and *I ſay that I am content,* he is ſole Diſſeiſor, and this is no Command but Sufferance. Br. Diſſeiſin, pl. 15. cites 21 H. 7. 35.

2. If a *Man ſays to me that he will beat J. S.* and *I ſay do as you will,* this is no Tort in me. Br. Diſſeiſin, pl. 15. cites 21 H. 7. 35.

3. A. *requeſts B. to take Goods* of C. if B. takes them A. is a Treſpaſſor. See 1 Salk. 409. pl. 9. Hill. 9 W. 3. B. R. in Caſe of Britton v. Cole.

(X. 4) What

(X. 4) What ſhall be ſaid Treſpaſs, *and what Felony.*

1. A Man *took the Feme of another by Rape, with the Goods of the Baron*, and it was adjudged Felony, and well, as ſeems to me; for tho' the taking of the Feme be not Felony, they remain therefore in the Cuſtody of the Feme as the Goods of her Baron, and when he took the Feme and the Goods, this is Felony in him. Br. Corone, pl. 77. cites 13 Aſſ. 6.

2. *And the like* was adjudged before of a Vicar who took Feme and Goods, and was deliver'd to the Ordinary by his Clergy. But this ſeems to be where the Feme is *taken againſt her Will*; But *Quære*, if the Feme takes the Goods, and go with another Man *with his good Will*. Ibid. and ſo is 13 E. 4. 9. where the Feme *took and delivered them to W. N.*

See (Y. 2) pl. [10.] 19. in the Notes.

(Y) *Treſpaſs. Againſt whom* it lies. Giſt of the Action. [Treſpaſs *or Detinue.*]

Fitzh. Tit. Treſpaſs, pl. 187. cites S. C.

1. HE that comes to the Goods by Delivery of the Plaintiff, cannot be charged in Treſpaſs; but he ought to have Detinue. 43. E. 3. 30.

Treſpaſs, and not Detinue.

2. If A. poſſeſs'd of Goods, ſells them to B. and after B. leaves them in the Poſſeſſion of A. and after A. delivers them to C. to carry to another Place, who carries them there accordingly. B. ſhall not have Treſpaſs againſt C. upon this, but Detinue; becauſe he came to the Goods under the Delivery of the Plaintiff himſelf. 16 H. 7. 2. b. 3. Per Curiam.

It is a good Plea, *that the Plaintiff deliver'd the Goods to him for ſafe keeping*, Judgment of the Writ, if it be *in one and the ſame County*; for this proves, that he ought to have Action of Detinue. Br. Treſpaſs, pl. 33. cites 34 H. 6. 5.

3. So if A. buys Goods of me, and after leaves them in my Poſſeſſion, A. ſhall not have Treſpaſs againſt me for the Detaining after, but Detinue; becauſe he comes to the Goods by lawful Means, by Deliverance of the Plaintiff himſelf. 16 H. 7. 2. b. Per Curiam.

4. He who comes to the Thing by the Law, cannot be charged in Treſpaſs.

5. As if a Man comes to Goods by Delivery of the Sheriff upon Replevin ſued, Treſpaſs does not lie againſt him. 44 E. 3. 20. b.

Br. Treſpaſs, pl. 54. cites S. C.

6. If Goods are caſt into the Sea by Tempeſt, and a Stranger takes them, and delivers to the Servant of the Owner, for the Profit of the Owner, no Treſpaſs lies againſt him. 46 E. 3. 15.

Ow. 120. S. C. and the Point was, that the

7. If a Conſtable takes my Goods lawfully into his Poſſeſſion, to the Uſe of the Owner, upon Waiver of them by a Felon, tho' he afterwards refuſe to deliver them to me upon Demand, yet no Treſpaſs lies

lies againſt him, but Detinue. Trin. 4 Ja. B. R. between *Walgrave and Skegnes.* Conſtable took a Felon who had robb'd B. of 20 l. and found the 20 l. about the Felon, but becauſe the Place where he took the Felon was of no Strength, he was carrying it to another Town, but was robb'd by the Way; and whether he ſhould be charged in Treſpaſs was the Doubt. Williams J. held, That he ought to keep the Money ſafely, and becauſe he did not, he is liable to this Action. Popham ſaid, he might have pleaded Not Guilty; for he ſaid, that if a Town has the Poſſeſſion of my Goods a Detinue lies, and not a Treſpaſs: But if a Stranger takes them out of their Poſſeſſion, there a Treſpaſs lies; and therefore he conceived, in this Caſe, that the Plaintiff ſhould have brought a Trover and Converſion, and not a Treſpaſs, quod all Juſticiarii conceſſerunt; and therefore the Caſe was deferr'd till next Term, to be argued upon the General Iſſue.

8. If Leſſee at Will does voluntary Waſte, as in Abatement of houſes, or cutting of Trees, a General Action of Treſpaſs lies, for * this determines the Will. Lit. 15. Co. 5. *Counteſs of Salop*, 13. b. 22. E. 4. 5. b. * Fol. 556. Cro. E. 777. pl. 10. S. P. agreed by Popham and Fenner in the Caſe of the Counteſs of Salop v. Crompton, S. C.——Cro. E. 784. pl. 22. S. C. and S. P. For the Privity of the Leaſe is determined by the doing ſuch Act.

9. If I bail to B. my Beaſts to keep, or for ſpecial Purpoſe, as to compoſt or plow his Land, and after B. kills them, Action of Treſpaſs lies; for tho' he comes to them by my Delivery, yet if he deſtroys the Thing, the Privity is determined, and General Treſpaſs lies. Lit. 15. Co. 5. *Counteſs of Salop*, 13. b. 22. E. 4. 5. b. S. P. in S. C. agreed by Popham and Fenner. Cro. E. 777. —— 11 Rep. 82. a. S. P. per Cur. cites Litt. fol. 15. and 11 H. 4. 17. a. and 23. b.——Litt. S. 71. S. P. ——Co. Litt. 57. S. P. and ſays, that I may have Action of Treſpaſs on the Caſe for this Converſion, either the one or the other at my Election.

If a *Man has my Beaſts to draw in the Plough, and kills them*, I ſhall have Treſpaſs; per Moyle. Br. Treſpaſs, pl. 295. cites 2 E. 4. 4.

Contra if they are bail'd to him, and he kills them; per Moyle. Br. Treſpaſs, pl. 295. cites 2 E. 4. 4.

10. In Treſpaſs it is a good *Plea, that T. S. was ſeiſed of the Houſe, and made him Executor, by which he enter'd, and took the Cheſt* in the Declaration. Per Thorp: The *firſt Poſſeſſion of the Goods and Cheſt is in the Executor*, tho' Evidences are in the Cheſt; for they cannot know what is in it till it be open'd, and if Charters are in the Cheſt, the Heir may have thereof an Action of *Detinue*, but *not Treſpaſs*; quod Cur. conceſſit. Br. Treſpaſs, pl. 396. cites 43 E. 3. 24.

11. If a *Man diſtrains*, and after the *Tenant offers the Rent*, and the *Lord refuſes it*, the Tenant ſhall have Detinue of the Diſtreſs, but not Treſpaſs; but if the Lord kills the Beaſts, or labours them, Treſpaſs lies. Br. Treſpaſs, pl. 29. cites 33 H. 6. 26. 27. Br. Detinue de biens, pl. 10. S. C.

12. If a Man *takes my Goods as a Treſpaſſor*, I may have Replevin, tho' the Treſpaſſor has Property by Tort; for this is of the Property which I had at the Time of the Caption. But I cannot have Detinue; for this is of Property which is in me at the Time of the Action taken; Per Brian. Br. Replevin, pl. 36. cites 6 H. 7. 9.

13. Where the *Sheriff levies the Condemnation, and does not return the Writ*, Action of Treſpaſs lies; Per Kingſmill J. Br. Faux Impriſonment, pl. 12. cites 21 H. 7. 22.

14. Detinue does not lie *of Hawks, Hounds, Apes, or Monkeys*, or ſuch like, which are Things of Pleaſure, and are made tame, and were *Feræ Naturæ*; and yet Treſpaſs lies of them well, and the Plaintiff ſhall recover Damages of the Taking; Per Brudnell, & non negatur. Br. Detinue de Biens, pl. 44. cites 12 H. 8. 5. Br. Property, pl. 44. cites S. C.

See (L) pl 4.—Actions (M. c) (N c) pl. 36. 37.

(Y. 2) Treſpaſs, and not Caſe.

* Br. Action ſur le Caſe, pl. 14. cites S. C.——Fitzh. Tit. Action ſur le Caſe, pl. 31. cites S. C.——Br. Treſpaſs, pl. 41. cites S. C.

[1] 10. IF Toll be taken by a Miller of one who ought to be Toll-free, general Treſpaſs lies, not Action upon the Caſe; For it is as illegal as if he had taken the Moiety. * 41 E. 3. 24. b. † 44 E. 3. 20.

† Br. Action ſur le Caſe, pl. 19. cites S. C.——Br. Treſpaſs, pl. 47. cites S. C.——Fitzh. Tit. Brief, pl. 579. cites 40 E. 3. 20.

* Br. Action ſur le Caſe, pl. 38. cites S. C.—Br. Labourers, pl. 21. cites 11 H. 4. 21. 22. S. P. Treſpaſs Vi & Armis lay at Common Law.——Br. Treſpaſs, pl. 92. cites 11 H. 4. 23. S. P.

[2] 11. If a Man takes a Servant out of my Service, and retains him, Treſpaſs lies againſt him. * 11 H. 4. 23. b. 24. Tr. 15 Ja. between *Wheteley and Stone*, agreed per Curiam in Writ of Error at Serjeant's Inn. 39 E. 3. 38. adjudged. 43 Aſſ. 9.

Br. Labourers, pl. 21. cites 11 H. 4. 21. 22. that Treſpaſs Vi & Armis did not lie in this Caſe at Common Law, but that Action on the Caſe did.

[3] 12. But if he does not take him out of my Service, but procures him to go out of my Service, and retains him, Treſpaſs does not lie againſt him, but Caſe; for he does not do it contra Pacem. 11 H. 4. 23. b.

No Action in this Caſe lay againſt the Retainer at Common Law, and for that Reaſon the Statute of Labourers was made. Br. Labourers, pl. 21. cites 11 H. 4. 21. 22.

Hob. 180. pl. 215. S. C.

[4] 13. If a Servant departs out of my Service, no Treſpaſs lies againſt him. 11 H. 4. 23. b.

[5] 14. If a Serjeant of London, or Bailiff in a Counter, takes a Man upon a Capias in Proceſs at my Suit, and J. S. reſcues him out of his Poſſeſſion, I may have a general Writ of Treſpaſs againſt him, becauſe the Serjeant is my Servant to this Purpoſe, as well as Servant to the King; and therefore the Taking out of the Poſſeſſion of the Serjeant, who is my Servant, is a Taking out of my Poſſeſſion. Tr. 15 Ja. between *Wheteley and Stone* adjudged in a Writ of Error at Serjeant's Inn. See the ſame Caſe Hobart's Reports 242. and at Serjeant's Inn there were cited theſe Precedents. Mich. 34, 35 El. B. R. Rot. 169. *Aſhtell and Rudge* adjudged in Point. Mich. 42, 43 El. Rot. 468. B. R. *Pattinger and Marriot.* Mich. 37, 38 El. Rot. 192. between * *Fenner and Plasket*, both adjudged in Point.

* Cro. E. 459. bis, pl. 2. Hill 38 Eliz. B. R. S. C. but not S. P.——Mo. 422. pl. 584 S. C. but not S. P.

Hob. 180. pl. 215. in Caſe of Wheatley v. Stone, cites S. C.

[6] 15. But in the Caſe aforeſaid, I may have Action on the Caſe at my Election. Tr. 15 Ja. between *Speere and Stone* adjudged, and the Judgment affirm'd in Writ of Error at Serjeant's Inn, at the ſame Time that the general Action was affirm'd.

that tho' the Reſcous were laid Vi & Armis, yet it would bear either Treſpaſs Vi & Armis, or Treſpaſs upon the Caſe; but the Plaintiff muſt beware that he follow his Original, if it be by Writ; for if that be Vi & Armis, or upon the Caſe, the Judgment muſt be ſuitable. And ſo it muſt be in a Bill in B. R. but

but if the Bill be Treſpaſs general, neither Vi & Armis, nor upon the Caſe ſpecial, he may uſe it to either.

[7] 16. **If a Man** beats the Feme of J. S. by which he loſes the Conſortſhip of his Feme, **J. S. alone, without naming his Wife, may have a general Action of Treſpaſs againſt him for the Battery of the Feme** Per quod Conſortium amiſit **by 2 Months, tho' this Action be grounded upon the Loſs of the Conſortſhip. Mich. 16 Ja. B. R. between** *Guy and Liveſey* **adjudged by Admittance, that the general Action of Treſpaſs lies.** Cro. J. 501. pl. 11. S. C. adjudged; for the Action is not brought in Reſpect of the Harm done to the Feme, but it is brought for the particular Loſs of the Husband's, for that he loſt the Company of his Wife, which is only a Damage and a Loſs to himſelf, for which he ſhall have this Action, as the Maſter ſhall have for the Loſs of his Servant's Service.

[8] 17. So **the Baron alone may have a general Action of Treſpaſs** for Menacing and Battery of the Feme Per quod Negotia ſua intecta remanebant. **Tr. 27 El. B. R. Rot. 227. between** *Cholmley and Cuney* **adjudged.** S. C. cited Cro. J. 502. pl. 11. in the Caſe of **Guy v. Liveſey**, as adjudged 28 Eliz. in B. R. And another Precedent was cited to be in the Exchequer in **Doylie's** Caſe, that ſuch an Action was adjudged good.

[9] 18. **If the** Sheriff upon **a Writ of** Extent takes a Furnace fix'd to the Land, and ſells it to J. S. and he takes it, **no Action of Treſpaſs lies againſt J. S. tho' it be admitted that the Sheriff could not lawfully ſell that which was fix'd to the Land; for J. S. comes to it without any Tort done by himſelf. Hill. 37 El. B. between** *Day v. Auſtin and Bisbich*, **Per Curiam.** Cro. E. 374. pl. 24. **Day v. Bisbitch**, S. C. ſays it was moved that the Action lay not againſt the Defendant, becauſe he has it by the Delivery of another, and not by his own Taking; but that this Matter was not much inſiſted upon, becauſe he was preſent, and took it, and ſo he was an immediate Treſpaſſor; and cites 42 E. 3. 6. 20 H. 7. 13. and 21 H. 6. 26.——Ow. 70. S. C. ſays, that the Court held it a good Diſcharge.——Cro. E. 398. pl. 3. S. C. but not S. P.

10. Where a Man *lends Beaſts to another to compeſter his Land*, and *a Stranger takes them*, Treſpaſs lies Vi & Armis; but *contra if the Owner takes them within the Term*; for there lies only Action upon the Caſe; for if Treſpaſs Vi & Armis ſhould lie, he ſhould recover the Value againſt the proper Owner; Per Hank, quod Hill & Culpeper conceſſerunt. Br. Treſpaſs, pl. 92. cites 11 H. 4. 23.

11. In *Debt againſt 2, as Executors*, where the *one is not Executor*, and *he appears and confeſſes*, and the *other makes Defence*, and the Plaintiff recovers, the other ſhall have *Déſceit*, but *not Treſpaſs*; for he is *Party to the Judgment*; Per Littleton. Br. Treſpaſs, pl. 180. cites 9 E. 4. 13. Br. Action ſur le Caſe, pl. 66. cites S. C.

12. If *a Man lends his Horſe to ride to York*, and he *rides further*, Treſpaſs general does not lie, for this is the *Authority of the Party*, but Treſpaſs upon the Caſe; but where he *miſuſes the Authority of the Law*, he ſhall have Treſpaſs general; as if a Man diſtrains, and kills the Diſtreſs &c. Br. Treſpaſs, pl. 327. cites 12 E. 4. 8. Per Brian.

13. In Treſpaſs the *Defendant juſtified entering into the Houſe by Licence of the Plaintiff*; and the *Plaintiff ſaid, that he broke his Door and Windows, of which he has brought his Action*, and no Plea; for *of Licence in Fact, as here, he ſhall not have General Action of Treſpaſs, but upon the Caſe.* Br. Treſpaſs, pl. 359. cites 21 E. 4. 75, 76. *Contra of Licence in Law, and Miſdemeanor after*, as entring into a Tavern to drink, and taking the Bowl, or entering to ſee Waſte, or to diſtrain, and after breaking the Walls, or killing the Diſtreſs, there lies General Writ of Treſpaſs. Contrary above of Licence in Fact. Ibid.

14. If a Man *diſtrains Beaſts, and impounds them*, and *another takes them*, he who diſtrains ſhall not have general Action of Treſpaſs; for he has no Property. Contrary of Goods bail'd; Quære of Eſtray. Br. Property, pl. 52. cites 20 H. 7. 1.

15. A. *Leſſee*

Jo. 224. pl. 4. S. C by Name of Weſt and Treſuſit, adjudged Una Voce that the Action lay.

15. A. *Leſſee* for Years *of a Houſe, demiſed it for* 6 *Months, and* afterwards *permitted him to occupy the Houſe for* 2 *Months longer, during which Time he pull'd down the Windows* &c. A. brought Caſe againſt him; It was objected that the Action did not lie, becauſe it was the Plaintiff's Folly to let him continue Tenant at Sufferance; and if any Action did lie, it was Treſpaſs. The Court conceived that either Caſe or Treſpaſs lay, but that Caſe was the moſt proper Action to recover ſo much as he was damnified, becauſe he himſelf is ſubject to an Action of Waſte; and Judgment for the Plaintiff. Cro. C. 187. pl. 7. Paſch. 6 Car. B. R. Weſt v. Treude.

16. It was holden, that where an *Action* is brought *by the Maſter for beating his Servant, by which he loſt his Service*, that this is Treſpaſs Vi & Armis, and not upon the Caſe; but in this Caſe the Maſter ſhall not have Damages for the Beating, but for the Loſs of Service only. Clayt. 17. pl. 27. Aug. 1633. Swallow v. Stephens.

17. In an Action for *ſtopping a Rivulet, and drowning a Cloſe, and thereby ſpoiling the Trees*, it was held, that Caſe lies for him in Reverſion, and Treſpaſs for the Tenant in Poſſeſſion; but during the Term the Reverſioner cannot have Treſpaſs, that being founded only upon the Poſſeſſion. 3 Lev. 209. Hill. 36 and 37 Car. 2. C. B. Biddleſford v. Onſlow.

18. Treſpaſs Quare Vi & Armis, for a Nuſance in *laying Dung, and cauſing ſtinking Water in his Yard to run to the Walls of the Plaintiff's Houſe, and by piercing them run into his Cellar.* After a Verdict it was moved, that Treſpaſs Vi & Armis does not lie againſt the Defendant for this, becauſe a Man cannot be a Treſpaſſor with Force and Arms in his own Ground; but that he ought to have brought an Action on the Caſe. The Court ſeem'd to be of Opinion againſt the Plaintiff; but afterwards they gave Judgment for him, after great Wavering in Opinion, pro & con. Hard. 60. Trin. 1656. in the Exchequer. Preſton v. Mercer.

The Court agreed this Caſe to be good Law; for the Plaintiff *turn'd* that which was properly *Treſpaſs into* an Action upon the *Caſe*, only with Deſign to evade the Statute of 22 and 23 Car. 2. and *to get full Coſts, tho' the Damages were under* 40 *s.* Ld. Raym. Rep. 188. in Caſe of Shapcott v. Mugford.

19. In Caſe the *Plaintiff* declared, that he *was poſſeſs'd of a Cloſe*, and the *Defendant dug Pits in it* &c. per quod &c. And after Verdict for the Plaintiff it was adjudg'd, That the Action will not lie; becauſe the Cauſe of Action was properly Treſpaſs, for which the Party might have an Action of Treſpaſs, but could not turn it into an Action upon the Caſe. Arg Ld. Raym. Rep. 188. Eaſt. 9 Will. 3. in Caſe of **Shapcott v. Mugford**, cites Hill. 4 and 5 W. and M. in C. B. Thornton v. Auſten.

[Y. 3] [In what Caſes, and at what Time, Treſpaſs lies, *where the Matter is Felony.*]

Ow. 70. S. P. per Cur. in S. C. that Treſpaſs will not lie againſt the Vendee, but a Detinue.

[1.] 19. **If a** Stranger takes my Horſe, **or other Goods,** and ſells it to J. S. and J. S. takes it accordingly, **no Action of Treſpaſs lies againſt him. Hill. 37 El. B. in the ſaid Caſe of** *Day.* **Per Curiam.**

Fol. 557.

[2.] 20. **No Treſpaſs lies, becauſe it** appears to the Court to be Felony; **for this appertains to the King only to puniſh. Tr. 4 Ja. B. R.** *Huggin's Caſe.*

S. C. cited by Roll Ch. J. Sty.

[3.] 21. As **Action of Treſpaſs does not lie for the Baron for** Battery of the Feme, by which the Feme languiſh'd by 6 Weeks, and then died

died of the Stroke; For this is Felony. Tr. 4 Ja. B. R. *Huggin's Caſe*, adjudg'd. 347. in Caſe of Dawkes v. Coveneigh.

[4] 22. [So] If A. robs B. of 3000 l. of Money in Baggs, for which he is after indicted and convicted, and after B. brings Treſpaſs againſt A. for taking of the Money, and he pleads this Matter in Bar, it ſeems that the Action does not lie; becauſe, when it appears that the Act was Felony, the Party ought to ſue him by way of Appeal, if he will have his Goods again; or proſecute him by Indictment, and then he ſhall have his Goods again by the Statute of 21 H. 8. for otherwiſe no one will proſecute Felony for the Publick Good, to puniſh ſuch Offenders, but only to have Treſpaſs for his private Intereſt. Contra, Mich. 2 Car. B. R. between *Markham and Cobbe*, by Doderidge and Whitlock; but Jones e contra, becauſe he cannot aver againſt the Verdict. But it ſeems he may aver againſt it, he being a Stranger to it. Intratur. P. 1. Car. Rot. 112. The Bar was adjudg'd ill upon the Pleading, not upon the Matter in Law. Noy 82. S. C. The Court held the Plea in Bar naught, becauſe it does not ſhew, that the Plaintiff gave Evidence for the Conviction; becauſe otherwiſe he ſhall not have Reſtitution, and an Allegation of Procurement is not ſufficient; and for that Reaſon, Judgment was given for the Plaintiff.——Jo. 147. pl. 6. S. C. agreeable to Roll, together with the Reaſons of Jones; and in the Concluſion ſays, Quære bene; for it is a Point of great Conſequence as well of the one Part as of the other.——Lat. 144. S. C and the Defendant in his Bar having averr'd, that it is the ſame Offence, it was ſaid by Doderidge to be ill; becauſe by the Indictment it was found Burglary, and here it is only Treſpaſs, which cannot be the ſame Offence; but he might have averr'd, that it was for the ſame Caption. And Jones and Whitlock agreed to this, tho' they differ'd as to other Matters.——S. C. cited per Roll Ch. J. Sty. 347. in Caſe of Dawkes v. Coveneigh.

[5] 23. So in Treſpaſs of Goods taken, if it appears upon Evidence that it was Felony, it ſeems the Action does not lie for the Cauſe aforeſaid, and yet he cannot plead it. Contra in the ſaid Caſe of *Markham*. Agreed per Curiam.

[6] 24. If A. enters into the Houſe of B and there robbs him feloniouſly, and after B. indicts A. for this Felony, and upon Not Guilty pleaded he is found Guilty, and has his Clergy, and is burnt in his Hand, and ſo deliver'd; in this Caſe B. may bring an Action of Treſpaſs againſt A. for Entry of his Houſe, and taking 300 l. of his Money; for here is not any Inconvenience by it, for he has proſecuted him according to the Law as a Felon, at the Suit of the * Commonwealth, and it was a Treſpaſs alſo to the Party; and therefore there is good Reaſon, that he ſhall have Recompence for the Wrong done to him alſo, inaſmuch as he has done his Duty in the Proſecution, according to the Law, for the Felony at the Suit of the King. M. 1652. between *Dawkes and Cavennaugh*. Adjudg'd per Curiam upon a Special Verdict in London. Intratur Hill. 1650. Rot. 653. Sty. 346. S. C. accordingly; but Roll Ch. J. ſaid, that the Action would not lie before Conviction, for the Danger that the Felon might not be tried; and ſince the Party robb'd could not have his Remedy before, he ſhall not loſe it now; for now there is no Danger of compounding for the Wrong; and the reſt of the Juſtices agreed with Roll, and ſo Judgment was given for the Plaintiff.—See (A. a) pl 3.

* Orig. is (Bien Publique.)

(Y. 4) Treſpaſs, or *Trover*.

See (Z) pl. 5. the Note.

1. THE *Defendant's Bailiff ſeiſed* the Plaintiff's Beaſt for an *Heriot, where none was due.* The *Defendant agreed to the Seiſure, and converted the Beaſt*; whereupon the Plaintiff brought Trover. It was inſiſted, that the Property was gone by the Taking, ſo as the Plaintiff Cro. E 824. pl. 25. Paſch. 43 Eliz. C. B. S. C.

cannot diſpoſe of the Beaſts, and therefore the proper Action is Treſpaſs. And of this Opinion was Daniel; but others e contra, and that he had Election to bring either of the Actions at his Pleaſure. And ſo it was adjudg'd for the Plaintiff. Cro. J. 50. pl. 21. Mich. 2 Jac. C. B. Biſhop v. Lady Montague.

2. In Treſpaſs &c. the *Plaintiff declared, That he was robb'd of* 20 *l. and that he purſued the Robber to ſuch a Town, and there ſhew'd him to the Defendant*, who was *Conſtable, and he apprehended him, and finding the* 20 *l. about him took the ſame, and detain'd it in his Poſſeſſion.* The Defendant confeſs'd the taking the 20 l. as above; but that it being a Place of no Strength, he was carrying it to the next Town, and was robb'd of the Money. Popham thought the Plaintiff ſhould have brought Trover, and not Treſpaſs, to which the other Juſtices agreed. Owen. 120. Mich. 3 Jac. B. R. Walgrave v. Skinner.

(Z) Treſpaſs. *Of what Thing.*

1. THE Obligor **may have Treſpaſs** Vi & Armis againſt the Obligee, for taking of the Obligation. 20 H. 6. 24. b.

2. If he who has Charters *breaks the Seals*, Treſpaſs lies. Br. Treſpaſs, pl. 29. cites 33 H. 6. 26. 27.

3. Treſpaſs lies *of a Couple of* * *Hounds*, and of *Partridges*, and *Feaſants* taken; but he *ſhall not ſay Ad Valentiam.* Br. Treſpaſs, pl. 315. cites 8 E. 4. 5.

* Treſpaſs *of a Hound taken*, and the Defendant demurr'd in Law, and the Plaintiff recover'd 6 s. 8 d. for Coſts and Damages, notwithſtanding that the Hound be a Beaſt of Pleaſure, and fere Naturæ, and of which a Man does not pay Tithes, and Appeal of Felony does not lie thereof, nor Action of Detinue: But *if a Man takes it and kills it, Treſpaſs lies*; for when it is made tame the Maſter has thereof a Property, and it may be Pleaſure or Profit to the Owner, as to guard his Houſe, or to kill Deer or Vermin &c. quod nota. Br. Treſpaſs, pl. 407. cites 12 H. 8. 3.

4. Treſpaſs by the Lady Wiche againſt the *Parſon* of D. who *took a Coat Armor, certain Pendants with the Arms* of Sir Hugh Wiche her Baron, *and a Sword in a Chapel where he was buried*; the *Parſon ſaid that he took them as Oblations.* Yelverton ſaid, I have a Seat in the Chancel, and have a Carpet, Book, and Cuſhion, and the Parſon ſhall not have thoſe Choſes in Action. Per Pigot, the Parſon cannot take a Grave-ſtone. Quære, for by the Reporter Oblations ſhall be taken according to the Intent of the Donor. Br. Treſpaſs, pl. 181. cites 9 E. 4. 14.

5. Treſpaſs lies of a *Hawk, Popinjay, Thruſh, Ape* &c. which are *made tame.* Br. Treſpaſs, pl. 507. cites 12 H. 8. 3.

For the taking of a *Hawk* (*reclaim'd*) a Man ſhall not have Treſpaſs, but Trover and Converſion. And the Count ought to be that he is reclaim'd; and is not ſufficient to ſay he was poſſeſs'd of him as of his proper Goods. F. N. B. 86. (L) in the New Notes there (f)

6. If a Man *draws Wine out of the Veſſels and puts Water in the ſame to fill them up again*, he ſhall have an Action of Treſpaſs. F. N. B. 88. (F.)

7. In Treſpaſs for *taking a Greyhound with a Collar*, the Defendant pleads *that the Dog was courſing an Hare in his Land, and therefore he took and led him away.* Whereupon the Plaintiff demurred; and adjudg'd for the Plaintiff, becauſe the Plea is frivolous. Whereby it ſeems Treſpaſs lies. Cro. J. 463. pl. 10. Hill. 15 Jac. in B. R. Athil v. Corbet.

8. Treſ-

8. Treſpaſs will lie againſt a Man *for frighting another out of his Money*. As where ſeveral Perſons threatned to ſend A. to Newgate by Colour of a Warrant, and to indict him of Perjury unleſs he would give them Money and a Note, which he did through their Threats. And every *Extortion* is an actual Treſpaſs. Per Holt Ch. J. 11 Mod. 137. Mich. 6 Annæ B. R. The Queen v. Woodward.

(A. a) Treſpaſs. *At what Time* it lies.

1. IF a Man marries by Nieſe **I ſhall not have Treſpaſs ſuppoſing the Treſpaſs at the Day after the Marriage, for then ſhe was free by Marriage before.** 46 E. 3. 6. Fitzh. tit. Laborers, pl 24. cites S. C.

2. If a Man takes my Goods, and after I grant them to another, **yet I may have Treſpaſs for the taking.** 42 E. 3. 2. If one takes my Goods, and afterwards I have my Goods again, yet I may have a General Action of Treſpaſs, and upon the Evidence the Damages ſhall be mitigated. 13 Rep. 69. per Cur. in Caſe of Leydon v. Smith cites it as the better Opinion in 11 H. 4. 23.

3. It was agreed, that if a *Man be indicted, arraign'd and acquitted of Robbery* of J. S. he ſhall not have thereof Treſpaſs, for the Treſpaſs is extinct in the Felony, and Omne majus trahit ad ſe minus; Quære inde. Br. Treſpaſs, pl. 415. cites 31 H. 6. 15. See (Y 3) pl. [6] 24.

4. If an *Act* be *made Felony by Statute*, as *Hunting* or the like, *and after a Man offends in it and then the Act is repeal'd* by Statute, there the Hunting is diſpuniſhable; for there the Law by which it ſhall be tried is repeal'd. But where *Treſpaſs* is done *upon a Termor*, and after the *Term expires*, the Treſpaſs is puniſhable; for there the Intereſt expires, but not the Law. And ſo ſee a *Diverſity* where *the Intereſt expires*, and the *Law remains*, and where the Law is repeal'd and does not remain. Br. Corone, pl. 202. cites 2 M. 1.

5. If I limit Uſes and revoke them and *limit new Uſes*, the Uſes ſettle without Entry or Claim; yet not ſo as to bring Action of Teſpaſs. Per Bridgman Ch. J. Cart. 78. Trin. 18 Car. 2. C. B. in Caſe of Thomaſin v. Mackworth.

(Aa. 2) At what Time. *Before Poſſeſſion had* by the Plaintiff of the Thing taken.

1. IF a Man have *Waif and Stray* within his Manor by Preſcription, and another Man takes the Waif or Stray out of the Manor &c. he who has the Manor ſhall have an Action of Treſpaſs for them &c. and that without any Seiſure of them before. F. N. B. 91. (B)

2. If a Man have a *Wreck* by Preſcription, or by the King's Grant &c. if Goods be wreck'd upon his Lands, another takes them away, he who has the Wreck ſhall have an Action of Treſpaſs Quare vi & Armis for this taking without Seiſure thereof before. F. N. B. 91 (D)

3. If an Abbot or other Man has a Hundred, and has all *Felons Goods* within the Hundred, if any Felon within the Hundred be attainted, and the Sheriff takes the Goods of the Felon within the Hundred, he who has the Hundred and ſuch Liberty ſhall have an Action of Treſpaſs againſt

againſt the Sheriff for the Goods which the Sheriff took, and the ſame ſhall be Quare vi & Armis &c. F. N. B. 91. (F)

Fol. 558.

(B. a) Treſpaſs. In what Caſes it may be *juſtified.* Juſtification *for the Publick Good.*

2 Bulſt. 60 S.C. —Cro. J. 321. S. C. — Brownl. 224. S. C.

1. IN Treſpaſs for entring his Land Pedibus ambulando for Hunting and digging the Land, the Defendant cannot juſtify this, and the Digging of the Land by Reaſon of the Hunting a Badger, and to draw him out of his Hold, tho' he fills up the Hole again with Earth afterwards, tho it be for the Publick Good. Tr. 11 Ja. B. R. between *Gedges and Minn.*

See Tit. Hunting (A) pl. 4.

2. In a Treſpaſs Quare Clauſum fregit & herbam &c. The Defendant cannot juſtify this Treſpaſs for Cauſe of Hunting the Fox. Mich. 37 B. between *Nicholas and Badger* by Fenner.

3. Treſpaſs for *digging his Land*, the *Defendant ſaid that it is* 4 *Acres adjoining to the Sea, in which all the Men of Kent have uſed Time out of Mind when they fiſh in the Sea, to dig in the Land adjoining, to pitch Stakes to hang their Nets to dry.* Nele ſaid he ought to ſhew what Men. Per Choke and Littleton, this is no Cuſtom; for it is contrary to common Right and Reaſon. But per Danby, Fiſhers may juſtify the going upon the Land to Fiſh; for this is for the Common Weal, and for the Suſtenance of ſeveral &c. and it is the Common Law, quod fuit conceſſum; but per Fairfax the *Digging is the Deſtruction of the Inheritance*, therefore it is no Cuſtom &c. Br. Cuſtoms, pl. 46. cites 8. E. 4. 18. 19.

For the Common-Wealth a Man may juſtify Treſpaſs as *to enter the Land of J. N. to make a Bulwark* &c. per Kingm. Juſtice. Br. Treſpaſs, pl. 213. cites 21 H. 7. 27.

4. Treſpaſs of cutting of Graſs, the Defendant ſaid that there is ſuch a Cuſtom in the County of Kent, that *when any Enemies come to the Sea, it is lawful for all the Men of Kent to come upon the Land adjoining to thoſe ſame Coaſts, in Defence and Safe-guard of the Country, and there to make their Trenches amd Bulwarks for the Defence of the ſame Country*, and ſaid that at the Time of the ſame Treſpaſs Enemies came &c. by which they dug to make Trenches and Bulwarks &c. Per Jenney this is at Common Law to do ſo in *Defence of the Realm*; but Catesby Contra inde &c. quære. Br. Cuſtoms, pl. 45. cites 8 E. 4. 23.

5. Every Man may *arreſt a Nightwalker*; for this is for the Commonwealth; Per Huſſey and Fairfax. Br. Treſpaſs, pl. 416. cites 5 H. 7. 5.——And ſo it was agreed, 4 H. 7. 18.

6. In Treſpaſs for *taking his Horſe*; the Defendant juſtified *by Virtue of a Commiſſion* directed to the Conſtables *by the Poſt-Maſter General*, and that the Conſtables made a Warrant to him; and held good. Noy. 114. Garrons v. Banbury.

7. In Treſpaſs for *flinging down Materials erected towards the Building of a Houſe*; the Defendants pleaded that the Erection was for Building a Houſe *upon the King's Highway*, and that they threw down the Materials. And Holt Ch. J. ſeem'd to agree that the throwing down the *Nuſance* was juſtifiable. Comb. 417. Hill. 9 W. 3. B. R. Lovey v. Arnold.

(C. a) Treſ-

(C. a) Treſpaſs. *Impriſonment* juſtifiable. *By Officers Upon Warrants.*

1. IF the Sheriff arreſts a Man upon Proceſs, and lets him to Bail, and after returns a Cepi Corpus, and after a Habeas Corpus comes to the Sheriff to remove the Body, the Sheriff cannot juſtify the re-taking of him upon this Writ, after he had let him to Bail before, but he ought to aid himſelf upon the Bail. Mich. 10 Car. B. R. between *Lay and Strut* per Curiam in Action of Falſe Impriſonment upon ſuch Re-taking.

2. In a Falſe Impriſonment againſt a Tipſtaff of B. R. for impriſoning him for 3 Months, if the Defendant juſtifies for 6 Hours becauſe he was a Servant to Sir John Lenthall, the Marſhal of B.R. and appointed by him to attend and execute the Commands of the Chief Juſtice of B. R. for the Time being, and that there is a Cuſtom a Tempore &c. that ſuch Servant ſo appointed by the Marſhal for the Time being, had uſed to execute the Commands of the Chief Juſtice &c. and that after upon Complaint of J. S. to Sir Thomas Richardſon then Chief Juſtice, againſt the Plaintiff according to the Cuſtom in ſuch Caſe for the Chief Juſtice for the Time being, a Tempore &c. uſitatam, the ſaid Chief Juſtice mandavit eidem Mareſcallo quod caperet the Plaintiff & eum ſalvo cuſtodiret ita, quod haberet eum coram eodem Capitali Juſticiario quandocunque &c. ad reſpondendum de & ſuper his quæ ei ex parte dicti Domini Regis objicerentur in ea parte. By Force of which Warrant he took the Plaintiff as Servant to the Marſhal and by his Command, and detain'd him by the Space of 6 Hours, and after, at the End of the 6 Hours, deliver'd him to the ſaid Marſhal Salvo Cuſtodiendum quouſque. This is a good Juſtification, tho' this Warrant was by Parol and not in Writing, it being by Cuſtom, and tho' No Cauſe was expreſs'd in the Warrant, inaſmuch as it is alleg'd to be according to the Cuſtom, and it may be greatly prejudicial to the King's Service to expreſs the Cauſe in the Warrant; and tho' the Warrant is ita quod haberet eum coram eodem Capitali Juſticiario quandocunque &c. yet it is good; for it is uſual in Warrants of Sheriffs to be with an &c. * and the Signification of the Words Quandocunque &c. is Quandocunque the Party, who complains, will complain againſt him, and tho' the Defendant does not make any Anſwer, what the Marſhal did with him after his Delivery of the Plaintiff to his Cuſtody, but he only ſays, that he is not conuſant of it, yet the Plea is good; for if the Marſhal afterwards detains him unjuſtly, yet the Defendant is excuſed, becauſe he has done legally before. P. 11 Car. B. R. between Sir *George Throgmorton and Allen* adjudg'd upon a Demurrer. Intratur Tr. 11 Car. B. R. Rot.

* Fol. 559.

3. In falſe Impriſonment, the Defendant *ſaid that the Commiſſion of the King* ſuch a Day *was directed to him and others to take thoſe who were notoriouſly ſlander'd for Felonies or Treſpaſſes, notwithſtanding that they were not indicted*, and this is againſt Law, *and that the Plaintiff had wounded J. N. to Death by which they took them* &c. And admitted for a good Juſtification, tho' the Commiſſion be againſt Law, quod nota; And [tho'] a Man to whom the Commiſſioners directed their Precept to take the Plaintiff made this Juſtification upon the Matter, and not the Commiſſioners themſelves. Br. Faux Impriſonment, pl. 9. cites 24 E. 3. 9.

If a *Commiſſion* iſſues to take J. S. which is *contrary to Law*, and thereupon W. R. takes him, yet he ſhall be excuſed of Treſpaſs as to this Act, by this *void Commiſſion*. Br. Treſpaſs, pl. 372. cites 42 Aſſ. 5.

S. P. Br. Faux Impriſonment, pl. 12. cites 21 H. 7. 22.

4. It was agreed Arguendo, that where a *Capias Iſſues to the Sheriff without an Original, and he ſerves it*, falſe Impriſonment does not lie; for it is not the Default of the Sheriff; P er Hank. in Treſpaſs. Br. Faux Impriſonment, pl. 31. cites 11 H. 4. 36.

* S. P. And the Plaintiff ſhall have Remedy. Br. Faux Impriſonment, pl. 7. cites 21 H. 6. 5. per Paſton.

5. In Debt it was ſaid by Hill J. That if *the *Sheriff takes a Man by Capias, and does not return the Writ*, falſe Impriſonment lies; *but not againſt the Bailiff*, if the Sheriff does not return the Writ; for the Default of the Sheriff ſhall not condemn the Bailiff as it is ſaid elſewhere. Br. Faux Impriſonment, pl. 5. cites 11 H. 4. 58. —— A Common Bailiff arreſts a Man by the Sheriff's Warrant, Falſe Impriſonment lies againſt the Sheriff, and alſo againſt the Bailiff, if the Sheriff does *not return the Writ*; But if the Bailiff of a Liberty makes ſuch Arreſt, he ſhan't be puniſh'd tho' the Sheriff never returns the Writ, becauſe he is not Servant of the Sheriff; for the Sheriff can make no other Return than the Bailiff of the Liberty certifies him. Per Frowike Ch. J. But per Rede Ch. J. If a Common Bailiff makes Arreſt, and his Maſter does not return the Writ, the Maſter ſhall be puniſh'd, and the Bailiff not. Kelw, 89. pl. 12. 22 H. 7. Anon.

If the Sheriff does not return the Capias, Falſe Impriſonment lies; but otherwiſe it is of an *Attachment of Goods out of an Inferieur Court*, Becauſe the *Capias is conditional, but the Attachment General.* Arg. Lat. 223. in Caſe of Turvil v. Tipper cites 14 H. 7. 14. per Keble.

Fieri Facias & Capias ad reſpondendum, which have theſe Words *Ita quod habeas Corpus ejus hic* ad reſpondend' &c. *ought to be return'd* in Pain of Action of Falſe Impriſonment; but *Contra of Capias ad Satisfaciend'*, which has no ſuch Words in it. Br. Faux Impriſonment, pl. 12. cites 21 H. 7. 22. Per Kingſmill J.

If a *Conſtable* has a *Warrant to being a Perſon before a Juſtice of Peace to find Surety* of the Peace, and, *upon Refuſal to carry him to Gaol* &c.

6. In Treſpaſs of Impriſonment, the Defendant *juſtified by Warrant of the Peace to him directed to make the Plaintiff to find Surety* of the Peace. And it was held that he *ſhall ſay firſt, that he required him to find Surety, and he would not, by which he arreſted him*; for he ſhall not arreſt him if he does not refuſe to find Surety, and there it is agreed that he may arreſt him diverſe Times; for if he arreſts him, and he breaks from him, he may retake him, and ſo ſeveral Times; quod nota. Br. Faux Impriſonment, pl. 18. cites L. 5 E. 4. 12. if *upon carrying the Perſon before a Juſtice he refuſes* to give Security, the Officer without any New Warrant or Command may carry him to Priſon by Virtue of the Words of the Warrant, viz. (And *if he ſhall refuſe* &c.) 5 Rep. 59. a. b. Hill. 32 Eliz. B. R. in a Nota of the Reporter in Foſter's Caſe, alias Foſter v. Smith.

7. In Falſe Impriſonment, the Defendant *juſtified* the Impriſonment for a quarter of an Hour *by Capias directed to the Sheriff* againſt the Plaintiff, *who commanded the Defendant to arreſt him, by which he took him and did not ſhew Precept.* Per Moyle, where the Sheriff comes to arreſt a Man he need not ſhew Capias, but if the *Defendant demands his Warrant*, he ought to ſhew his Warrant; but Choke ſaid, No; for the Sheriff or Bailiff Errant who is known and ſworn, needs not ſhew Warrant, for the Party is bound to take Conuſance thereof; but where the Sheriff commands another to arreſt the Party, he ought to ſhew Warrant; for otherwiſe the Party may make Reſcous. Br. Faux Impriſonment, pl. 23. cites 8 E. 4. 14.

8. A Man may juſtify in Falſe Impriſonment inaſmuch as *Supplicavit came to the Sheriff, and he awarded Warrant to the Defendant to take him*, which he did, and yet the Sheriff cannot give his Power to another to take Surety there. Br. Faux Impriſonment, pl. 34. cites 9 E. 4. 30.

9. If *Action be brought againſt J. N. Son of W. N.* if the *Sheriff by Capias arreſts J. N. Son of T. N.* Action of Falſe Impriſonment lies, tho' the Party, who is arreſted, be *the ſame Perſon againſt whom the Plaintiff has Cauſe of Action*, which was agreed Arguendo in Detinue. Br. Faux Impriſonment, pl. 38. cites 10 E. 4. 12.

10. If the *Sheriff of London arreſts* a Man in London *by Capias directed Vicecomitibus Midd'* Writ of Falſe Impriſonment lies. Br. Privilege, pl. 44. cites 16 E. 4. 5.

11. Where

11. Where a *Juſtice of Peace awards Warrant* of the Peace, and *the Officer arreſts him, and will not ſuffer him to come before ſuch of the Juſtices of the Peace which he chuſes, to find Surety of the Peace, the Party ſhall have Action of* Falſe Impriſonment againſt the Officer; Per Fineux Ch. J. Brooke ſays, Quære inde; for as it ſeems, it is at the Diſcretion of the Officer to carry him before ſuch Juſtices as he will. Quære, if the Officer of Malice will *carry him to a Juſtice who inhabits* 40 *or* 60 *Miles diſtant*, where there are other Juſtices of Peace who inhabit within two Leagues [or 5 or 6 Miles] of the Place where he arreſted him. Quære, if Action upon the Caſe does lie or not. Br. Faux Impriſonment, pl. 11. cites 21 H. 7. 21.

12. If *Bailiff*, by Precept of the Sheriff, *arreſts a Man, and does not carry him to the Sheriff*, Falſe Impriſonment lies; Per Kingſ. J. Br. Treſpaſs, pl. 211. cites 21 H. 7. 22.

13. *A Juſtice of Peace cannot make a Warrant to arreſt a ſuſpected Perſon, unleſs he be indicted*; and yet if he does make ſuch Warrant, and the Bailiff ſerves it, he ſhall be excuſed; for they are Juſtices of Record. Br. Faux Impriſonment, pl. 33. cites 14 H. 8. 16.

S. P. *And this is a good Juſtification for him, notwithſtanding that the Juſtice err'd in awarding the Proceſs.* So where *the Sheriff errs in his Warrant, directed by him to the Bailiff* of Franchiſe. So of his own Bailiff; by 3 Juſtices, and after Fitzh. the fourth Juſtice did not deny it. Br. Faux Impriſonment, pl. 8. cites 14 H. 8. 16.

14. If the *Sheriff* takes J. S. by Force of *Proceſs* awarded *out of a Court, which has not Juriſdiction of the principal Cauſe*, he is a Treſpaſſor. But otherwiſe if the Court has Authority of the principal Caſe; there if the Proceſs be miſconceived, it is only erroneous; Per Manwood Ch. B. 2 Le. 89. pl. 112. in Caſe of Ognel v. Paſton.

But Trin. 34 Car. 2. B. R. it was ſaid by the Ch. J. and agreed to by the Court,

That if an Arreſt be by Proceſs out of an inferior Court, in a *Cauſe not ariſing within their Juriſdiction*, the Party arreſted may have Action againſt the Plaintiff, who ſhall be intended Conuſant where the Cauſe of Action aroſe; but not againſt the Judge or Officer who has enter'd the Plaint, or the Officer who has executed it, but the proper and juſt *Remedy is againſt the Plaintiff*. 2 Jo. 214. in the Caſe of Olliet v. Beſſey.

15. If the *Plaintiff commands the Sheriff to diſcharge the Defendant before his Impriſonment*, and makes to the Sheriff a Releaſe of that Suit, and yet the Sheriff impriſons the Defendant, it is falſe Impriſonment. And per Doderidge J. If the Caſe be, that the *Sheriff has no Conuſance of the Plaintiff*, and therefore refuſes to diſcharge the Priſoner, he muſt plead ſo. Cro. J. 379. pl. 7. Mich. 13 Jac. B. R. Withers v. Henly.

3 Bulſt. 96. S. C.—Roll Rep. 240. S. C.

16. If the *Sheriff has not any Writ, and makes a Warrant* to J. D. to arreſt J. S. Action lies for this Arreſt againſt J. D. and the Sheriff alſo. Per Jones J. Jo. 379. Hill. 11 Car. B. R. in Girling's Caſe.

17. Where a Capias iſſues out of an inferior Court, and *no Summons was firſt iſſued*, tho' upon a Writ of Error, this Matter is not aſſignable, becauſe a Fault in the Proceſs is aided by Appearance &c. yet Falſe Impriſonment lies upon the Arreſt. And an Officer cannot juſtify by Proceſs out of an *inferior Court*, in like manner as upon Proceſs out of the *Courts at Weſtminſter*. For ſuppoſe an Attachment ſhould go out of the County Court without a Plaint, could he, that executes it, juſtify? Yet a Sheriff may juſtify an *Arreſt upon a Capias out of C. B. tho' there was no Original*. But * Miniſters to the Courts below muſt ſee that Things be duly done; Per Hale Ch. J. and Judgment accordingly. Vent. 220. Trin. 24 Car. 2. B. R. in Caſe of Read v. Wilmot.

S. C. cited by Sir John Powell, Baron of the Exchequer, in his Argument in the Caſe of **Gwinne v. Poole**, 2 Lutw. 1565, 1566. but ſays, that this certainly is only

Proceſs inverſo Ordine, and *only erroneous*, and that it was ſo held in the Caſe of **Ward v. Ellain** Cro. J. 261. and ſo in Palm. 449. **Warget v. Larvey**, and that no Cuſtom of any Inferior Court will make this Proceſs good, and cites 2 Roll Abr. 277. **Banks v. Pembleton**, nor would it be ſo by the Cuſtom of London, but that it is confirm'd by Act of Parliament, and otherwiſe would be only erroneous; that where Proceſs iſſues out of an Inferiour Court without Plaint, it is only Error, cites 4 Le. 78. **Savage and Knight.** And Nota, there is no Authority cited by Hale to ſupport the Judgment in the Caſe of **Read v. Wilmot**, and there ſeems no Reaſon that Officers of Inferior Courts ſhould be more

more knowing than thoſe of Superiour Courts, to judge of the Legality of Proceſs under the Peril of being ſubject to an Action, and that it would be hard Doctrine; but the true Reaſon, why they are not liable, is, where the Court or Judge has Juriſdiction of the Matter, they are only Miniſters and cannot diſpute the Legality of the Mandates directed to them.

* S. P. by Mallet J. Mar. 118. pl. 195. Mich. 17 Car. in Caſe of **Dye v. Olive**; but Heath J. contra. And Bramſton Ch J. confeſs'd, that it was hard to puniſh an Officer for his Obedience to what he is bound to do; and that if he does an Act by Command of the Court, whether the Act be juſt or unjuſt, he is excuſed, in caſe the Court has Juriſdiction; but otherwiſe he is liable to an Action of Falſe Impriſonment. But the Caſe was adjourn'd.

2 Show. 148. pl. 131. Hill. 32 and 33 Car. 2. B. R. adjornatur. S. C. by the Name of Colcot v. Belchy.——Ibid. 204. pl. 214. Trin. 34 Car. 2. S. C. by the Name of Oliet v. Reſſey, adjornatur.

18. If a *Bailiff of a Liberty arreſts J. S. out of the Liberty*, and delivers him to the Gaoler of the Liberty, who detains him, yet the *Gaoler is not liable* to an Action of Falſe Impriſonment; for he knew not that the Arreſt was tortious, nor is he obliged to inquire about it. And if he had been *inform'd of it, (without being of the Covin or Practice in it)* yet he ought to detain J. S. being deliver'd to him with a good Warrant for the Arreſt, tho' the Execution of it was illegal; for had ſuch Information been falſe, the Gaoler, by letting J. S. at large, would be liable to an Eſcape. And a Judgment in C. B. was revers'd. 2 Jo. 214. Trin. 34 Car. 2 B. R. Olliet v. Beſly.

——S. C. cited per Powell J. in Caſe of Gwin v. Pool. Lutw. 1568 ——Skin. 49. **Elliot v. Beſey**, S. C. in B R. and it was argued againſt the Judgment in C. B. that if the Gaoler had ſuffer'd him to depart after the Bailiff had brought the Priſoner to him, it had been an Eſcape; and likewiſe if the Gaoler had refuſed him, it had been an Eſcape; ſo that to puniſh the Gaoler for an Eſcape if he refuſes him, and for Falſe Impriſonment if he receives him, is unreaſonable. And tho' their main Reaſon in C B. was, for that the Bailiff of a Liberty and the Gaoler were but one Officer, yet 'tis plain that is a Miſtake, as was ſaid here by the Court; and they ſaid, that in this Caſe the Gaoler ſhould be puniſh'd for doing but his Duty, and yet be without any Remedy. 'Twas ſaid by the Court, that in this Caſe, tho' Notice had been given to the Gaoler, yet 'twere not material. Upon this the Court pronounced their Reverſal, Niſi.——Lambert & Olliot v. Beſſey, Raym. 421. S. C. argued by Raymond J. who conceived the Judgment ought to be affirm'd.——Raym. 467. **Beſſey v. Olliet**, S C. and the ſame Argument of Raymond J. in Support of the Judgment of C. B. but ſays the other 3 Judges reſolved, That the Gaoler was not chargeable, becauſe he could not have Notice whether the Priſoner was legally arreſted or not, and yet he is compellable to take him into his Cuſtody, and if he lets him go it will be an Eſcape.——S. C. cited by Powell J. 2 Lutw. 1568. in the Appendix, in the Caſe of **Gwinne v. Poole & al'**. That the Gaoler not being Privy to the Tort, ſhall not be puniſh'd for doing his Duty in keeping his Priſoner.

19. If an *Officer intermeddles in, or does nothing but what belongs to his Office*, he is not liable to precedent tortious Acts. 2 Jo. 214. Olliet v. Beſly.

Vent. 369. **Hodſon v. Cooke**, S. P. in S. C. and ſays, that ſo it was ſaid to be reſolved

20. If an Action be brought in an inferior Court for a *Matter* which does *not ariſe within its Juriſdiction*, and the Defendant be arreſted thereupon, yet no Action will lie againſt the Officer that arreſted him, tho' it will againſt the Plaintiff. Skin. 131. pl. 6. Mich. 35 Car. 2. B. R. Per Cur. in the Caſe of Hudſon v. Cook.

18 Car. 2. in the Exchequer, when Ld. Ch. J. Hale ſat there, in the Caſe of Cowper v. Cowper.——2 Show. 328. pl. 335. S. C. but not S. P.——S. C. cited 2 Lutw. 1568. by Powell J. in his Argument in the Caſe of **Gwinne v. Poole**, and ſays he knows not any Authority againſt it, unleſs the Caſe of * **Martin v. Marſhall**, in Roll's Rep. which he ſays is a Miſ-report of that Caſe, becauſe the Ld. Hobart, who was Ch J. when this Judgment was given, reports it otherwiſe.

* Hob. 63. pl. 64. and 2 Roll 109. 116.

21. If one *has a legal and an illegal Warrant*, and arreſts by Virtue of the illegal Warrant, yet he may juſtify by Virtue of the legal one; for it is not what he declares, but the Authority which he has, is his Juſtification; per Holt Ch. J. 12 Mod. 387. Paſch. 12 W. 3. B. R. in the Caſe of Dr. Greenville v. College of Phyſicians.

22. If upon an *Eſcape-Warrant* a Priſoner is *taken by the Mob*, without any Officer, and deliver'd to the Sheriff, per Holt, 'tis as if there had been no Warrant at all; nor can the Sheriff detain him by grafting legal Impriſonment on an illegal one; if he does, Falſe Impriſonment will lie againſt him. He is bound not to receive him from any body but the Conſtable, or other Peace-Officer; but if ſuch affirms himſelf to be

be a Conſtable, he muſt believe him, and make Return accordingly; per Holt Ch. J. 6 Mod. 154. Paſch. 3 Ann. B. R. in Caſe of Rich v. Doughty.

(C. a. 2) Impriſonment. Juſtification. By Officers by Warrant. *Pleadings.*

1. *Deceptus de Facie* is no Excuſe for the Sheriff's arreſting a wrong Perſon by Virtue of a Writ. Arg. in the Caſe of **Dale v. Hill.** Built. 149. cites 13 H. 4. 2. Per Hankford.

2. In *Falſe Impriſonment* the *Defendant juſtified, becauſe B. F. Juſtice of Peace* &c. *found the Plaintiff guarding a Manor with Force and Arms, and arreſted him, and ſent him to the Gaol of L. where the Defendant was Conſtable, by Force of a Warrant* &c. *made to him by the ſaid Juſtice to receive him, by which he received and impriſon'd him there, prout* &c. *which is the ſame Impriſonment.* Yelverton ſaid, De ſon tort Demeſne abſque tali Cauſa, and held no Plea; for the Defendant juſtified by Matter of Record. Yelvert. De ſon tort Demeſne, abſque hoc that he impriſon'd him by Force of the Precept. Newton; As he had a Precept, it ſhall be intended that he did it by Virtue thereof. Yelverton ſaid, *he impriſon'd him, abſque hoc that the Juſtice of Peace made to him any Precept*; and the others e contra. And becauſe it was dubious how this Matter ſhould be tried, whether per Pais, or by Certificate of the Juſtice to certify it upon a Writ to him directed, therefore he *ſaid, That De ſon tort Demeſne abſque hoc, that the Juſtice of Peace illic ei miſit; and the others e contra.* Br. De ſon tort &c. pl. 16. cites 21 H. 6. 5.

3. And in 16 E. 3. the Defendant *juſtified to make Execution for Damages recover'd*; and the *other ſaid*, that *De ſon tort Demeſne abſque tali Cauſa.* And the Iſſue received, and P. 18 E. 3. accordingly; *for notwithſtanding his Authority, he may take the Goods de ſon tort Demeſne.* Nota bene, and Study of the beſt; and ſee the Book for the Pleading of the Bar above at large. Br. De ſon tort &c. pl. 16.

4. In Falſe Impriſonment the Defendant *ſaid, that Capias iſſued out of the Exchequer againſt the Plaintiff to the Sheriff of M.* to take the Plaintiff; *by which he took and impriſon'd him, by Virtue of a Warrant to him directed thereupon by the Sheriff, the Defendant being a Bailiff ſworn and known.* And the Plaintiff demurr'd, becauſe the Defendant did *not ſhew* * *Place where the Warrant was made, and* did not ſhew *if the Sheriff* † *return'd the Writ or not.* And as to the Place it is good by the beſt Opinion; for if the Plaintiff denies the Warrant, the Defendant may rejoin, That it was made at D. &c. And as to the Return, it is good; for the Bailiff cannot compel the Sheriff to return the Writ; but this is the Default of the Sheriff. But where the Sheriff himſelf juſtifies, he ought to allege, that he has return'd the Writ; but per Rede J. the *Defendant ought to ſay, that he return'd the Body to the Sheriff, or brought the Priſoner to him.* And then a good Juſtification, & adjornatur. Br. Faux Impriſonment, pl. 12. cites 21 H. 6. 22.

* In Treſpaſs of Aſſault, wounding, taking, and impriſoning, the Defendant as to the Taking and Impriſoning *juſtified by a Warrant from the Lord Mayor*; but *ſhews neither Time or Place when or where it was made.*

And per Cur. a Place ought to be alleg'd where the Warrant was made. Roll. Rep. 135 pl. 15. Hill. 12 Jac. Wilſon v. Dodd.——Ibid. 176. S. C. accordingly, and admitted by Coventry of Counſel for the Defendant.

† In Treſpaſs *of Impriſonment* the Defendant pleaded, *That he took the Body as Servant of the Sheriff, and by his Command.* And well, without ſhewing that his Maſter had return'd the Writ; for the *Laches of the Maſter ſhall not prejudice the Servant*; but contrary of the Maſter himſelf; Per Littleton. Br. Treſpaſs, pl. 339. cites 18 E. 4. 9.

5. Treſpaſs. *If a Serjeant arreſts a Man, and one comes in Aid of him,* or if the Party ſhews to the Serjeant, or the Sheriff, the Man who ſhall be arreſted, there, in Treſpaſs or Falſe Impriſonment, the Serjeant, or he who ſhews or comes in Aid, juſtifies as above. There the *Plaintiff ſhall not ſay, that De ſon tort Demeſne abſque tali cauſa, againſt the one or the other; but* ſhall traverſe *abſque hoc that he had ſuch Capias, or made any Reſcous,* or ſuch like &c. Br. De ſon tort &c. pl. 19. cites 2 E. 4. 6.

6. In Falſe Impriſonment the Defendant *juſtified, that he at another Day, after the Day in the Declaration, arreſted him by Warrant of the Peace, and carried him to the Gaol, abſque hoc that he was guilty before* &c. But it was ſaid, that the Juſtification is no Plea without ſaying, that he carried him to Gaol. Br. Faux Impriſonment, pl. 21. cites 5 E. 4. 5. 6.

7. In Treſpaſs the Defendant juſtified the Impriſonment *by Precept,* which came *from a Juſtice of Peace, by reaſon of a Supplicavit.* And the Plaintiff ſaid, that De ſon tort Demeſne &c. and ſo to Iſſue. Br. De ſon tort &c. pl. 40. cites 9 E. 4. 31.

8. In Falſe Impriſonment the Defendant *juſtified as Sheriff of M. and arreſted him by Capias,* Judgment &c. And per Catesby, this is no Plea, *without anſwering to the Falſe Impriſonment;* but it ſeems a good Plea, if he *ſays, that it is the ſame Impriſonment.* Br. Faux Impriſonment, pl. 29. cites 22 E. 4. 47.

9. In Falſe Impriſonment, where the *Bailiff makes an Arreſt,* De ſon tort Demeſne &c. is a good Plea. Contra where the *Sheriff himſelf makes the Arreſt, and is prohibited.* Br. De ſon tort &c. pl. 53. cites 16 H. 7. 3. Per Keble

10. Faux Impriſonment. The Defendant *juſtified, becauſe the Plaintiff ſaid to J. S. that the Mayor of Barnſtable was a Fool, which the Mayor hearing of, commanded the Defendant, being an Officer &c. to impriſon him.* And upon Demurrer it was adjudg'd no Plea; but for ſuch Words he might have bound him to his good Behaviour, but was not to impriſon him. Yet if the Mayor had been *in publick Place of Juſtice,* and he had call'd him by ſuch opprobrious Words, he might impriſon him. Cro. E. 78. pl. 38. Mich. 29 and 30 Eliz. B. R. Simons v. Sweete.

11. In Falſe Impriſonment the Defendant *juſtified, that he was Conſtable, and the Plaintiff being in the Preſence of a Juſtice of Peace, who, not having Opportunity to examine him, commanded the Defendant to take the Plaintiff into his Cuſtody till the next Day,* which he accordingly did, which is the ſame Impriſonment. It was adjudg'd a good Juſtification, tho' *not alleg'd what Cauſe the Juſtice had to impriſon the Plaintiff, or any Warrant in Writing, it being in the Juſtice's Preſence.* But the Juſtification is as proper for another as for the Conſtable. But becauſe the Defendant juſtified the 16th, where the Impriſonment is ſuppoſed the 15th, the Plaintiff had Judgment. Mo. 408. pl. 551. Trin. 37 Eliz. Broughton v. Mulſhoe.

12. In Falſe Impriſonment, if the Defendant *juſtifies by a Capias to the Sheriff, and a Warrant from him, there De injuria ſua Propria generally is no good Replication;* for then Matter of Record will be Parcel of the Cauſe, (for the Whole makes but one Cauſe) and Matter of Record ought not to be put in Iſſue. But he may reply De injuria ſua Propria, and traverſe the Warrant, which is Matter of Fact. *But upon ſuch Juſtification, by Force of any Proceeding in* the Admiralty, Hundred, or County *Courts* &c. *not being Courts of Record,* there De injuria ſua Propria generally is good; for all is Matter of Fact, and the Whole makes but one Cauſe; Per Cur. 8 Rep. 67. a. Mich. 6 Jac. in Crogate's Caſe.

13. In Treſpaſs of Faux Impriſonment *againſt a Sheriff and Bailiff,* they *juſtified by Warrant on Writ to the Sheriff.* The Plaintiff *replies, that no Writ was then taken out.* To which the Defendant demurr'd, and

Judgment

Judgment pro Plaintiff; for albeit the Bailiff has a Warrant, yet he is liable, if there be no Writ. Contra if the Writ be void, if deliver'd. 2 Keb. 705. pl. 69. Mich 22 Car. 2. B. R. Plucknett v. Grenes.

14. Treſpaſs of *Battery and Impriſonment.* The Defendant *juſtified by a Writ* out of B. R. directed to the Sheriff, *and a Warrant thereupon made to him.* The *Plaintiff demurr'd* ſpecially, *becauſe* it is *not pleaded, that the Writ was deliver'd to the Sheriff* as the uſual Form is. It was anſwer'd, that it need not be ſo pleaded; for if in Truth a Writ be ſued, tho' he made a Warrant before it came to his Hands, it is lawful; and the Precedents are both Ways, as **Dr. Bonham's Caſe,** Co. 8 Rep. and other Caſes cited; and of ſuch Opinion was Hales and all the Court, and gave Judgment for the Defendant. Levinz of Counſel for the Defendant. 2 Lev. 19. Mich. 23 Car. 2. B. R. Jones v. Green.

Saund. 298. **Green v. Jones,** S. C. and ſays, that it was inſiſted that the Plaintiff *ought to have replied, that the Arreſt was before the Bill of Middleſex deliver'd,* and then the Matter would come in Queſtion; but now the *Plaintiff by his Demurrer has loſt the Advantage* of it. And of ſuch Opinion was the Court, viz. that it ſhould be intended, that the Bill of Middleſex was deliver'd to the Sheriff before the Arreſt, and before the making of the Warrant; and that the Plaintiff ſhould have replied the contrary, ſpecially if it had not been true; and that by the Demurrer he has admitted the Delivery of the Bill, and the Court was ready to give Judgment for the Defendant; but gave the Plaintiff leave to diſcontinue on Payment of Coſts; becauſe, in Truth, the Bill was not deliver'd to the Sheriff till after the Arreſt, as the Plaintiff's Counſel inform'd the Court.

15. In Falſe Impriſonment &c. the Defendant *juſtified under a Latitat and Warrant, and Arreſt thereupon at* D. *Abſque hoc, that he is guilty at any other Place or Time.* The Plaintiff *replied De injuria abſque tali cauſa.* The Defendant demurr'd, and Judgment for him; becauſe upon General Demurrer it is ill to put Matter of Record, and Fact, and Variety of Matters in one Iſſue, as the Warrant, the Arreſt &c. Beſides the *Replication wanted* Concluſion, viz. *Et petit hoc quod Inquiratur* per Patriam; for the Replication in this Caſe ought to make Iſſue of itſelf, whereas here thoſe Words are wanting. 3 Lev. 65. Trin. 34 Car. 2. C. B. Furſdon v. Weeks.

S. P. 3 Salk. 357. pl. 15. Paſch. 9 W. 3. Anon. cites 3 Lev. 69.

16. In Treſpaſs and *Falſe Impriſonment, and detaining him in Priſon, quouſque finem fecit* ad Damnum 100l. The Defendant *pleaded Not Guilty as to all, except the Impriſonment*; and *as to that,* he *juſtified by a Non Omittas* &c. It was *aſſign'd for Error, that the* Defendant was charged for Impriſonment of the Plaintiff, quouſque *finem fecit* pro Deliberatione, which *is not anſwer'd*; for the Impriſonment only is juſtified, and not the Finem fecit. But the whole Court thought the Plea good notwithſtanding, becauſe he pleaded *Not Guilty as to all, beſides the Impriſonment.* Raym. 467. Trin. 34 Car. 2. B. R. Beſſey v. Olliot.

Skin. 50. **Elliot v. Beſey,** S. C. The Court as to this Point ſaid, that the Gaoler here was a diſtinct Officer from the Bailiff or Steward; and where it had been objected, that the Gaoler might, in this Caſe, have Action ſur Caſe againſt the Bailiff, the Court doubted of it. And where it was urg'd, that if the Gaoler keeps one impriſon'd for not paying unreaſonable Fees, that now the Impriſonment becomes falſe ab initio, the Court doubted of it.

17. In Treſpaſs, Aſſault, Battery, and Falſe Impriſonment, the Defendants *juſtified under a Plaint levied* againſt the now Plaintiff *in an inferiour Court,* for a Debt of 20l. and that a Capias iſſued, whereupon he arreſted him. The Plaintiff *replied, that the Cauſe of Action did not ariſe within the Juriſdiction* of the Court. And upon a General Demurrer Judgment was given for the Defendants. 2 Lutw. 935. 1506. Mich. 4 W. & M. in the Exchequer, Gwinne v. Poole & al'.

18. In Treſpaſs of Aſſault, Battery, Wounding, and Impriſonment, the Defendant, *as to the Aſſault and Impriſonment, juſtified as Bailiff under a Judgment and Execution in an inferior Court of Record,* and that he at D. Molliter manus &c. and arreſted him &c. The *Plaintiff demanded Oyer of the Execution, which appear'd to be ſued out more than a Year after the Judgment.* And then replied, that no Execution emanavit infra Annum. And upon Demurrer it was reſolved, That ſuing out the Execution

tion after the Year was not void, but only voidable by Writ of Error; ſo that till it is reverſed, it is a good Juſtification. 3 Lev. 403 Mich. 6 W. & M. in C. B. Patrick v. Johnſon.

19. In Treſpaſs, Aſſault, Battery, and *Falſe Impriſonment*, the Defendants, as to all but the Falſe Impriſonment, pleaded Not guilty; and as to that they *juſtify by Virtue of their Charter* confirmed by Act of Parliament, and by the Statute 14 H. 8. impowering them to fine and impriſon pro non bene utendo Facultate Medicinæ &c. and ſo juſtify the Impriſonment Pro mala Praxi, *by a Warrant in Writing* under the Hands and Seals of the Cenſors &c. The Plaintiff *replies De Injuria ſua propria, & Non Virtute Warranti prædicti*, & hoc petit quod inquiratur Per Patriam; And Holt Ch. J. who delivered the Opinion of the Court, held the Replication ill, and that the Plaintiff does not ſay there was no ſuch Warrant, nor traverſes it, but only ſays he was not arreſted by Virtue of it. If he had denied that there had been any ſuch Warrant, it had been a good Traverſe, for then the Defendant would not have had Authority to arreſt the Plaintiff; but if the Plaintiff was arreſted for other Cauſe, and not upon this Warrant, then the Plaintiff ſhould have ſhewn the other Cauſe; as if there were two Warrants, the one good, and the other ill, and the Plaintiff had been arreſted upon the ill one, he ought to ſhew it ſpecially, and a Traverſe that Defendant did not take him by Virtue of ſuch Warrant, is ill; but he *ſhould have traverſed that there was any ſuch Warrant*, or have *ſaid that it was granted afterwards, abſque hoc that there was any ſuch Warrant at the Time* of the Arreſt. Ld. Raym. Rep. 454. Eaſter-Term 11 W. 3. Groenvelt v. Burwell & al. Cenſors of the College of Phyſicians.

(D. a) Impriſonment juſtifiable by Officers. What ſhall be *good Cauſe of Juſtification* of Impriſonment by Officers.

1. IF a Man comes thro' a Vill, driving certain Beaſts, and a Hue and Cry purſues him, the Bailiff of the Vill may juſtify the Impriſonment of him &c. without other Cauſe, that is to ſay, of ill Fame. Suſpicion, or Indictment. 29 E. 3. 39. adjudged.

Br. Falſe Impriſonment, pl. 16. S. P. cites 5 H. 7. 4.—

2. If an Hue and Cry be levied upon a Man, it is good Cauſe of Impriſonment of him by an Officer, without any other Cauſe. 29 E. 3. 39 b.

And See Robbery (Z) per totum.

Cro. E. 222. pl. 2 Taylor v. Beale is not S. P.—

3. Upon a Suit in the Chancery between A. and B. if an Order be made by the Court that the Warden of the Fleet ſhall take B. and impriſon him for diverſe Contempts done to the Court till he has made an Obligation to A. and the Warden of the Fleet, by Force of this Order takes him accordingly, this is juſtifiable in an Action of Falſe Impriſonment againſt A. who comes in Aid of the Warden by Force of ſuch naked Commandment without Writ. Tr. 39 El. B. R. between *Taylor and Beale.*

And Le. 237 pl. 320. S. C. is not S. P.

4. Falſe Impriſonment againſt R. who came Vi & Armis, and beat and impriſoned him, the *Defendant ſaid that he was Conſtable, and the Plaintiff beat R. almoſt to Death*, by which *Hue and Cry was levied, and the Defendant would have arreſted him, and the Plaintiff refuſed the Arreſt, by*

by which the Conſtable took Power to arreſt him, and the Damage which he had was becauſe he diſturb'd the Arreſt; *and* to the Impriſonment he ſaid, that becauſe the Plaintiff beat R. almoſt to Death, *he impriſoned him by 4 Days, till he perceived that R. would live, and then he let him at large*; Judgment &c. and no more is thereof ſaid; and therefore it ſeems that it is a good Plea. Br. Faux Impriſonment, pl. 6. cites 38 E. 3. 6. And ſee 38 H. 8. that a Man cannot arreſt him after the Affray is over without Warrant. Contra before the Affray, and in the Time of the Affray &c. And ſo of a Juſtice of Peace.

5. A Man cannot juſtify Impriſonment by *Writ de Nativo habendo*, or by *Juſticies*; for thoſe are only Commiſſions to hold Plea, and the Body ſhall not be taken but by Proceſs out of Court of Record, and the Court of the Sheriff by thoſe is not of Record. Br. Faux Impriſonment, pl. 30. cites 2 H. 4. 24.

6. If the *Sheriff does not return the Writ*, yet the *Servant who makes the Arreſt, may juſtify*; for the Act of the Maſter ſhall not loſe the Juſtification of the Servant, Per Danby and Choke; but Moyle and Littleton contra, but agreed of the Bailiff of the Franchiſe that it ſhall not hurt him. And ſo after, that the Sheriff himſelf cannot juſtify without returning the Writ; and yet he may, Per Choke, in caſe the Parties notify to him that they are agreed. Br. Faux Impriſonment, pl. 23. cites 8 E. 4. 18.

7. If a Man *makes Aſſault upon the Conſtable, he may juſtify to arreſt him who made the Default*, and to carry him to Gaol for breaking the Peace, *tho' he himſelf be Party*, viz. the Conſtable upon whom the Aſſault was made; Quod nota. Br. Faux Impriſonment, pl. 41. cites 5 H. 7. 6.

8. A Man may arreſt J. N. *by Command of the Juſtices of Peace*, if J. N. be *preſent in Sight*, and not otherwiſe. Br. Faux Impriſonment, pl. 33. cites 14 H. 7.

9. If a *Conſtable by Warrant of the Peace from a Juſtice of Peace arreſts the Party, and brings him to the Juſtice*, who does not put him to find Surety, Action does not lie againſt the Conſtable. Br. Faux Impriſonment, pl. 12. cites 21 H. 7. 22.

10. Where a Man arreſts another, and *has no Warrant at the Time of the Arreſt, but after a Warrant is directed to him* for this Purpoſe, this is no Cauſe to juſtify; Per Cur. Br. Faux Impriſonment, pl. 8. cites 14 H. 8. 16.

11. In Falſe Impriſonment the Defendant juſtified, for *that* Sir R. L. the *Lord Mayor of London, and who was a Juſtice of Peace, commanded him, being Serjeant at Mace, pro diverſis cauſis eidem Majori bene cognitis, to impriſon the Plaintiff* &c. All the Court held it no good Plea; for the Cauſe of Impriſonment ought to be ſhewn, ſo as the Court may adjudge whether it were lawful, or not; for tho' a Magiſtrate may ſend for any to examine him, without ſhewing Cauſe in the Warrant, or telling the Officer what the Cauſe is, which might not always be proper to diſcover, yet when he is committed, the Cauſe is then diſcover'd. Cro. J. 81. pl. 4. Mich. 3 Jac. B. R. Boucher's Caſe.

Brownl. 204, 205. Mich. 3 Jac. Woody's Caſe ſeems to be S. C. and there the Court took Notice, that it did not appear whether the Commitment was by the Lord Mayor, as Mayor, or as Juſtice of Peace; and that his Power as Mayor was not known to the Court, but ought to be ſhewn in the Pleading.——S. C. cited 2 Hawk. Pl. C. 83. cap. 13. S. 11. by Name of Broucher's Caſe. And the Serjeant ſays it ſeems to be holden in this Caſe, That where an Officer arreſts a Man by Force of a Warrant from a Magiſtrate, pro certis Cauſis, without ſhewing any Cauſe in particular, he cannot juſtify himſelf in an Action brought againſt him for ſuch Arreſt, without ſetting forth the particular Cauſe in his Plea; and yet in this very Report it ſeems to be allowed, that ſuch a general Warrant is good; and if ſo, it ſeems ſtrange that the Officer ſhould not be juſtified by ſetting forth the Truth of his Caſe, ſince if there were no good Cauſe to juſtify the granting of the Warrant, the Magiſtrate ought to anſwer for it, and not the Officer.

12. In Treſpaſs of taking his Servant out of his Service &c. the Defendant *juſtified that A. was poſſeſs'd of Corn* at S. *and* that *the Servant, by*

Command of his Maſter, had *carried the ſame away*; and that the ſaid *A. deſired the Defendant, being a Conſtable, to detain the Servant* until he could get a Warrant from a Juſtice of Peace &c. And upon Demurrer the Plea was held ill, becauſe a *Conſtable cannot detain any* Perſon *but for Felony*. Brownl. 198. Mich. 11 Jac. Ringhall v. Woolſey, or Welſh.

2 Bulſt. 328. Hill. 12 Jac. S. C. accordingly.

13. In Falſe Impriſonment, the Defendant *juſtified, that he was Sheriff* of London, *and having arreſted one T. S. he eſcaped, and being in Purſuit after him* in February, *he met the Plaintiff about Nine at Night, who us'd him indecently, thruſting him againſt the Wall, and giving him ſcurrilous Language; and thereupon finding him wandring in the Street in the Night-time, and misbehaving himſelf, the Defendant impriſoned him*; and upon a Demurrer it was objected, that it was ill, becauſe Circa nonam Horam was uncertain as to the Time, neither was it a Time to be committed for a Night-walker, it being uſual for Men at that Time to be about Buſineſs; and that the uſing him uncivilly is too general, and the thruſting him againſt the Wall might be by Accident. Sed per Curiam, taking it all together, the Juſtification was good; but if it were ſo that the Thruſting him againſt the Wall was caſual, this ought to have come in the Replication, and not to have demurr'd; and Judgment per tot. Cur. againſt the Plaintiff. Roll Rep. 237. pl. 8. Mich. 13 Jac. B. R. Chune v. Pyot.

14. In Treſpaſs of Aſſault, Battery, and Falſe Impriſonment, the Defendant *juſtified as Deputy-Governor of the Iſle of Scilly, ſetting forth a Cuſtom there to chaſtiſe and puniſh by Impriſonment any Soldier* &c. *who neglects or misbehaves himſelf in his Duty, or obſtinately refuſes to obey the Orders of the Governor or his Deputy, and being required thereunto gives contumelious Words* to the ſaid Deputy Governor; and then ſets forth that the Defendant diſobeyed the Orders of the Deputy Governor, and gave him opprobrious Words, whereupon he impriſoned him Prout ei bene licuit; and upon Demurrer the Plaintiff had Judgment. 2 Jo. 147. Paſch. 33 Car. 2. B. R. Ekins v. Newman.

15. If a *Proceſs* be *unduly obtain'd*, and the Party, againſt whom it is had, be thereupon taken and impriſon'd, an Action of Falſe Impriſonment *lies* by the Party impriſon'd, *againſt him at whoſe Suit he is impriſon'd*, but *not againſt the Officer* who executes it. Mich. 24 Car. 1. B. R. L. P. R. 595. Tit. Falſe Impriſonment.

(Da. 2) Impriſonment. Juſtification by Officers without Warrant. *Pleadings.*

1. TReſpaſs of Wounding and Impriſonment, the Defendant *juſtified the Wounding that it was of the Aſſault of the Plaintiff and in his Defence, and the Impriſonment, becauſe the Defendant is Conſtable of the Vill, and the Plaintiff broke the Peace upon him, by which he took and carried him to the Gaol*; and the *Plaintiff ſaid*, that *De ſon tort demeſne abſque tali cauſa*; and a good Plea, becauſe *no Matter of Record was alleg'd* as Capias &c. For there De ſon tort Demeſne, is no Plea without more, viz. Traverſe of the Matter. Br. De ſon tort &c. pl. 18. cites 5 H. 7, 6.

2. In Falſe Impriſonment, the *Defendant arreſted the Plaintiff without Warrant*, and *after Warrant came to him, and he juſtified by the Warrant*; and the *Plaintiff ſaid*, that *De ſon Tort demeſne abſque hoc, that he had any ſuch Warrant*, and gave the Matter in Evidence; and the Warrant

was

was of a Juſtice of Peace to arreſt him. Br. De ſon tort &c. pl. 17. cites 14 H. 8. 16.

3. In Falſe Impriſonment, the Defendant *juſtified that York was a City by Preſcription, incorporated by Name of Mayor* &c. and *had Time out of Mind a Court of Chancery* for all Cauſes of Equity ariſing in the City *between the Citizens* &c. and that the Mayor had always uſed to direct *Precepts for Appearance, and to impriſon for Contempt* of Orders; *and that* a Bill was exhibited againſt the *Defendant*, who being ſummon'd did appear but *refuſed to anſwer*, and thereupon an Order was made that he ſhould anſwer or ſtand committed; and becauſe he ſtill refuſed to anſwer, the *Mayor commanded the* Defendant, who was *Serjeant at Mace, to take him, who* did ſo; and *brought him into Court, where he was in open Court committed*, and ſo juſtified &c. And upon Demurrer this Plea was adjudg'd ill, becauſe the *Preſcription* being laid for the Mayor *to direct Precepts* for Appearance, thoſe *muſt be underſtood to be in Writing*, but the Precept to the Defendant to arreſt the Plaintiff was by Word only, and if that were void which is made Part of the Cauſe of the Judgment the whole Plea is vitious tho' the Commitment in Court was good; beſides the Plea is ill in Subſtance, becauſe a Court of Equity did not lie in Grant and much leſs in Preſcription, as here it is alleged, it being a Juriſdiction to be derived from the Crown, and it had been reſolved by all the Judges of C. B. that the King could not grant to the Queen to hold a Court of Equity, and that the Courts of Chancery in Cheſter and Durham are Incidents to a County Palatine, which had Jura Regalia. Hob. 63. Martin v. Marſhall and Keys.

2 Roll Rep. 109 17 Jac. B. R. S. C. ſays the Demurrer was becauſe the Defendant did not aver that the Matter in Controverſy for which &c did ariſe and grow within the City, and therefore it was adjudg'd for the Plaintiff, and for the ſame Reaſon Judgment, was confirm'd in B. R. in a Writ of Error, and that in this Caſe Serjeant Hitcham ſaid that it was the Opinion of the Court of C. B. that a Court of Equity cannot be by Preſcription, but true it is, that in London they have ſuch Court, but their Cuſtoms are confirm'd by Act of Parliament; but e contra it was ſaid that the Court of C. B. gave no ſuch Opinion, and that Mountague Ch. J. demanded of Hitcham, why a Court of Equity may not be by Preſcription: and cited tit. Juriſdiction the laſt Plea, where it is held that a Court of Equity may be by Preſcription. Haughton J. ſaid, that the Cinque Ports have had a Court of Equity by Preſcription; but Hitcham ſaid that they have likewiſe an Act of Parliament for it in 7 H. 6. and that in the Chancellor of Oxford's Caſe, it is doubted whether a Court of Equity may be by Preſcription or not.—S. C. cited 2 Lutw. 1564. in the Caſe of **Gwinne v. Poole** in the Argument of Sir John Powell who ſays, Nota that this was for want of Juriſdiction in the Court as to the Proceſs, and that this was the Reaſon of the Judgment, and not for want of Averment, that the Cauſe aroſe within the Juriſdiction of the Court, as is ſaid in Roll Rep. 109 which Report he ſays is certainly miſtaken. ——— And Ibid. pag. 1568. ſays it is miſreported, becauſe the Lord Hobart, who was Chief Juſtice, when the Judgment was given, reports it otherwiſe.

4. In Treſpaſs, the Plaintiff declared that the Defendant 1 Apr. &c. Vi & Armis aſſaulted, beat, wounded and impriſon'd the Plaintiff for 2 Days &c. The *Defendant, as to the Aſſault Battery and Wounding, pleads ſon Aſſault demeſne*; and *as to the Impriſonment, except for* 11 *Hours, he pleads Not guilty*; and *as to thoſe* 11 *Hours he pleads in Bar that it was on the* 10 *January* &c. at the City of Coventry, in the County of that City, *and that he was then Sheriff* thereof, *and in the Execution of his Office, by watching the Common Gaol* there, *leſt the Priſoners ſhould eſcape*; *and that the Plaintiff at* 11 *a Clock at Night, being an unſeaſonable Time, ſtruck the Defendant with his Fiſt, and hinder'd him in the Execution of his Office, whereupon he, to keep the Peace, impriſon'd the Plaintiff till the next Morning, and then carried him before a Juſtice of Peace*, who bound him over to the Aſſiſes &c. And upon Demurrer it was objected that the *not anſwering to the Vi & Armis* had made both the Pleas ill. But the Court held that the Vi & Armis was only Matter of Form, and aided by the Statute 27 Eliz. Cap. 5. of General Demurrers. Saund. 81. Trin. 19 Car. 2. Law v. King.

2 Keb. 237. pl. 13. S. C. ſays that the Defendant traverſed, abſque hoc, that he was guilty on the 1ſt of April, or at any other Time before or after while he was Sheriff, or at any other Place. To which the Plaintiff demurred. And per Curiam this Traverſe is ſufficient, and the Plaintiff muſt reply, and ſhew if there were any other Aſſault or Impriſonment; alſo the traverſing the Time before, and after, does not lock up the Plaintiff from aſſigning another Day and Place, eſpecially the Thing being local. Twiſden on 1 Cro. 514. ſaid this would be a Departure. Judgment pro Defendant.

(E. a) Im-

(E. a) Impriſonment. *For what Cauſes* or Things thoſe Perſons may be impriſon'd.

1. A Man may impriſon another to prevent apparent Miſchief which may enſue.

Br. Faux. Impriſonment, pl. 28. cites S. C. That the

2. As a Man may juſtify the Impriſonment of Feme Covert againſt Baron, becauſe ſhe was mad and would have kill'd herſelf, or done other Miſchief, as Fire an Houſe or other Thing. 22 E. 4. 45. b.

Plaintiff brought Action of Impriſonment againſt the Defendant for impriſoning of his Feme; the Defendant ſaid that he declared [*to the Feme that her Baron was taken and impriſon'd] for a Scot, and the Feme *look'd as if ſhe had been mad or Lunatick, and* the Defendant *to avoid Miſchief, took her and put her in his Houſe for an Hour*, which is the ſame Impriſonment. And per Fairfax J. this is no Plea; for you cannot have the Jury to try your Conceit or Mind, which cannot be, but you *ought to ſurmiſe in Fact that ſhe was mad, and ſuppoſed that ſhe would have kill'd herſelf, or done other Miſchief, as burnt a Houſe.*

* Theſe Words are omitted in the large Edition.

S P. Br. Faux Impriſonment, pl. 28. cites S. C. ——

3. If a Man ſees two Men fighting, ſo that perhaps one would kill the other, it is lawful for him to part them, and put one in an Houſe till the Rage be over. 22 E. 4. 45. b.

It is ſaid that if a Conſtable ſees Perſons either actually enged in an Affray, as by ſtriking or *offering to ſtrike or drawing their Weapons* &c. *or* upon the very Point of entring upon an Affray, As where one ſhall *threaten to kill, wound, or beat another*, he may either carry the Offender before a Juſtice of Peace, to the End that ſuch Juſtice may compel him to find Sureties for the Peace &c. or he may impriſon him of his own Authority for a reaſonable Time, till the Heat ſhall be over, and alſo afterwards detain him till he find ſuch Sureties by Obligation. But it ſeems that he has no Power to impriſon ſuch an Offender in any other Manner, or for any other Purpoſe; for he cannot juſtify the committing an Affrayer to Gaol till he ſhall be puniſh'd for his Offence; And it is ſaid, that he ought not to lay Hands on thoſe who barely contend with *hot Words, without any Threats of Perſonal Hurt*, and that all, which he can do in ſuch a Caſe, is to command them under Pain of Impriſonment to avoid fighting. Hawk. Pl C. 137. cap. 63. S. 14.

4. But if he ſees 2 quarreling, and having many Words as if they would fight, yet it is not lawful to take the one or the other and put in any Place; for notwithſtanding the Words, the one will not peradventure ſtrike the other, and ſo it ſhall be intended. 22 E. 4. 45. b.

* As by chaſtiſing and beating him with Rods. Br. Treſpaſs, pl. 235. cites S. C. ——

5. If a Man be in a Rage and does a great deal of Miſchief, his Parents may juſtify the taking and binding of him in a Houſe, and there to uſe him in ſuch a Manner *as ſhall be reaſonable to reduce him to his good Senſe again; for it is for the Benefit of the Party and of all others for the Miſchief which he may do if he were at large. 22 Aſſ. 56.

Br. Faux Impriſonment, pl. 35. cites S. C —— In this Caſe the Defendant juſtified as above, abſque hoc, that he impriſon'd him in other Manner; and the other ſaid that De ſon tort demeſne &c. abſque tali cauſa. Br. De ſon tort demeſne, pl. 44. cites S. C. —— S. P. Br. Faux Impriſonment, pl. 28. cites 22 E 4. 45.

In Falſe Impriſonment, the *Defendant ſaid that the Plaintiff was Lunatick, and would have kill'd himſelf, or would have burnt a Houſe* in B. by which he took and impriſon'd him; the Plaintiff ſaid, that De ſon tort demeſne abſque tali cauſa, and the others e contra. Br. De ſon tort &c. pl. 51. cites 22 E. 4 45.

Br. De ſon tort &c. pl. 44. cites S. C. — Br. Faux Impriſonment, pl. 35. cites S. C. —— S. P. Ibid. pl. 44. cites 10 H. 7. 20.

6. In Falſe Impriſonment, the *Defendant juſtified becauſe the Plaintiff and others aſſaulted J. F. and beat him [almoſt] to Death, by which Hue and Cry was made, and the Defendant, as Steward of the Vill, him took, arreſted and kept, till they were aſſur'd of the Life of J. F.* &c. And the other ſaid that De ſon tort demeſne &c.. Br. Treſpaſs, pl. 235. cites 22 Aſſ. 56.

7. A

7. A Stranger cannot juſtify to arreſt a Man *by Command of the Sheriff without Precept*. Br. Faux Impriſonment, pl. 23. cites 8 E. 4. 14. per Needham.

8. A Man may arreſt a *Vagrant* and ſend him to Gaol; and a good Juſtification; per tot. Cur. Br. Treſpaſs, pl. 184. cites 9 E. 4. 26.

9. If I *ſee a Man going to kill J. N.* I may take and hold him from it; per Moyle and Needham. Br. Treſpaſs, pl. 184. cites 9 E. 4. 26.

Serjeant Hawkins ſays that any one may lawfully lay hold on another whom he ſhall ſee *upon the Point of committing a Treaſon or Felony*, or doing an Act which may manifeſtly endanger the Life of another, and may *detain him* ſo long *till* it may reaſonably be preſumed that he hath changed his Purpoſe. 2 Hawk. Pl. C. 77 cap. 12. S. 19.

10. In Treſpaſs of Falſe Impriſonment, the Defendant *ſaid that the Plaintiff felonioufly robb'd W. N. by which he took and arreſted him, and deliver'd him to the Conſtable of D. to carry him to Gaol*; and a good Plea, tho' he does not ſay that the Conſtable did carry him to Gaol, Contra of *Arreſt by Capias, and not returning the Writ*; for this is upon Condition Ita quod habeas Corpus ejus tali die &c. Br. Faux Impriſonment, pl. 24. cites 10 E. 4. 17.

So of *Lord* who *arreſts a Vagrant, and does not ſend him to Gaol*; for the Statute is that he ſhall ſend him to Gaol, but this Caſe it at the Common Law; *But* per Cur. *if he ſends him to Gaol by his Servant, who ſuffers him to eſcape*, Action does not lie againſt the Maſter; per Cur. And ſo if the Plaintiff had been *reſcued out of the Poſſeſſion of the Defendant*, Action does not lie for the Plaintiff; for there is no Default in the Defendant. Br. Faux Impriſonment, pl. 24. cites 20 E. 4. 17.

11. Where *a Man arreſts a Felon, and* offers him to the *Gaoler*, and he *will not receive him*, the Party himſelf may keep him. Br. Faux Impriſonment, pl. 25. cites 11 E. 4. 4.

12. In Falſe Impriſonment in B. the *Defendant ſaid that he was robb'd in another County, and the Voice and Fame was, that the Plaintiff did the Robbery, by which he arreſted him for Suſpicion* in the County of B. The Defendant ſaid that De ſon tort Demeſne abſque tali Cauſa; and well per Catesby; but per Brian and Townſend, he ſhall ſay that De ſon tort Demeſne, abſque hoc that there was any ſuch Felony done; & adjornatur. Br. De ſon tort &c. pl. 52. cites 2 H. 7. 3.

13. Where *a Juſtice of Peace ſees a Man who will break the Peace, he may take him and put him in Priſon*, and Action does not lie thereof. Br. Faux Impriſonment, pl. 12. cites 21 H. 7. 22.

And if a Juſtice of Peace *ſees a Man breaking the Peace, and lays his Hands upon him, and ſtays him*, and lets him go at large, yet Action does not lie thereof. Br. Faux Impriſonment, pl. 12. cites 21 H. 7. 22.

14. *Juſtices of the Peace cannot award Warrant to arreſt a Man, for that he had broke the Peace, but* they may award Warrant to arreſt him *for Fear that he will break the Peace for the future*; this is not for the breaking which is paſt. Br. Faux Impriſonment, pl. 41.

Serjeant Hawkins ſays it ſeems clear, that regularly no private Perſon can of his own Authority arreſt another *for a bare Breach of the Peace after it is over*; for if an Officer cannot juſtify ſuch an Arreſt without a Warrant from a Magiſtrate, a fortiori a private Perſon cannot. 2 Hawk. Pl. C. 77. cap. 12. S. 20.

15. A *Conſtable took a Madman, and put him in Priſon, where he died*, and the Conſtable was indicted of this, but was diſcharg'd; for the Act was legal. Cited by Glanvill. Arg. Ow. 98. Hill. 31 Eliz. C. B. in Caſe of **Beale v. Carter**, as a Caſe which he heard in that Court in 10 Eliz.

16. Treſpaſs for Falſe Impriſonment; the Defendant *juſtified as Conſtable* of A. *becauſe the Plaintiff brought a Child of 2 Months old, and laid it in the Church-yard* of A. to the Intent to have deſtroyed it, or to charge the Pariſh with the Keeping of it; for which he did arreſt him, and put him in the Stocks. And upon Demurrer it was held a good

Mo. 284. pl. 436. S. C. by Name of **Beale v. Carter**, that he juſtified

the Impriſonment till the Plaintiff agreed to retake the Infant; and

Juſtification; for it is an ill Practice, and is good Cauſe to ſtay the Plaintiff, and to impriſon him; and afterwards in the ſame Term, it was adjudged that the Plaintiff Nihil capiat per Billam. Cro. E. 287. pl. 1. Mich. 34 & 35 Eliz. B. R. Beal v. Charter.

adjudged good, becauſe the Plaintiff's Intent was felonious, and the Act of the Conſtable was only an Impriſonment to prevent the Felony, which he might do Ex Officio.—Le. 327. pl. 462. Beale v. Carter, mentions the Child not to be above 6 Years old, and the Bringing to be into the Church [And ſo is Mo.] to be left there. Exception was taken, becauſe the Plea ſaid (Quendam Infantem) without naming him, or ſaying (Ignotum) Sed non Allocatur. And the Plea being alſo, that the Plaintiff intended to have left the Child there, Exception was taken, becauſe he did not ſay that the Plaintiff departed from it; beſides, his Intention is not traverſable, nor can be tried by Jurors. Wray ſaid, If the Defendant had pleaded that he ſtay'd the Plaintiff to have carried him before a Juſtice of Peace, it had been good; and Fenner ſaid that the Juſtification had been good, if the Defendant had pleaded that the Plaintiff refuſed to carry away the Child; ſo all the Juſtices were of Opinion againſt the Plea, but they would not give Judgment by Reaſon of the ill Example, but they left the Parties to compound the Matter. ——Poph. 12. pl. 3. Anon. S. C. mentions the Child not above 10 Days old, and that the Plaintiff left it upon the Ground, to the great Diſturbance of the People there, and that Fenner held that what the Conſtable did was lawful; and Popham ſaid, that if one lays an Infant, which cannot help itſelf, upon a Dunghill, or openly in the Field, ſo that the Beaſts or Fowls may deſtroy it, the Conſtable ſeeing it, may commit the Party ſo doing to Priſon; for what greater Breach of the Peace can there be, than to put ſuch an Infant by ſuch Means in Danger of his Life? And what Diverſity is there between this Caſe and the Caſe in Queſtion; for no Body was bound by the Law to take up the Infant but he which brought it thither, and by ſuch means the Infant might periſh; the Default thereof was in the Plaintiff, and therefore the Action will not lie. And thereupon it was agreed, that the Plaintiff take nothing by his Writ.——Ow. 98. S. C. according to Le. 327.

Serjeant Hawkins ſays, it ſeems to be the better Opinion, That not only a Conſtable, but any private Perſon who ſhall ſee another *expoſe an Infant in the Street*, and refuſe to take it away, may lawfully apprehend and detain him till he ſhall conſent to take Care of it. 2 Hawk. Pl. C. 77. cap. 12. S. 19.

17. It ſeems clear, That *all Perſons* whatſoever who are *preſent when a Felony is committed, or a dangerous Wound given*, are bound to apprehend the Offender, on Pain of being fined and impriſoned for their Neglect, *unleſs* they were *under Age* at the Time. 2 Hawk. Pl. C. 74. cap. 12. S. 1.

(E. a 2) Impriſonment. Juſtification. By *Perſons not Officers*. *Pleadings*.

1. TReſpaſs *of Impriſonment*, the Defendant pleaded that the *Plaintiff aſſaulted him, and would have beat him, by which the Defendant came to the Conſtable, and pray'd him to arreſt him to find Surety of the Peace, who did ſo, and he came in Aid of the Conſtable*; Judgment ſi Actio, and admitted for a good Plea in the written Book. Br. Treſpaſs, pl. 79. cites 3 H. 4. 8. 9.

2. In Treſpaſs of Falſe Impriſonment, becauſe the Defendant aſſaulted, beat, and impriſoned the Plaintiff till he made Fine. The Defendant ſaid *that Actio non*; *for* he ſaid that *in the Time of the Rebellion of Jack Cade, one W. S. and other Malefactors* in the Vill of B. where &c. *made Inſurrection, and would have cut off the Heads of all that were not their Friends, and they took the Plaintiff, and carried him to the Croſs, and would have cut off his Head, and the Defendants came and laid their Hands peaceably upon the Plaintiff, and carried him to the Houſe of the Mayor, and prayed him to keep him in his Houſe all that Night, in Salvation of his Life, by which he was there all the Night, which is the ſame Aſſault*, Battery, and Impriſonment of which the Action is brought; and ſaid that he did not make any Fine &c. And the beſt Opinion was, that it is a *good Plea, without ſaying that the Rebels were there watching all the Night, ſo that they could*

could not let the Plaintiff at large ſooner than they did; *and* a good Plea, *without traverſing abſque hoc that they impriſoned him till he made Fine*; for then he traverſes that which he juſtified before, and alſo the Impriſonment ought to be anſwered; for otherwiſe he ſhall recover Damages for the one, and for the other. Br. Faux Impriſonment, pl. 3. cites 35 H. 6. 54.

3. Treſpaſs of Impriſonment; the *Defendant juſtified, becauſe he himſelf brought Action of Debt againſt the now Plaintiff in the Court of the Tower of London, and it was return'd Nihil*, by which *Capias iſſued to the Bailiff there to take the Plaintiff, and the now Defendant ſhew'd the Plaintiff to the ſaid Officer, by which the Officer took him by his Warrant*, and return'd Cepi Corpus &c. which is the ſame Impriſonment of which the Plaintiff has brought his Action; and the Plea was challeng'd, becauſe it is an Impriſonment by the Bailiff or Officer who arreſted him, but is no Impriſonment by the Defendant who ſhew'd him to the Officer; and ſo Per Cur. it is *no Plea, unleſs he ſays further that he required the Officer to arreſt him by his Warrant, by which he did it*, and then *this Requeſt, with the Arreſt by the Officer, is a lawful Impriſonment in him who required him*; Quod nota. Br. Treſpaſs, pl. 307. cites 4 E. 4. 36.

4. Impriſonment was *juſtified, becauſe the Defendant was in Company of Thieves, who had killed J. S. and the Voice and Fame was that he was guilty*. The *being in the Company* is traverſable, but *not the Voice and Fame*; Per Markham Ch. J. Br. Traverſe per &c. pl. 339. cites 7 E. 4. 20.—But ſee 11 E. 4. 4. 6. that the Iſſue was taken upon the Voice and Fame; Quod nota. Ibid.

Common Fame in ſome Caſes may be a good Juſtification, as appears by 2 H. 7. 5. 26

H. 8. 9. 7 E. 4. 20. But this is to be underſtood, if the *Cauſe* for which he was taken be *Publick*, but not where the Cauſe is *Private*, as for taking a Man's Goods in a private Manner, there he muſt ſhew ſpecially that the Goods were found with him, and in his Poſſeſſion, and not to go by Belief, and to give Credence to every particular Man, but he muſt ſhew ſome good and apparent Cauſe to the Court. Arg. Bulſt. 149. and ſays ſo is 7 E. 4. 20.———Ibid. 150. Per Croke J. The Difference is where an *Offence was committed*, and Suſpicion withal, Common Fame will excuſe, but not where no ſuch Offence was committed, in Caſe of Wale v. Smith.

5. In Treſpaſs the Defendant *juſtified the Impriſonment* of the Plaintiff, *becauſe he aſſaulted J. N. to have robb'd him*, by which the Defendant took him and put him in the Stocks. The Plaintiff ſaid that De ſon tort Demeſne abſque tali Cauſa; and a good Plea, and ſo to Iſſue. Br. De ſon tort &c. pl. 39. cites 9 E. 4. 27.

6. Treſpaſs of Aſſault, Battery, and Impriſonment at E. the *Defendant ſaid that a Man was robb'd by J. S. and R. ſuch a Day, who came to the Houſe of the Plaintiff, and the Conſtable arreſted the Plaintiff, becauſe he had Suſpicion of him, and becauſe he would not obey him, he commanded the Defendant to aſſiſt him, by which the Defendant put his Hands upon him*, which is *the ſame Battery*; *and after he went with the Conſtable to D. in Aid of him, and there delivered him to the Gaoler*, which is *the ſame Impriſonment* &c. and a good Plea; for it is as well the Impriſonment of the Defendant as of the Conſtable, and is not double, viz. the Power which every Man has to arreſt a Felon, and the Command of the Conſtable; but it is not good unleſs the Defendant *ſhews Suſpicion* in the Plaintiff, *as* to ſay that *he was a Man of ill Fame*, or a *Vagrant doing no Work*; by which he pleaded ſo. Br. Treſpaſs, pl. 335. cites 17 E. 4. 5. Br. Double, pl. 103. cites S.C.

7. Falſe Impriſonment againſt an Abbot, and Commoign; the Abbot *ſaid that W. S. came to him ſuch a Day and Year, and ſaid that he was in Doubt of his Life by R. who intended to kill* and deſtroy *him, and prayed his Advice and Counſel, who counſell'd him to go to T. N. Juſtice of Peace for a Warrant of the Peace*, by which he obtained a Warrant, whereby the Plaintiff was arreſted to the Peace; and the Officer ſaid that if he would not find Surety, that he would carry him before the Juſtice of the Peace. And the Opinion of the whole Court was, that the Plea amounts

amounts only to Not guilty; for the Defendant juſtifies no Impriſonment, and his Counſel was lawful. But per Rede, if he had *ſaid that he came in Aid of the Officer* &c. this had been a good Plea; quod non negatur. Br. Faux Impriſonment, pl. 17. cites 12 H. 7. 14.

8. In Falſe Impriſonment, it is no Plea *that diverſe Oxen were ſtole, and* becauſe *he ſuſpected the Plaintiff* that he had ſtole 6 Oxen, he arreſted him; for he ought to ſay preciſely that the Oxen were ſtole; for otherwiſe he cannot arreſt him. Per Fitzh. quod nemo negavit. Br. Faux Impriſonment, pl. 1. cites 27 H. 8. 23.

9. In Falſe Impriſonment, where the Defendant *juſtifies for ſeveral Cauſes*, and *ſome* of them are found *good*, and *others not*, the Defendant ſhall not be amerced for this Falſity; for there was good Cauſe for the Arreſt, and this is only a Defence, and not by Way of Action, as an Avowry is. Jenk. 184. pl. 77.

Fol. 560.

(F. a) Impriſonment. *Juſtification.* For what Cauſes it may be.

Br. Falſe Impriſonment, pl. 13. cites S. C.—Br. De ſon tort &c. pl. 46. cites S. C.

1. IF a Tenant by Knight-Service has 2 Sons, **and the** eldeſt is taken by the Scots, and carried out of the Realm in the Life of the Father, **and after the** Father dies, **the** Lord may juſtify the Taking the younger **Brother** as his Ward, till **the eldeſt comes back into England, and he has Conuſance of it. 22 Aſſ. 85. admitted. It ſeems it is intended, that he had not Conuſance in his Abſence whether he was alive or dead.**

2. A Man cannot juſtify the Impriſonment *of a Villein by Command of the Lord*, unleſs for Rebellion or Diſobedience. Br. Faux Impriſonment, pl. 40. cites 33 E. 3. and Fitzh. Tit. Treſpaſs 253.

(F. a. 2) Treſpaſs juſtifiable *by Officers.* [*By Warrant.*]

Cro. C. 394. pl. 6. S. C. accordingly, and the Court ſaid, that it is not like to an Officer's making an Arreſt by Warrant out of the King's Court, which, if it be Error, the Officer muſt not contradict, becauſe the Court

1. IF **there be** the Pariſh of D. and **there is alſo** a Vill call'd S. which in truth is within the Pariſh of D. but for **a long Time, that is to ſay,** 60 Years and more before the Statute of 43 El. cap. . of the Poor, and all Times after has been reputed a Pariſh by itſelf. **But the Church-Wardens of the Pariſh of D. conceiving that by Force of the Statute of 43 El. they had Power to** tax the Inhabitants of S. to the Poor of the Pariſh of D. **tax'd them accordingly; and thereupon, for Default of Payment thereof, have a Warrant from the Juſtices of Peace, according to the Statute, directed to the Church-Wardens to levy it. Whereupon the** Church-Wardens take a Diſtreſs of the Inhabitants of S. **who bring an Action of Treſpaſs, and the Church-Wardens** juſtify by Force of the Warrant of the Juſtices. **This is no good Juſtification nor Excuſe of the Treſpaſs, tho' they do it by Force of the Warrant of the Juſtices, and tho' (as was ſaid) they cannot diſpute the Authority of the Juſtices, inaſmuch as the Church-Wardens nor Juſtices have any Power to charge them, and ſo they ought to take Conuſance of the Law at their Peril.**

Hill.

Hill. 10 Car. B. R. between *Nichols and Walker* adjudg'd, upon a Special Verdict found at Bar. Tr. 10 Car. Rot. 222.

has a General Juriſdiction. But

here the Juſtices of Peace have but a particular Juriſdiction to make Warrant to relieve Rates well aſſeſs'd ——— Jo. 355 pl. 4. S. C. adjudg'd that Treſpaſs lay. ——— S. C. cited Arg. 4 Mod. 349. in the Caſe of Crump v. Holford.

2. If A. brings Action againſt B. in an inferior Court of Record, in which C. is Bail for B. and binds by Recognizance his Goods and Lands, That B. ſhall render his Body to Priſon if he be condemn'd, or that he ſhall pay the Money recover'd; and after Judgment is given againſt B. and a Precept is directed thereupon to the Baily of the Court in Nature of a Capias ad Satisfaciendum, to take B. if he be found, and in his Default to take C. And thereupon the Baily returns, That becauſe B. was not found, he took C in Execution; tho' by this Recognizance C. does not bind his Perſon, ſo that the Capias does not lie againſt him; and tho' a Capias does not lie at the ſame Time againſt the Principal and Bail by a Cuſtom, (as was alleg'd) but a Capias ought to be firſt againſt the Principal, and after a Scire Facias againſt the Bail; and tho' it was apparent in the Precept to be againſt Law, ſo that the Bailiff might have taken Notice of it, yet becauſe the Court had Juriſdiction of the Cauſe, and he did it by Force of the Precept of the Court, it ſhall excuſe him. Hill. 10 Car. B. R. between *Seaborne and Savaker*, adjudg'd. Per Curiam upon Demurrer. Intratur Tr. 10 Car. Rot. 572.

S. C. cited by Sir John Powell in his Argument in the Caſe of Gwinne v. Poole, 2 Lutw. in the Appendix 1563.

3. In Bill of Treſpaſs it is not denied by the Plaintiff, but that the Sheriff, by *Capias* awarded *upon Indictment of Treſpaſs*, may break the Houſe, or the Doors of his Cloſe, to ſerve the Arreſt. Br. Treſpaſs, pl. 248. cites 27 Aſſ. 37. but ſee thereof 18 E. 4. 4.

The Sheriff cannot break a *Houſe nor Cheſt*, to make Execution by

Fieri Facias; per Cur. But he may take the Goods or Body for Execution. Br. Treſpaſs, pl. 390 cites 18 E. 4. 4.

4. What an Officer does *by Colour of Juſtice or Office*, is excuſable. See Kelw. 66. b. pl. 8. 20 H. 7. Anon.

5. When a *Court has Juriſdiction* of the Cauſe, *and proceeds* Inverſo Ordine, or *erroneouſly*, no Action lies againſt the Party that ſues, or againſt the Miniſter of the Court that executes the Precept or Proceſs of the Court. Reſolved. 10 Rep. 76. Mich. 10 Jac. in Caſe of the Marſhalſea.

As in Treſpaſs the *Defendant juſtified taking of Beaſts in Execution, becauſe he*

was Bailiff of the Manor of D. and J. S. recover'd Damages upon Plaint againſt the Plaintiff in the Court-Baron; and the Defendant, by Precept to him directed, made Execution. The *Plaintiff ſaid, that J. S. ſued againſt him Plea of Franktenement there by Plaint*, where none ſhall anſwer of Franktenement there, unleſs by Writ, by which he *demurr'd* upon it; and yet the Court awarded Damages againſt him for not defending, and the Defendant took the Beaſts for the Damages, where the Judgment was *Coram non Judice*, and demanded Judgment, and pray'd Damages, and by Award he took nothing by his Bill; for the Officer ſhall not be grieved as here, for the *Judgment is not void; but ſhall have Error or Falſe Judgment*; *but* ſhall *not* have *Aſſiſe*; becauſe *the Land lies within the Juriſdiction of the Court*, tho' they ought to have held the Plea by Writ. Br. Treſpaſs, pl. 238. cites 22 Aſſ. 64.

So if the Sheriff *arreſts a Peer on a Capias in Debt out of C. B.* he is excuſable, becauſe the Court has Juriſdiction of the Cauſe. 10 Rep. 76. b. in Caſe of the Marſhalſea.

Treſpaſs againſt an Officer, who juſtified by a Proceſs out of an inferior Court; but becauſe the Cuſtom was not purſued, Judgment was againſt him. Hale Ch. J. took this Difference: If an Officer, for his Excuſe, *juſtifies by Proceſs according to Cuſtom, out of an inferior Court*, tho' the Cuſtom be bad, the Officer ſhall be excuſed, and the Judgment is not void, but voidable; but if the Cuſtom be not purſued, the Officer ſhall not be excuſed; as if a Cuſtom be alleg'd in a Court after a Plaint levied to take out Proceſs, and he alleges that Proceſs was taken out, (but alleges no Plaint levied) he is a Treſpaſſor. Freem. Rep. 356. pl. 449. Mich. 1673. Bennet v. Therne.

6. *But* when the Court *has not Juriſdiction*, all the Proceeding is Coram non Judice, an Action lies againſt them, without regard to Precept or Proceſs. Reſolved. 10 Rep. 76. in Caſe of the Marſhalſea. —2

As where Action is brought in a Court *of a*

Contract, which was *made out of* the Juriſdiction, *or of Land which lies out of the Juriſdiction*, and the Plaintiff or Demandant recovers, has Execution, there Treſpaſs lies; for it was Coram non Judice. Contrary here, and ſo a *Diverſity where the Court may have Juriſdiction* of the Thing by ſome Means, and where it cannot have Juriſdiction by any Means. Br. Treſpaſs, pl. 238. cites 22 Aſſ. 64. Bulſt. 64. Weaver v. Clifford, S. P. Per Fleming Ch. J. and Doderidge J.

But where a *private Act of Parliament erected a Court of Conſcience in B.* for all Matters under 40*s.* and *enacted, that all Judgments for ſuch Matters elſewhere ſhould be merely void*; yet a Judgment had in the Town-Court for a Matter under 40 s. where this Matter was not pleaded, is a Juſtification of the Officers for taking the Defendant in Execution. Carth. 274. Paſch. 5 W. & M. B. R. Prigg v. Adams.—2 Salk. 674. S. C. accordingly.——Skin. 350. 366. 407. S. C.

So if a Juſtice of Peace *does not obſerve in his Warrant all the Circumſtances preſcrib'd by a Statute*, yet if the Conſtable executes the Warrant he is excuſed, *As* the Statute of Car. 2. appoints, that all ſend their Horſes and Carts to work in the Highways, (not having a reaſonable Excuſe to the contrary.) If a Complaint be made to a Juſtice of Peace, that ſuch a Man did not ſend his Horſes &c. and he makes a Warrant; but mentions nothing in the Warrant of his having ſent for the Party to know his Excuſe, yet the Officer ſhall not be queſtion'd for executing it. Vent. 273. Trin. 27 Car. 2. B. R. Webb v. Batchilor.——Freem. Rep. 396. pl. 514. S. C. and the Court inclin'd, that the Officer was not liable, by reaſon of any Irregularity in the Juſtice's Proceedings, if it be a Matter whereof he has Juriſdiction.——Ibid. 407. pl. 533. S. C. and Judgment per tot. Cur. for the Defendant.——S. C. cited by Sir John Powell in his Argument in the Caſe of Gwynne v. Poole, 2 Lutw. 1563. and ſays, that Lord Hale there ſaid, That otherwiſe it would be making the Conſtable more knowing than the Juſtice.

7. If *Juſtice of Peace* makes a *Warrant to arreſt one for Felony, who is not indicted*, tho' the Juſtice errs in the Warrant of it, yet Falſe Impriſonment lies not againſt him who executes it. 10 Rep. 76. b. in Caſe of the Marſhalſea, cites 14 H. 8. 16. a.

8. No Action of Treſpaſs will lie againſt Officers for taking *Goods* or Cattle *by a Replevin, unleſs he who has the Poſſeſſion claims Property when the Officers come to demand them*, and they take them, notwithſtanding ſuch Claim of Property; and this ſpecial Matter muſt come in *by way of Replication* by the Plaintiff; Per Holt Ch. J. Carth. 381. Trin. 8 W. 3. B. R. in Caſe of Hallet v. Byrt.

9. *And* ſo there is a *Difference* between a *Replevin and other Proceſs*, in reſpect to Officers; for in Replevin they are expreſsly commanded what to take in Specie. But in Writs of Execution the Words are general, viz. To levy of the Goods of the Party; and therefore it is at their Peril if they take another Man's Goods; for in that Caſe an Action of Treſpaſs lies; Per Holt Ch. J. Carth. 381. in Caſe of Hallet v. Byrt.

5 Mod. 295. S. C. and per Cur. this is a Special Authority given by Act of Parliament to this Court of Conſcience, to commit &c but the Officer is not to detain the Perſon in Cuſtody till the Money is paid to him; for neither he or the Sheriff ſhould receive it, unleſs it is upon a

10. In Treſpaſs and *Falſe Impriſonment* for ſuch a Time, *quouſque the Plaintiff paid* 11*s.* The Defendant juſtified under the Statute 3 Jac. 1. cap. 15. for erecting a *Court of Conſcience in London*; and that on ſuch a Day the Court did order, That he ſhould be carried to the Counter, and impriſon'd until he paid 7 s. Debt, and 2 s. 6 d. for Coſts, by Virtue whereof the *Defendant, being an Officer, took him and detain'd him* 6 Hours. And upon Demurrer it was held, per Cur. that tho' the Defendant did not anſwer the Detaining, quouſque the Plaintiff paid 11 s. yet the Plea is well enough; for the Impriſonment, and not the Quouſque, is the Cauſe of Action; but the Quouſque is only Matter of Aggravation. And if he had ſaid nothing to the Money, the Juſtification had been good; and if, after Payment of the 9 s. 6 d. he had been detain'd, he ought to have replied it. But they held the Plea *ill, becauſe the Order was to carry the Plaintiff to the Counter*; and tho' *he confeſſes he detain'd him* 6 Hours, he *does not ſhew it was in the Counter*, or in carrying him thither. And this differs from the Caſe of a common Arreſt; for in ſuch Caſe the Officer may make any Place his Priſon, becauſe the Writ is Ita quod Habeas Corpus ejus Coram &c. apud Weſtm'. which is a general Authority; but here it is a Special Authority to carry him

to

to the Counter. 1 Salk. 408. pl. 3. Mich. 8 W. 3. B. R. Swinſted v. Liddall. Fi'. Fa'. And afterwards in

Hillary Term, for this Reaſon, Judgment was given for the Plaintiff.——Skin. 664. pl. 2. S. C. and Holt Ch. J. ſaid, If the *Plaintiff* would take Advantage, he *ought to ſhew that he paid the 9 s 6 d. and that the Plaintiff detain'd him afterwards*: otherwiſe the Quouſque is only in Aggravation, and ought not to be anſwer'd; and tho' it ſhould be a Variance, yet the Concluſion, Quæ eſt eadem Trangreſſio, aids it.——3 Salk. 219. pl. 6. S. C. by the Name of **Swinſtead v. Smith**, adjudg'd. And Holt ſaid, If the Detainer had been after Payment of the 9 s. 6 d. it had been material; but then the Plaintiff ſhould have ſet it forth in a Replication.

11. If there be *no Judgment*, and a *Ca'. Sa'.* or other Execution is taken out, the *Sheriff* and all other Perſons acting under him in the Execution are juſtifiable, tho' there be no Judgment. But if a Stranger of his own Head *interpoſes*, who is not concern'd, and he ſets on the Sheriff to do Execution, he cannot juſtify this. Or ſuppoſe it be the Plaintiff who ſued out the Writ, he muſt in his Juſtification plead the Judgment; for if there be no Judgment he is a Treſpaſſor; Per Holt Ch. J. in delivering the Opinion of the Court. 12 Mod. 178. Hill. 9 W. 3. B. R. in the Caſe of Britton v. Cole, cites Ray. 73. Turner v. Felgate.

12. Where a *Judgment* is *illegally enter'd*, and afterwards *Execution is ſued out* thereupon, *and executed*, the Officers who execute it are excuſed, but the Plaintiff is liable; for the Officers are in no Fault; they do but obey the Proceſs of the Court. 2 L. P. R. 260. Tit. Office and Officer.

13. In Treſpaſs for taking Goods, the Defendant *pleaded a Plaint in Replevin in the Sheriff's Court in London, and that he was Serjeant at Mace, and a Precept came to him to replevy thoſe Goods, which he did* accordingly. The Plaintiff demurred. And per tot. Cur. the Plea is ill for want of ſhewing a Return; for wherever a *Principal Officer* is to juſtify under a returnable Proceſs, he *muſt ſhew that the Writ was return'd* as he is commanded to do, and ſhall not be protected by it, unleſs he ſhews he paid a full Obedience in acting under it; but any ſubordinate Officer, as a Bailiff, may. In this Caſe the Defendant is a principal Officer; and this Proceſs, under which he juſtifies, was a returnable Proceſs; and Judgment was enter'd for the Plaintiff. Salk. 409, 410. pl. 5. Hill. 12 Will. 3. B. R. Freeman v. Blewit. 12 Mod. 396. Paſch. 12 W. 3. S. C. And ſays, That in all *Capias's ad Reſpondendum*, or other *mean Proceſs* to Sheriff, if Treſpaſs or Falſe Impriſonment be brought againſt him ſays, that becauſe the Piuries Replevin commands the Sheriff to replevy the Goods, vel Cauſam nobis ſignifices, therefore he muſt return the Writ, otherwiſe this Inconvenience might happen, (viz.) that if the Defendant ſhould appear, and be Nonſuit (for he is the firſt Actor) the Court would be at a Loſs how to give Judgment whether Pro Returno Habendo, or a Capias in Withernam, or a meer Nonſuit.——Ld. Raym. Rep. 632. S. C. adjudged accordingly.

for executing them, he cannot juſtify without ſhewing a Return.—3 Salk. 220. pl. 8. S. C.

14. An Arreſt of a *Criminal without a Warrant* cannot be made good by a *Warrant ſubſequent*. 2 Hawk. Pl. C. cap. 13. pl. 9.

(Fa. 3) Treſpaſs juſtifiable by thoſe *who are aiding Officers*.

Fol. 561.

1. IF a Latitat comes to a Sheriff to take J. S. and the Sheriff makes his Warrant to certain Bailiffs to arreſt him, and the Bailiffs arreſt him, and after the Arreſt J. D upon the Intreaty of the Bailiffs keeps the Priſoner in his Cuſtody till he is delivered by the Sheriff; this is good Matter of Juſtification for J. D. in an Action of Falſe Impriſonment brought againſt him by J. S. Hill. 11 Car. B. R. Cro. C. 446. pl. 11. Girling's Caſe. S. C. adjudg'd for the Defendant, notwithſtanding

it was objected that the Sheriff did not return the Writ.——Jo. 378. pl. 8. S. C. adjudg'd.

B. R. between *Girling and Allen.* Per Curiam adjudged upon a Demurrer. Intratur. Tr. 11 Car. Rot. 539.

See pl. 1. above.

2. If a Stranger after an Arreſt of a Priſoner by Bailiffs upon a Proceſs of Latitat, or Capias comes in Aid of the Bailiffs, and aſſiſts them to keep the Priſoner in their Cuſtody, and this upon the Command of the Bailiffs, it is juſtifiable by the Stranger in an Action of Falſe Impriſonment. Hill. 11 Car. B. R. in the ſaid Caſe of *Girling and Allen.* Per Curiam.

3. Treſpaſs of Battery by J. The *Defendant ſaid that J. wounded B. to Death and one W. a Conſtable* of the Ward *came to attach him, and he ſtood in Defence, and he came in Aid of the Conſtable*, and the Iſſ which he had, was De ſon tort demeſne &c. Judgment &c. The Plaintiff ſaid that De ſon tort demeſne &c. Br. Treſpaſs, pl. 110. cites 38 E. 3. 9.

4. Treſpaſs *againſt* 2 of a Horſe taken, *the one ſaid that he is Bailiff, and attach'd it by Plaint enter'd by R. againſt the Plaintiff*, and the *other ſaid that he came in Aid of the Bailiff.* Br. Treſpaſs, pl. 402. cites 41 E. 3. 29.

5. Aſſault and Battery by Husband and Wife againſt the Defendant, a Conſtable, and 2 others, who *pleaded to all but the Aſſault Not guilty, and as to that*, the Defendant *juſtified that the Wife was preſented in the Leet to be a common Scold; whereupon the Steward made a Warrant* to the Conſtable to puniſh her according to Law, *and the Defendants went to the Plaintiff's Houſe to execute the Warrant, and the Wife aſſaulted the Conſtable; wherefore he commanded the other Defendants to lay Hands upon her, and take her, which they did Molliter.* It was holden by the Juſtices to be a good Juſtification, altho' they *neither ſhew the Day when the Leet was holden, nor that the Plaintiff's Houſe was within the Juriſdiction* of the Leet, *nor the Steward's Warrant*; for that theſe were all but Inducements to the Bar and Juſtification, and the Subſtance is the Preſentment and the Command of the Conſtable. Mo. 847. pl. 1147. Hill. 13 Jac B. R. Curteys's Caſe.

6. Treſpaſs for *entering into Plaintiff's Houſe, and taking his Goods*; Defendant *juſtifies by* Virtue of a *Replevin* out of the Sheriff's Court in London, *and a Precept thereupon to J. S.* an Officer, *and Defendant came in Aid* of him. Plaintiff *replies, That before the taking away the Goods he claim'd Property in them, and gave Notice thereof to the Defendant.* And the Queſtion, upon a ſpecial Verdict was, whether the taking away after Claim of Property, and Notice thereof, did not make him a Treſpaſſor ab initio? And held per tot. Cur. That he was a Treſpaſſor ab initio; for tho' the Claim ought to be to the Sheriff or Officer, and that a Claim to a Perſon that comes in Aſſiſtance, be not enough to the making the Execution illegal, if the Officer does not deſiſt, yet if it be notified to him that comes in Aid, that Claim of Property is made, he at his Peril ought to deſiſt. 6 Mod. 139, 140. Paſch. 3 Ann. in B. R. Leonard v. Stacy.

7. It is a good Plea for a Stranger, that he enter'd into a Houſe in Aid of a Bailiff who had a Writ of *Execution*, and took the Goods, and *he need not ſay that he did it by Command or Deſire of the Bailiff*; For every one not only may, but is by Law, *bound to aſſiſt Officers in Execution of Juſtice.* 10. Mod. 24. Trin. 10 Ann. B. R. Templeman v. Caſe.

(Fa. 4) Juſtification by Officers. *Pleadings.*

1. TReſpaſs. *J. N. rid upon the Horſe of his Maſter to C. and there one affirm'd a Plaint againſt the ſaid J. N. and attach'd the ſame Horſe,* by which the *Maſter of the Servant brought Treſpaſs againſt the Bailiffs, who attach'd the Horſe* and recover'd by Award; for the *Defendant ſaid the Arreſt was by others and not by him, and did not traverſe the Tort done by him,* and ſo the Plaintiff recover'd; for the Officer is bound to know whoſe Goods he attaches. Br. Treſpaſs, pl. 99. cites 11 H. 4. 90.

2. The Defendant *juſtified* to make Execution upon the Land *as Officer of the Admiralty, for* the Sum of 20 *Marks there adjudg'd to J. N.* and the Plaintiff ſaid that *De ſon tort demeſne* without ſuch Cauſe. Yelverton ſaid, this is no Plea; for where a Sheriff juſtifies by Fieri Facias to him directed &c. it is no Plea that De ſon tort demeſne without ſuch Cauſe, quod Newton & tota Curia conceſſit; but if the Sheriff makes Warrant to his Servant, and he ſerves it, and juſtifies thereby, there De ſon tort demeſne is a good Plea againſt him; quod nota, *Diverſity being Matter of Record and Matter in Fact,* and *immediate Officer and other Officer,* andtherefore as here he was compell'd to anſwer to the Cauſe, per Cur. quod nota. Br. De ſon tort &c. pl. 14. cites 19 H. 6. 7.

3. Treſpaſs for *Beating and Impriſoning his Wife* &c. the Defendant *juſtified by Warrant from the Sheriff*; the Plaintiff replied *De injuria ſua propria abſque tali cauſa.* The Plaintiff had a Verdict, and it was mov'd for a Repleader, becauſe De injuria ſua propria is not a Plea to Matter of Record, but the Plaintiff *ought to have travers'd the Warrant*; but adjudged good after a Verdict. Raym. 50. Mich. 13 Car. 2. B. R. Collins v. Walker.

4. In Treſpaſs the Defendant, as Bailiff, *juſtifies by Warrant on Recovery in Aſſumpſit in Court Baron, not ſhewing the Cauſe* thereof *to ariſe within the Juriſdiction* of the Court; for which Cauſe the Plaintiff demurred, and per Cur. it is ill. 1 Keb. 840. pl. 26. Hill. 16 & 17 Car. 2 B. R. Hoyland v. Bacon.

5. In Treſpaſs of Battery, the Defendant *juſtifies by Proceſs to arreſt one Wood, and the Plaintiff would have reſcued him, whereupon he did Molliter Manus imponere*; the Plaintiff *replied De injuria ſua propria abſque hoc, that the Defendant had taken him by Virtue of ſuch Warrant as that by which the Defendant juſtified*; to which the Defendant demurred. And per Curiam the Juſtification is ſufficient, and better by the Admittance in the Replication, than if the Iſſue had been offer'd De injuria ſua propria generally without ſuch Traverſe; and Judgment pro Plaintiff. 2 Keb. 293. pl. 77. Mich. 19 Car. 2. B. R. Haywood v. Wood.

6. In Treſpaſs, the Defendant *juſtified by a Judgment in Ejectment, and an Habere Facias Poſſeſſionem, and Warrant thereon,* by which he was commanded to put the Plaintiff in Ejectment in Poſſeſſion, by Virtue whereof he enter'd into the Houſe &c. and took the Goods and put them in the Highway, *and the Plaintiff refuſing to go out,* he *thereupon molliter manus impoſuit to turn her out, and ſhe* de injuria ſua propria *aſſaulted him, by which he defended himſelf, abſque hoc that he was Guilty before the Warrant or after Return of the Writ*; the Plaintiff *replied De injuria ſua propria, without any Traverſe, or without ſaying Abſque tali Cauſa.* Reſolv'd upon Demurrer that this Replication was ill, becauſe De injuria ſua propria is no good Iſſue in any Caſe without the Words Abſque tali Cauſa; but in

this Caſe either the Writ of Poſſeſſion or the Warrant upon it ought to be traverſed. 2 Lutw. 1381. Paſch. 4 Jac. 2. Rodoway v. Lowder.

7. Treſpaſs for entring her Houſe and taking her Goods; the Defendant *juſtified by Virtue of a Fieri Facias againſt the Goods of one Dunn, and a Warrant thereon, by which he enter'd the Houſe and took the Goods aforeſaid.* And upon Demurrer the Plaintiff had Judgment, becauſe the Plaintiff counted of the Goods taken as of his own Goods, and the Defendant did *not aver that the Goods which he took were the Goods of Dunn*; *and* if he had made ſuch an Averment, yet he ſhould have alleg'd *that they came there by the Tort of the Plaintiff, or ſome other Matter by which he might juſtify the entring the Houſe* of the Plaintiff to take them. 2 Lutw. 1385. Trin. 4 Jac. 2. Gardner v. Peyton and Chapman.

8. Where an Action is brought againſt an *Officer*, or his Aſſiſtant, for executing of a Capias ad ſatisfaciendum, *he need not ſet forth the Judgment, but only the Writ and Warrant*; becauſe he is an Officer of the Court to execute the Proceſs of the Court; And if the *Proceſs* be *erroneous, or* there is *no Judgment to ground the Proceſs upon*, yet the Officer ſhall not ſuffer, for he doth but his Duty to obey the Court, who will protect him. But if the Action be brought againſt the *Plaintiff* in the Execution, he *muſt plead his Judgment.* Hill. 5 W. & M. B. R. 2 L. P. R. 259. tit. Office and Officer.

9. Treſpaſs Quare clauſum fregit & Averia cepit & aſportavit, the Defendant came and juſtified, and *pleaded a By-Law* &c. and that he, *as Bailiff, took* the Beaſts as a *Diſtreſs* for Breach of the By-Law by the Plaintiff; and upon prolix Pleadings, which were drawn up on the Precedent of **Tinteney's** Caſe in 1 Cr. and March, the Plaintiff demurr'd, and many Exceptions were taken, but in the Reſolution of the Court, Holt Ch. J. ſaid that the Pleadings are ill, becauſe that the Defendant had *not ſhewn a Precept* to make the Diſtreſs; for he could not do it *ex Officio*, no more than a Sheriff might execute a Judgment of B. R. without a Writ, and the Command in this Caſe is traverſable; for this is the *Difference* between a *Juſtification in Treſpaſs*, and an *Avowry in Replevin*, that the Juſtification there *is in the Right*, and therefore not traverſable. *But in Treſpaſs* it is only *by Way of Excuſe*; alſo *in Treſpaſs* it is ſufficient to ſay, *Præſentatum exiſtit, but in Avowry* he ought to *ſhew the Thing was done*, as well as Præſentatum exiſtit. Skin. 587. Mich. 7 W. 3. B. R. Lamb v. Mills.

10. *Treſpaſs againſt the Officers* will not lie for taking Goods &c. by Virtue of a Replevin unleſs he that has Poſſeſſion *claims a Property when the Officers come to demand them*, and they take them notwithſtanding ſuch Claim; and this ſpecial Matter muſt came in by Way of Replication by the Plaintiff; and ſo there is a Difference between a Replevin and other Proceſs of Law, with Reſpect to the Officers; for in the firſt Caſe, (viz.) in Replevin, they are expreſsly commanded what to take in Specie, but in Writs of Execution, the Words are general, (viz. To levy of the Goods of the Party, and therefore 'tis at their Peril if they take another Man's Goods, for in that Caſe an Action of Treſpaſs will lie. Per Holt Ch. J. Carth. 381. Trin. 8 W. 3. B. R. in Caſe of Hallet v. Burt.

(G. a) *Treſpaſs* ab Initio. What Act ſhall make a Man [*Officer or other*] Treſpaſſer *ab Initio.*

1. IF a Man enters into a Houſe by Authority of Law, and abuſes that Authority, he is a Treſpaſſor ab Initio for the firſt Entry; For it ſhall be intended that his firſt Entry was to this Purpoſe. Co. 8. *The ſix Carpenters.* 146. b. 11 H. 4. 75. b.

The Caſe was, That the Six Carpenters went to a Tavern, and drank a Quart of Wine which they call'd for, but went out again, and *refuſed to pay* for the Wine. 8 Rep. 146.

The *Non-payment* did not make the Carpenters Treſpaſſors; for that was a *Non-feaſance*, and no Non-feaſance ſhall ever make a Man a Treſpaſſor ab Initio; Per Coke Ch. J. Roll Rep. 130.——Non-feaſance cannot make the Party that has Authority or Licence by Law to be Treſpaſſor ab Initio. 8 Rep. 146. b. Mich. 8 Jac. The Six Carpenter's Caſe.

If a Man diſtrain *Corn* in Sheaves, *and threſhes it*, or comes to a *Tavern*, *and ſteals* a Hamper, in theſe Caſes they are Treſpaſſors ab Initio, and the very Entry is puniſhable, which at firſt by the Licence in Law was good. Otherwiſe it is of a *Licence in Fact*, as Yelv. J. ſays; for this excuſes the Entry, tho' tortious Act enſues, and the Party ſhall be puniſh'd only for this in which the Act is tortious, and for nothing more. Yelv. 96. Hill. 4 Jac. B. R. Bagſhaw v. Gaward.

If the Law gives a Man a Liberty to a certain Intent, and he uſes this Liberty to another Intent, or miſuſes it, he ſhall be a Treſpaſſor from the Beginning, if not that it be in ſpecial Caſes. Perk. S. 190.

The *Difference* is *between a Licence in Fact*, and a Licence *in Law*. Perk. S. 191.

2. As if Leſſor enters into the Houſe to ſee if Waſte be done, and there ſtays all Night, he is a Treſpaſſor ab Initio. * 11 H. 4. 75. b.

* Br. Treſpaſs, pl. 97. cites S. C.—Br. Replication, pl. 12. cites S. C.——Fitzh. Tit. Treſpaſs, pl. 176. cites S. C.——S. P. Br. Licence, pl. 17. cites 21 E. 4. 75.——So if he enters to ſee Waſte, and breaks the Hedge. Yelv. 96. Bagſhaw v. Gaward.

3. If the Purveyor of the King takes my Beaſts, as for the Houſhold of the King, and after ſells them in a Market, he is a Treſpaſſer ab Initio. 18 H. 6. 9. b.

8 Rep. 146. b. cites 18 H. 6. 19. b. [but is miſprinted, and ſhould be as in Roll. 18 H. 6. 9. b.]

4. If a Searcher ſearches certain Stuffs, and unpacks them, and lays them in the Dirt, by which they are impair'd, tho' the Search was lawful, yet this Abuſer of this Authority in Law will make him a Treſpaſſer ab Initio. M. 8 Ja. in the Exchequer. *Gibſon's* Caſe, Per Curiam.

Lane 90. S. C——S. C. Infra, pl. 17.

5. If a Man comes to a Tavern, and will be there all the Night, the Taverner is not bound to watch with him, nor wait upon him all the Night; and therefore if he prays him to go out, and he will not, but continues there all the Night, he is a Treſpaſſer ab Initio. * 11 H. 4. 75. b.

* Br. Treſpaſs, pl. 97. cites S. C.—Or if when he hath drank, he carrieth away the *Cup* without the Will of the Taverner, now he ſhall be puniſh'd for his firſt Entry; for it cannot be intended that his Entry was unto any other Intent but to ſteal the Cup; for the Law cannot judge his Intent againſt his Act done, ex poſt facto. Perk. S. 191.——S. P. Br. Treſpaſs, pl. 362. cites 22 E. 4. 5.

So if he breaks open a Hamper, or *ſtrikes a Servant* of the Houſe. Br. Replication, pl. 12. cites S. C.

6. If a Conſtable takes my Goods in his Will, being waiv'd by a Felon who robb'd me of them, and keeps them to the Uſe of the Owner; ſo that his firſt Act was lawful, tho' he refuſes to deliver them to me on Demand, he is not a Treſpaſſor ab Initio. Tr. 4 Ja. B. R. between *Walgrave and Skegnes.*

7. If a Man takes my Sheep Damage feaſant, and I tender him ſufficient Amends before the Impounding, and he refuſes it, and drives the Beaſts

So if I *tender* ſufficient Amends *be-*

fore the Diſtreſs, the Diſtreſs is tortious. **Beaſts to the Pound after, he is a Treſpaſſer ab Initio.** 13 H. 4. 17. b.

8 Rep. 147. in the 6 Carpenter's Caſe, and ſays that with this agrees 7 E. 3. 8. in the Maſter of St. Mark's Caſe; and that ſo is the Opinion of Hull in 13 H. 4. 17. b. is to be underſtood, which Opinion is not well abridg'd in Tit. Treſpaſs 180.

If the *Lord or his Bailiff comes to diſtrain*, and *before the Diſtreſs* the *Tenant upon the Land tenders the Arrears, a* Diſtreſs taken for it is tortious. 8 Rep. 147.

8. So **if he, who has diſtrain'd,** detains **the Beaſts** after Amends tender'd before the Impounding, **he is a Treſpaſſor ab Initio.** 45 E. 3. 9. b. **Contra Co.** 8. *Six Carpenter.* 147.

But if *after the Diſtreſs*, and before Impounding, it makes the Detainer, and not the Taking tortious, if *after Impounding*, it makes neither the one nor the other tortious. 8 Rep. 147.

* Jo. 226. pl. 2. S. C. adjudged accordingly. — Cro. C. 196. pl. 7. S. C. † Fol. 562. adjudged accordingly — 2 Vent. 96. in Caſe of Bealy v. Sampſon, Ventris J. ſaid that if the *Sheriff* upon Meſne Proceſs *refuſes Bail*, this does not make him a Treſpaſſor ab Initio, tho' he is liable to an Action upon the Caſe; and cited the Caſe of Salmon v Percival.——*So* if the Sheriff *detains* a Man taken upon Meſne Proceſs *after a Superſedeas*; Per Ventris J. 2 Vent. 96. cites Cro. E. 404. Stringer v. Stanlack, and Cro. J. 379. Withers v Henley.

‡ S. P. Agreed by all. Cro. C. 196 in the Caſe of Salmon v. Percival.

9. **If a** Serjeant of London arreſts J. S. **at the Suit of J. D. upon a Plaint enter'd in the Counter, upon which Arreſt** J. S. tenders Bail to the Serjeant, and prays him to go to the Court of the Counter to accept the Bail, **and the** Serjeant refuſes it, **yet Action of** Falſe Impriſonment **Vi & Armis does not lie, but he is put to his Action upon the Caſe; for this does not make him a Treſpaſſor ab Initio, the Caption being by** lawful Proceſs. **Tr. 6 Car. between** * *Salmon* † *and Percival.* **Adjudged B. R. Mich. 14 Car. B. R. between** *Feverell and Bridger.* **Adjudged per Curiam in Arreſt of Judgment, in Caſe of a Bailiff of another County. Intratur. Tr. 24 Car. Rot. where the Iſſue was upon the Refuſal; and the Court** held that it was ‡ not the Office of the Bailiff to take Bail, **but of the Sheriff or Under-Sheriff.**

10. [So] **if a** Capias for the Good Behaviour **be directed to the Sheriff by the Juſtices of Aſſiſe, and thereupon the** Sheriff makes a Warrant to J. S. **to take him who takes him accordingly, and the Party** tenders to J. S. ſufficient Bail **for his Appearance, and** J. S. refuſes it, **and keeps him in Priſon after, yet this does not make him a Treſpaſſor ab initio; for it was *not the Office of the Bailiff to take Bail, but the Sheriff himſelf ought to do it. P. 10 Car. B. R. between** *Adams and Bailie*, **Per Curiam, this being mov'd in Arreſt of Judgment. Intratur. H. 9 Car. Rot.** 109.

* See pl. 9. ‡

Cro. J. 147. pl. 6. Bagſhaw v. Goward, S. C. adjudged accordingly.—— Yelv. 96. S. C.——Noy 119. S. C. reſolved accordingly.

11. **If the** Lord of a Manor **that ought to have all Eſtrays there,** takes an Eſtray, and within the Year works it, **he ſhall be a Treſpaſſor ab Initio, becauſe it is not lawful, and he comes to the Cuſtody of him by the Law. H. 4 Ja. B. R. between** *Bagſhaw and Gallard*, **adjudged upon Demurrer.**

If a Man *takes Sheaves Damage feaſant, and after threſhes them*, by this he is a Treſpaſſer; and if he diſtrains Cows, and after milks them, or a Horſe, and after rides upon it, he is a Treſpaſſer. Br. Treſpaſs, pl. 392. cites 22 E 4. 47.———Br. Licence, pl. 17. cites 22 E. 4. 47.

12. **If the** Lord of a Fair **has uſed to have** Toll **upon every Sale, and for Non-payment of the Toll the Lord** ſeiſes one of the Beaſts ſo ſold, and works it, **this makes him a Treſpaſſor ab initio. Mich. 13 Ja. B. Per Hubard.**

Abuſer of Diſtreſs lawfully taken makes it a Treſpaſs ab initio. 1 Salk. 221. pl. 1. Hill. 2 W. & M. C. B. Gargrave v. Smith.——S. P. by Ventris J. 2 Vent. 96. in Caſe of Bealy v. Sampſon.

13. If

13. If the Cuſtom of a Vill be, that the Bailiffs of the Vill ſhall have 2 d. for every Hide of every Sheep, Cow, or Ox which is kill'd within the ſaid Vill, and for Non-payment of it to ſeiſe the Hides &c. and after the Bailiffs do take certain Hides for Non-payment &c. and tann them, and convert them into Leather; by this they are Treſpaſſers ab initio; for tho' they do it for Neceſſity, becauſe otherwiſe the Hides would putrify, yet this will not excuſe them, inaſmuch as the Damage by the Putrifying will be only to the Owner, and not to them; for they may have Action of Debt for the 2 d. M. 42. 43 El. B. R. between *Duncon and Reeve* adjudg'd.

Cro. E 783. pl. 21. S. C. adjudg'd for the Plaintiff accordingly; for by the Tanning the Property is quaſi alter'd, and the Marks to know them by are taken away from the Owner, ſo as he cannot have them again. But, per Popham, in ſome Caſes one may meddle with and u'e a Diſtreſs, where it is for the Owner's Benefit; as where one diſtrains Armour he may have it ſcour'd, to avoid Ruſt; ſo if one diſtrains Raw Cloth he may have it full'd, becauſe it is for the Owner's Benefit; but this Tanning is a Means of taking away the Thing itſelf.

14. If upon a Latitat a Warrant be made by the Sheriff to certain Special Bailiffs, to take the Body of the Party mention'd in the Writ, and they by Force thereof take him, and J. S. a Stranger, comes in their Aid, and by their Command, and after the Sheriff does not make any Return of the Writ, yet no Action lies againſt J. S. who comes in Aid of the Bailiffs, becauſe his Act was lawful, and the Default of the Sheriff in not returning the Writ ſhall not put him to Prejudice, and make him a Treſpaſſer ab initio. Hill. 11 Car. B. R. between *Girling and Allen* adjudg'd upon Demurrer, that no Falſe Impriſonment lies againſt J. S. who came in Aid, for the Cauſe aforeſaid. Intratur Tr. 11 Car. Rot. 539.

Cro. C. 446. pl. 17. Girling's Caſe, S. C. adjudg'd accordingly. — Jo. 378. pl. 8. S. C. adjudg'd accordingly.

15. But [And] if a Sheriff takes J. S. upon a Latitat, or other Capias in Proceſs at my Suit, and by my ſhewing, and does not return the Writ, a Falſe Impriſonment does not lie againſt me, becauſe I have not done any Wrong, nor is it my Default in not returning the Writ, nor was I the Servant of the Sheriff in Delivery of the Writ, and ſhewing of the Party to the Sheriff. Contra 8 E. 4. 17. b. by Moyle.

16. If a Sheriff, upon a Fieri Facias to him directed againſt J. S. makes a Warrant to J. S. [R. S.] to execute the Writ, and he does it accordingly, and after the Sheriff makes a Falſe Return, (ſcilicet, that the Writ came tarde to him &c.) by which he himſelf is Treſpaſſer ab initio, yet this falſe Return ſhall not make the Bailiff the Treſpaſſer, inaſmuch as it was legally done by him; and by this Execution by the Bailiff the Party, againſt whom it was executed, is diſcharged. M. 31. 32 El. B. R. between *Parks*, Plaintiff, and *Moſſe and How*, Defendants. Per Curiam. But adjudg'd H. 32. El.

Cro. E. 181. pl. 16. S. C. adjudg'd accordingly. — Mo. 352. pl. 473. Moſſe v. Backe, S. C. but S. P. does not appear. — Le. 144. pl. 20. S. C adjudg'd accordingly.

17. If J. S. be a Searcher of Stuffs, and certain Strangers come to the others as Servants to the ſaid J. S. to ſearch and unpack the Stuffs, and put it into the Dirt, by which it is much impair'd, though the Strangers did it without the Precedent Appointment, or Agreement of J. S. yet if J. S. after approves the Seiſure, without any Aſſent to the Abuſer, yet he ſhall be a Treſpaſſer ab Initio. M. 8. Ja. in the Exchequer. *Gibſon's Caſe.* Per Curiam.

Fol. 563.

Tho' by the *Abuſing* an Authority or *Licence in Facto*, a Man ſhall not be Treſpaſſer ab initio, but an Action on the Caſe lieth; yet for miſuſing an *Authority in Law*, Treſpaſs lieth ab initio. Lane 90. Gibſon's Caſe — S. C. ſupra, pl. 4.

18. If a Capias be directed out of an Inferior Court to the Officer of the Court, to take J. S. and he takes him accordingly, and does not return the Proceſs, he is a Treſpaſſor ab Initio, becauſe it is his own Default,

Default, inaſmuch as he himſelf is the Officer who ought to return it, and is as Sheriff within this Juriſdiction. Mich. 15 Car. B. R. between *Kirke and Atkins.* Per Curiam adjudged upon Demurrer, upon an Impriſonment in the Honour of Pevereil. Intratur Tr. 14 Car. Rot. 51.

[19.] 8. If a Capias in Proceſs iſſues againſt J. S. and the Sheriff takes him, and after returns Non eſt Inventus, he is Treſpaſſer ab initio, and Falſe Impriſonment lies againſt him. 8 E. 4. 18. 11 H. 4. 58.

The Diverſity is between Capias in Proceſs, and Capias ad Satisfaciendum;

[20.] 9. So if the Sheriff does not make any Return upon the ſaid Writ, Falſe Impriſonment lies againſt him; for he is Treſpaſſer ab initio; for the Writ is Ita quod Habeas Corpus ejus at the Day of the Return hic in Curia. 16 H. 7. 14. 3 H. 7. 3. b. 8 E. 4. 17. b. 9 E. 4. 3. 21 H. 6. 5. 18 E. 4. 9. b. Co. 5. *Hoe* 90. 2 H. 6. 26.

for if the Capias in Proceſs be not return'd, the Arreſt is tortious; becauſe there the Intent of the Arreſt is, that the Party ſhall appear and anſwer the Plaintiff. But in all other Writs of Execution, which are made by the Sheriff alone, if the Execution be duly made, it is good, tho' the Writ be not return'd; unleſs in Caſe of Elegit, where the Extent is made by an Inqueſt, and not by the Sheriff alone, it is otherwiſe. 5 Rep. 90. Trin. 42 Eliz. in the Exchequer, Hoe's Caſe.——And Ibid. 90. b. in a Nota of the Reporter, it is ſaid, that where the Words of the Writ of Fi. Fa. are Ita quod Habeas Denarios &c. thoſe are only Words of Commandment to the Sheriff to make Return; the which if he does not do he ſhall be amerced, but yet the Execution ſhall ſtand in force——Lane. 52. Trin. 7 Jac. in the Exchequer, in the Caſe of Doillie v. Joiliff. S. C. cited, and ſame Diverſity taken.

[21.] 10. Upon a Capias in Proceſs, if the Sheriff makes his Warrant to the Bailiff of a Franchiſe to execute it, who does it accordingly, and makes Return of the Body and Warrant accordingly to the Sheriff, and the Sheriff after does not return the Writ, yet this ſhall not make the Bailiff a Treſpaſſor ab initio, becauſe he has done his Duty, and no Default in him, and he is the Officer of the Franchiſe, and not of the Sheriff. 8 E. 4. 17. b. * 21 H. 7. 23.

* Kelw. 86. b.

The Bailiff is but the Sheriff's Servant, and has no Means to make the Sheriff to return the Writ, and the Arreſt made by the Bailiff was legal, and ſhall not be made illegal by the Sheriff's Act in not returning the Writ. See Cro. C. 447. Girling's Caſe.——Jo. 378. S. C.——Per Powell J. upon a meſne Proceſs the Bailiff who acts by a Warrant from the Sheriff is not liable in Treſpaſs, if the Sheriff does not return the Writ. 2 Vent. 95.

[22.] 11. [So] If a Capias in Proceſs be awarded to the Sheriff, and he makes his Warrant to a Bailiff Errant, who is ſworn, and a known Baily within the ſame County, to take him, and he does it accordingly; if the Sheriff after does not return the Writ, this makes him a Treſpaſſor ab initio, becauſe he is but the Sheriff's Servant, and therefore ought to be ſubject to the Tort done to the Party, as his Maſter is. 20 H. 7. 13. † 21 H. 7. 22. M. 14 Car. B. R. between *How and Stockenham* adjudg'd. Intratur P. 14 Car. Rot. 412. upon Demurrer.

† Kelw. 86. b.

[23.] 12. But in the ſaid Caſe, if the Bailiff Errant returns the Body and Warrant to the Sheriff, tho' the Sheriff does not return the Writ, yet he is excuſed. 20 H. 7. 13. b. by Read, and 21 H. 7. 22.

Cro. C. 446. pl. 11. Girling's Caſe, S. C. adjudg'd, that the Bailiffs are not Treſpaſſors ab initio.

[24.] 13. [So] If the Sheriff upon ſuch Proceſs makes ſpecial Bailiffs, and they take the Party, and the Sheriff does not return the Writ, tho' there be not any Default of the Bailiffs, yet they are Treſpaſſors ab initio, becauſe they are but Servants to the Sheriff, and by his Appointment. Contra H. 11 Car. between *Girling and Allen.* Per Curiam.

——Jo. 378. S. C. adjudg'd accordingly.——See pl. [22.] 11. Marg.

[25.] 14. If a Man makes his Executors and dies, and after the Executors find, amongſt other Goods of their Teſtator, an Obligation,

tion, by which their Teſtator was bound to J. D. and **they thinking that the Obligation was diſcharged, becauſe the Day of Payment was paſt,** break the Seal, **they are Treſpaſſors ab initio, tho' they come lawfully to it, ſcilicet, by Trover. Hill. 11 Ja. B. between** *Higginbottam and Stoddard* **adjudg'd.**

26. *If a Man may juſtify the Taking at one Time*, it cannot be tortious after without ſpecial Matter, as *Miſdemeanor after*, as it ſeems. Br. Treſpaſs, pl. 311. cites 7 E. 4. 3.

27. The *Defendant juſtified by Preſcription for* 10 *Load of Wood every Year to burn, and* 10 *Load to repair Pales between Michaelmas and Chriſtmas, abſque hoc that he is guilty before Michaelmas, and after Chriſtmas*; and the other ſaid that he cut the Day in the Declaration, abſque hoc that the Defendant and his Anceſtors &c. and travers'd the Preſcription, and if he *expends it in other Purpoſes* than in Burning or Repairing Pales, Treſpaſs lies; Quod nota *the Miſdemeanor after makes Treſpaſs to lie.* Br. Treſpaſs, pl. 318. cites 10 E. 4. 2.

28. If the Lord comes upon the Tenancy, and takes and chaſes away a Beaſt, and impounds it, the taking ſhall be deem'd as for a *Diſtreſs*; but if he * *kills the Beaſt*, this ſubſequent Act is a Declaration of his Intention ab Initio, and will make him a Treſpaſſer. 9 Rep. 11. a. Per Cur. in **Dowman's** Caſe, ſays with this accords 12 E. 4. 8. b. 28 H. 6. 5.

* S. P. Br. Licence, pl. 17. cites 21 E. 4. 75.

29. If there be *Lord, Meſne, and Tenant*, and the Lord *diſtrains the Beaſts of the Tenant* for Rents &c. paid by Meſne, if the *Lord will not ſuffer the Meſne to take the Beaſts of the Tenant out of the Pound*, he is a Treſpaſſor ab Initio. 9 Rep. 22. b. in B. R. in the Caſe of Avowry, cites 13 E. 4. 6. a. b.

30. If one takes a *Diſtreſs Damage feaſant, and drives it into another County, and* there ſells it, this makes him a Treſpaſſor ab initio. And. 65. pl. 139. Mich. 23 & 24 Eliz. Pleadall v. Knap.

So if ſuch Diſtreſs ſo taken, or taken for a *Rent Service*, be *miſuſed.* But quære if a Diſtreſs be taken for a *Rent-charge*, and be miſuſed. Perk. S. 191.

31. *Detainer* in his Houſe of one who comes there voluntarily is a *Caption*; Per Coke Ch. J. and Croke J. Roll. Rep. 241. Mich. 13 Jac. B. R. in Caſe of Withers v. Henley.

32. If the *Sheriff has not any Writ*, and *makes a Warrant* to J. D. to arreſt J. S. an Action lies for J. S. againſt J. D. for this Arreſt, and againſt the Sheriff likewiſe; Per Jones J. Jo. 379. pl. 9. Hill. 9 Car. B. R. in Girling's Caſe.

33. Action of Battery againſt a *Conſtable*, who had *made a Search* in the Plaintiff's Houſe *for ſtolen Goods, by* Virtue of *a Juſtice of Peace his Warrant*, to ſearch in all ſuſpicious Places; and upon the Evidence it appeared the Defendant in this Search *did pull the Cloaths from off a Woman's Bed*, then in her Bed, *to ſearch under her Smock*; And this was holden to be a Miſdemeanor in the Conſtable, and all with him, and did make all their Proceedings in this Place illegal from the Beginning. Summer Aſſiſes 1636. Coram Barkley J. Clayt. 44. pl. 76. Ward's Caſe.

34. If one impriſon'd be *detained by the Gaoler for not paying unreaſonable Fees*, it ſeems that this does not make it a Falſe Impriſonment ab Initio. Skin. 50. Trin. 34 Car. 2. B. R. in Caſe of Elliot v. Beſey.

35. In Battery and Impriſonment the Defendant juſtified by Attachment out of Chancery, that the Sheriff after Delivery of the Writ to him made his Warrant to him 27 May, by which he took the Plaintiff the ſame Day, and traverſed all Time before the Warrant or after the Return of the Writ. The Plaintiff maintain'd his Declaration and traverſed that the Writ was deliver'd to the Sheriff before the Battery and Impriſonment. The Defendant rejoin'd that before Return of the Writ he was deliver'd to the Sheriff, viz. on the ſaid 27 May, and that before the

the Arreſt he had no Notice of its not being deliver'd to the Sheriff. The Plaintiff ſur-rejoin'd, that *before the Arreſt the Writ was not deliver'd to the Sheriff*. The *Defendant rebbutted* as before, *that he had no Notice* &c. *Et de hoc ponit ſe* &c. Upon Demurrer, Judgment was given for the Defendant; For 1. It is not material whether the Writ be deliver'd to the Sheriff before the Warrant and Arreſt or not, ſo long as in Rei Veritate there is a Writ which warrants the whole. 2. There being a Writ and a Warrant thereupon, the Bailiff ſhall not be charged for the executing it; for he was neither privy nor had Notice of the Time of its Delivery to the Sheriff, and he has tender'd an Iſſue of Notice, which the Plaintiff has refuſed to accept. 3 Lev. 93. Mich. 34 Car. 2. C. B. Osborne v. Brookhouſe.

2 Mod 256. Trin. 4 Jac. 2. S. C but S. P. does not appear. —2 Vent. 169. Paſch. 2 W. & M. in C. B. the S. C. and mentions the Judgment in B R. but the S. P. does not otherwiſe appear there.

36. A *Fieri facias* was awarded againſt T. *teſted* 27 *April*, and afterwards, viz. the 28*th of April*, *he became a* **Bankrupt**, and the 29*th of April the Sheriff took the Goods by* Virtue of the *Fieri facias*; afterwards an *Extent iſſued out of the Exchequer*, *whereby the Goods are taken out of the Sheriff's Hands*; After which the *Commiſſioners* of Bankruptcy *make an Aſſignment* to the Creditors, and the *Aſſignee brings Treſpaſs againſt the Officers*, *who took the Goods by Virtue of the Extent*. The Court were of Opinion, that a Conſtruction ſhould not be made to make the Officer a Treſpaſſer by Relation; for the Taking was lawful at the Time, and **Baily and Bunning's** Caſe in Siderfin was agreed per Holt and Dolben; Judgment for the Defendant Niſi. Comb. 123. Trin. 1 W. & M. in B. R. Lechmere v. Thorowgood.

——Show. 12. Paſch. 1 W. & M. in B. R. the S. C. And the Court was clear that Treſpaſs lay not againſt the Officers, tho' Trover would againſt the Party. And Judgment for the Defendant.

37. Where it is apparent to the Officer, that the *Cauſe of Action aroſe out of the Juriſdiction*, he is a Treſpaſſor by executing it: Otherwiſe where it is not *apparent*. 1 Salk. 202. pl. 5. B. R. Lucking v. Denning.

Fol. 564. (H. a) Treſpaſs. *Juſtification by Officers.* Proceſs. Execution. What *Things done in Execution of Proceſs* may be juſtified.

1. IF the Sheriff arreſt J. S. upon a Latitat, **and he** eſcapes, **the Sheriff** cannot enter into the Houſe of J. D. and there break a Cheſt of J. N. after Demand of the Keys, to ſeek his Priſoner there, upon Information that he was fled into the ſaid Houſe: But he ought to take it upon him that he was in the Cheſt; **For otherwiſe the Sheriff upon ſuch Pretences may ſearch the Houſes of all Men within the County. P. 1 Car. between** *Bennet and Gray* **adjudged, the Declaration being that he was inform'd that he was in the ſaid Houſe &c. This is enter'd Mich. 22 Ja. B. R. Rot. 155.**

2. Treſpaſs of Goods taken &c. the *Defendant juſtified as Officer*, *becauſe A. recovered againſt W. N.* 10 *l. at B.* in a Fair *in the Court of Piepowders*, and he did the Execution, and ſold the Goods, and delivered the Money in Execution, and admitted for a good Plea. Br. Treſpaſs, pl. 244. cites 22 Aſſ. 90.

* S. P. Br. Treſpaſs, pl. 403. cites S. C. For it

3. If *Recovery in Aſſiſe is had in Ancient Demeſne of Land and Damages after a Fine thereof levied at Common Law*, ſo that the Land is made Frank-free, yet *the* * *Officer* who *ſerved the Execution for the Damages recovered*

covered in the Aſſiſe, ſhall not be blamed, nor the Lord who held the Plea, tho' the Recovery be Coram non Judice; for they are not bound to take Conuſance of the Fine; Quod nota. Br. Office & Off. pl. 6. cites 7 H. 4. 27.

is Actus Curiæ. —— Br. Execution, pl. 26. cites S. C. —— Br. Gage Deliverance, pl. 3. cites S. C.

4. In Replevin of taking Beaſts, it is a good Juſtification *that A. recover'd certain Land and Damages in Ancient Demeſne*, and that *he is Bailiff, and by Precept directed to him he made Execution*, viz. he *ſold the Beaſts and deliver'd the Money to the Plaintiff in Execution.* And a good Juſtification; for a Juſtification is to excuſe the Defendant of Tort only, and not to have Return of the Beaſts; but Avowry or Conuſance is to have Return Quod nota diverſitatem. And ſo ſee that it is admitted that *Bailiff in Ancient Demeſne* may ſell the Beaſts to levy a Sum to make Execution; *Contra* it was ſaid *in other Court Baron*, which is not Ancient Demeſne. Br. Juſtification, pl. 13. cites 7 H. 4. 27.

Br. Execution, pl. 26. cites S. C. accordingly, contra to the Opinion of 4 H. 6. 17.

5. In Treſpaſs the Defendant *juſtified by ſhewing the Land to the Sheriff to make there the View to the Demandant in a Writ of Formedon brought by this Defendant againſt this new Plaintiff*; and the Plaintiff ſaid that De ſon tort demeſne abſque tali Cauſa, and the Defendant ſaid that ſuch Cauſe, Priſt. &c. Br. De ſon tort &c. pl. 26. cites 10 H. 6. 8. and Fitzh.. tit. Iſſue. 60. Brooke adds Nota, that it was of a Houſe; and he ſaid that he *found the Doors open and enter'd and made the View.*

6. If *in Præcipe quod reddat* the Court *awards a Cape* by which the *Sheriff arreſts the Tenant*; he ſhall not have Falſe Impriſonment tho' they amend the Proceſs after into Grand Cape; for the *Act of the Court* ſhall not Prejudice the Party who ought to be obedient to the Commands of the Court. Br. Conſpiracy, pl. 1. cites 20 H. 6. 5.

Br. Juſtification, pl. 1. cites S. C.

7. Treſpaſs quare Clauſum fregit &c. the *Defendant juſtified becauſe the Plaintiff was amerced in the Court Baron of J. S. &c. and he by Command of the Court enter'd, finding the Houſe and the Cloſe open, and took for Diſtreſs.* And a good Plea, *without ſaying How the Cloſe was incloſed or open.* Br. Treſpaſs, pl. 439. cites 16 H. 7. 14.

For Land which lies open *without incloſure, is incloſed againſt every one who has no Intereſt there*; and his Writ ſhall ſay Clauſum fregit, and the *Precept in the Court Baron* is good by Parol. Br. Treſpaſs, pl. 439. cites 16 H. 7. 14.

8. Treſpaſs for *breaking his Houſe*; The Defendant *juſtifies* his Entry *Virtute Warranti of the Sheriff upon a Fieri Facias to levy ſuch a Debt De bonis, & catallis quæ fuerunt Philippi Biſcop Teſtatoris; tempore mortis in manibus Lucretiæ Biſcop his Executrix*; and ſays, *That the Executrix was in the Plaintiff's Houſe cum bonis ſuis, and for that the Door ſtood open, he enter'd to levy that Debt* &c. And it was thereupon demurred, and adjudg'd to be an ill Bar; becauſe he does not allege that Bona Teſtatoris were in the Houſe but Bona propria Executricis, which were not liable to Execution; but if Bona Teſtatoris had been there, it was conceived that the Entry had been juſtifiable. Wherefore it was adjudg'd for the Plaintiff. Cro. E. 759. pl. 30. Paſch. 42 Eliz. in C. B. Biſhop v. White.

9. By the *Common Law* no Houſe can be broken by the King's Officer at the Suit of a common Perſon (but otherwiſe *at the Suit of the King.*) But *by the Statute of 22 Jac. of Bankrupts*, Commiſſioners may break the Houſe of the other for Debt of the Debtor; And if Bankrupts *convey their Goods to a Neighbours' Houſe*, the *Commiſſioners* cannot, but the *Sheriff* may, break the Houſe, becauſe he is a ſworn Officer of the King. The Commiſſioners may break the *Booth or Ship* of the other to come at the Bankrupt's Goods. Per Mr. Barchdale Lecturer of Lincoln's Inn in Lent 1627. D. 36. b. Marg. pl. 41.

10. Sheriff on a Fieri Facias may *break* the Door of *a Barn, without Requeſt*, to take Goods in Execution, unleſs the Barn is adjoining and *Parcel of the Houſe.* Sid. 186. pl. 11. Paſch. 16 Car. 2. B. R. Penton v. Brown.

11. If there be a *Diſſeiſor of a Manor*, and a *Recovery in that Court-Baron*, the Officer may well juſtify executing the Proceſs; for he that is in Poſſeſſion is Dominus pro tempore. Freem. Rep. 204. pl. 207. Mich. 1675. Ward v. Bent.

(Ha. 2) Treſpaſs *juſtifiable.* [*Entry into Land or Houſe.*]

1. IF a Man ſeiſed of Land in Fee has certain Loads of Timber upon the Land and dies, his Executor may juſtify the Entry into the Land to take the Timber. 9 H. 6. 11.

2. So if the Executor ſells it to another, the Vendee may juſtify the Entry into the Land to take the Timber. 9 H. 6. 11.

3. If a Man has a Piſcary in another's Soil, he may juſtify the putting the Pales in the Soil, or doing other Thing. 20 H. 6. 4.

4. If certain Perſons unknown, in a felonious Manner, come into my Garden, and eradicate and pull up certain Apple and Pear Trees, and carry them away into the Houſe of J. S. and the Common Voice being that the ſaid Trees are in the Houſe of J. S. yet I cannot juſtify my Entry into the ſaid Houſe to take the ſaid Trees, inaſmuch as the ſtealing thoſe Trees being anner'd to the Franktenement, was not Felony, but only a Treſpaſs; and ſo the Caſe is no other; but that if the Trees had been taken by a Treſpaſſor and put into the ſaid Houſe, then it had not been lawful for me to take them without being a Treſpaſſor by my Entry. Mich. 16 Ja. B. R. between *Higgins and Andrews*, adjudg'd upon a Demurrer.

2 Roll Rep. 55. S. C. accordingly. — S.C. cited and adjudg'd accordingly. 2 Lutw. 1311. Baldwin v. Noaks. — *So* if A. *take* my Horſe, and carry him to the Land of B. 'tis not lawful for me to enter into the Land and take him. *But* if A. *feloniouſly ſteals my Horſe, and carries him into B's Land*, then I may juſtify my Entry into the Land, and retake him. 2 Roll Rep. 55. Higgins v. Andrews. — If *A. will carry my Horſe into his Stable*, I may juſtify my Entry into his Stable to retake him. But in the Caſe above, the Trees were carried away by a Stranger. Per Doderidge J. S. C. 2. Roll Rep. 56. cites 21 H. 6. 30. — If A. takes wrongfully the Goods of another, and carries them into A's *own Land*, the Owner may take them thence: But not out of the *Land of a Stranger*. *But* in no Caſe a Man can enter *within my Door* to take his Goods. Per Chamberlain J. 2 Roll R. 208. in Caſe of Maſters v. Poolie. — Becauſe every Man's Houſe is his Caſtle, into which another cannot enter without ſpecial Licence. Godb. 283. pl. 403. Mich. 18 Jac. B. R. in Pollye's Caſe.

5. But otherwiſe it had been, if the ſtealing of the Thing had been Felony, and I had upon freſh Suit taken it in his Houſe, this had been juſtifiable in a Treſpaſs againſt me. Mich. 16 Ja. B. R. in the ſaid Caſe of *Higgins and Andrews*, per Curiam agreed.

6. Treſpaſs by a Chaplain of a Chamber broken, and Gold Rings taken and carried into London; the Defendant *ſaid, that in London is a Cuſtom uſed*, Time out of Mind, *that when a Chaplain has a Feme in his Chamber, of whom a Man has an ill Suſpicion*, that Man *ſhall come to the Conſtable of the Ward*, or to the Beadle, *and enter the Chamber and ſearch*; and *that he was related to ſuch a Feme, and deliver'd the ſame Rings to the Feme, who brought them to the Chamber of the Chaplain, and there the ſaid Chaplain detain'd the Feme and the Goods by a great Time by which he and the Beadle enter'd the Chamber and ſearch'd and found the Goods, and carried them away, as lawfully he might*, Judgment, if Action of the Goods or breaking the Chamber ought he to have; and becauſe the Plaintiff by Poſſeſſion of the Goods for the Time had Property, therefore it was held a good Plea to the Goods, and to the breaking; quod nota, that this is Colour in itſelf. Br. Treſpaſs, pl. 74. cites 2 H. 4. 12.

7. If

7. If a *Vicar has Offerings at my Houſe or Chapel*, he cannot by Colour thereof break my Houſe or Chapel to take them out &c. Br. Treſpaſs, pl. 77. cites 2 H. 4. 24.

8. In Treſpaſs, the *Defendant ſaid that the Plaintiff diſtrain'd his Beaſts, and he ſued a Replevin, and came with the Sheriff to ſhew him the Beaſts, which is the ſame Treſpaſs &c.* Judgment Si Actio, and the Defendant imparl'd. Br. Treſpaſs, pl. 11. cites 3 H. 6. 37.

9. In Treſpaſs the Defendant juſtified, becauſe *J. S. was ſeiſed, and deviſed it to the Plaintiff for Life, and that the Defendant ſhould ſell the Reverſion* &c. and that he *found the Door open, and entered to ſee if there was any Waſte, and* to ſee *the* * *Value of the Houſe* to ſell it, and a good Plea; and 'tis there granted that ſuch Entry is lawful to ſee if Waſte be done, but he cannot break the Door nor Windows to enter. Per quod the Plaintiff replied that he broke the Door and Windows, and the other e contra. Br. Treſpaſs, pl. 16. cites 9 H. 6. 29.

* S. C. and P. cited 11 Rep. 52. a. in Lford's Caſe; quod fuit conceſſum per tot. Cur.

So if a Man is bound to repair a Bridge, he may *come upon the Land* of any one that *adjoins to the Bridge to repair the Bridge*, and this *without Licence* of them. Br. Treſpaſs, pl. 260. cites 43 Aſſ. 37. Per Knivet Ch. J.

10. In Treſpaſs *for Breaking his Cloſe and Hunting*, Defendant *pleaded Not guilty to the Hunting*; and *to the Breaking* he *ſaid that a Variance was between him and the Plaintiff for a Gorce, and he ſaw him Hunting in his Park, and entered by the Gate, which was open, to ſhew him his Evidence to the Gorce, which is the ſame* Breaking &c. and a good Juſtification by all the Juſtices; Quod nota. Br. Treſpaſs, pl. 23. cites 20 H. 6. 37.

Br. Juſtification, pl. 3, cites S. C.

11. If *Trees are blown down* by the Wind, it is no Treſpaſs to enter the Land into which they are blown down *to take them.* Lat. 13. Per Crew Ch. J. in Caſe of Millen v. Hawery, cites 6 E. 4. 7.

But if a Man *cuts Trees* in his own Land, which *fall into another Man's Land*, and he goes and takes them, Treſpaſs lies; Per Crew Ch. J. Lat. 13. cites 6 E. 4. 7.

12. If a *Man takes my Goods, and puts them upon his Land*, I may enter and retake them. *Contrary upon* * *Bailment* of Goods; Per Littleton. Br. Treſpaſs, pl. 186. cites 9 E. 4. 35.

S. P. Per Littleton; for in the one Caſe it is Tort, and in the other not. Br. Nuſance, pl. 14. cites S. C.

* When a Man *bails Goods to another to keep*, it is not lawful for him, tho' the Doors are open, to enter into the Houſe of the Bailee, and to take the Goods, but ought to demand them; and if they are denied, to bring Writ of Detinue, and to obtain them by Law. Br. Treſpaſs, pl. 208. cites 21 H. 7. 13.

13. A Man may break a Houſe *to take a Felon, or for Suſpicion of Felony.* Contra of Debt or Treſpaſs. Br. Treſpaſs, pl. 330. cites 13 E. 4. 8.

14. If 2 *are fighting in a Houſe*, I may juſtify Entry into the Houſe *to part them*, becauſe it is *for the Preſervation of the Peace*, which is a Thing that concerns the Commonwealth; Per Yaxley, quod Frowike Ch. J. conceſſit. Keilw. 46. b. pl. 2. Mich. 18 H. 7. Anon.

15. If *Beaſts are Damage feaſant in the Lands of another*, a Stranger cannot juſtify entering into the Land *to turn them out*, upon a Pretence that it is to the Advantage of the Owner of the Land; for it prevents the Owner from taking the Benefit of diſtraining them for Satisfaction of the Damage; Per Frowick Ch. J. Kelw. 46. b. Mich. 18 H. 7.

16. In Treſpaſs of Breaking a Cloſe, Per Rede, it is not lawful *to ſay that the Defendant had Timber lying there, and came to ſee his Timber.* Br. Treſpaſs, pl. 208. cites 21 H. 7. 13.

17. If my *Beaſts* are in another's Land *Damage feaſant*, I cannot juſtify to enter to *rechaſe* them; Per Rede Ch. J. Br. Treſpaſs, pl. 213. cites 21 H. 7. 27.

But if *another chaſes my Beaſts into the Land of J. N.* I may enter and rechaſe them; for the *Tort commenced in another Perſon*; Per Rede Ch. J. Br. Treſpaſs, pl. 213. cites 21 H. 7. 27.

18. In

3 Le. 266. pl. 358. S. C. but adjornatur.

18. In Treſpaſs for *entring his Houſe, and taking his Goods*, the Defendant *pleads that the Goods were B.'s, who ſold them to the Defendant, and* that *he came* to the Houſe, *and demanded them, and the Plaintiff being abſent, his Wife licenc'd him to enter and take them*; whereupon he entred and took them. And upon Demurrer it was adjudged ill, it not appearing how the Goods came, viz. either as Treſpaſs &c. and therefore cannot enter of his own Head, and the Licence by the Wife was not ſufficient; but Gawdy contra; for it may be intended the Goods were there by the Plaintiff's Licence, and then he might well enter and take them. Cro. E. 245. pl. 3. Mich. 33 & 34 Eliz. C.B. Taylor v. Fiſher.

All. 35. S. C. adjudged that his Fear is no Juſtification, and the Defendant has Remedy againſt thoſe that compell'd.

19. In Treſpaſs Quare *Clauſum fregit, and taking of a Gelding*, the Defendant *pleaded that he, for Fear of his Life, and Wounding of* 12 *armed Men, who threatned to kill him if he did not the Fact, went into the Houſe of the Plaintiff, and took the Gelding*. The Plaintiff demurr'd to this Plea; Roll J. This is no Plea to juſtify the Defendant; for I may not do a Treſpaſs to one for Fear of Threatnings of another; for by this means the Party injured ſhall have no Satisfaction, for he cannot have it of the Party that threatned; therefore let the Plaintiff have his Judgment. Sty. 72. Mich. 23 Car. Gilbert v. Stone.

20. If *Tenant at Will ſows* the Land, *and then determines his own Will*, he cannot break the Hedges to carry away the Corn. Vent. 222. Trin. 24 Car. 2. B. R. in Caſe of Perrot v. Bridges.

21. If the Sheriff upon a *Fieri Facias ſells Corn growing*, the Vendee cannot juſtify an Entry upon the Land to *reap it, until* ſuch Time as *the Corn is ripe*; Per Twiſden. Vent. 222. in Caſe of Perrot v. Bridges.

(H. a. 3) *Retaking* Goods &c. *Juſtifiable*, in what Caſes.

1. TReſpaſs. If a Man *ſeiſes an Ox* &c. *to the Uſe of the King*, he who has Property cannot re-take it. And ſo it ſeems that the King may be intitled to a Chattle by Seiſure, or otherwiſe, without Office, as appears by this Caſe. See the Book. Br. Treſpaſs, pl. 375. cites H. 39 E. 3.

2. If *a Man takes my* Swan's Eggs, which after produce Cygnets, the *firſt Owner may take the one and the other*; per Fairfax. Br. Treſpaſs, pl. 323. cites 12 E. 4. 4. 5.

So where a Man took the *Sow* of another *which produced Piggs*, the Owner brought Replevin of both, and recover'd Damages for both; Per Littleton. Br. Treſpaſs, pl. 323. cites 18 E. 3. 48.

3. *So* if a Man takes my *Mare or Cow, which after produces a Fole or Calf*, the firſt Owner may take them; Per Fairfax. Br. Treſpaſs, pl. 323. cites 12 E. 4. 4. 5.

'Tis agreed to, among Civilians, that in all Caſes where the *new Form may be reduced to the former State*, the Property remains to him who hath the old Subſtance; but otherwiſe not. Arg. Raym. 329. in Caſe of Bambridge v. Bates, and ſays, that with this agrees 16 H. 7. 16. pl. 6. Mo. 19. pl. 67.

4. *Where a Thing may be known*, the Owner may retake it, *tho' another Thing be mix'd with it*. Br. Property, pl. 23. cites 5 H. 7. 15.

S. P. Arg. Raym. 329.

5. *As* in Treſpaſs of Shoes and Boots taken, the Defendant ſaid, that he was *poſſeſs'd of* 3 *Dickers of Leather*, and *bail'd them to W. S. who gave*

to

to the Plaintiff, who made thereof Shoes and Boots, and the Defendant re-took them; and the Re-taking good and lawful, for the Nature remains. Br. Property, pl. 23. cites 5 H. 7. 15. in Caſe of Bambridge v. Bates.

6. *So* where a Man takes *Cloth*, and *makes thereof a Robe*, the Owner may retake it; for the Nature is not chang'd. Br. Property, pl. 23. cites 5 H. 7. 15. But *Wool* made into Cloth cannot be retaken. Arg. Raym. 329. in Caſe of Bambridge v. Bates.

7. *So* of *Iron made into a Bar.* Br. Property, pl. 23. cites 5 H. 7. 15. But Iron made into an *Anvil* cannot be retaken. Arg. 2 Brownl. 114. in Caſe of Croſs v. Weſtwood.

8. *But*, per Cur. where *Grain* is taken, and *made into Malt*, or * *Money* taken and *made into a Cup*, or † *a Cup* made *into Money*, theſe cannot be taken; for Grain *cannot be known one from another*, nor one Piece of Money from another. Br. Property, pl. 23. cites 5 H. 7. 15. * If a Man *takes a white Piece, and cauſes it to be gilt*, the Owner cannot retake it, by ſome. Br. Property, pl. 23. cites 5 H. 7. 15.

† Plate alter'd in Faſhion may be retaken, but not if converted into Coin. Arg. 2 Brownl. 114. in Caſe of Croſs v. Weſtwood.

9. *And* if a Man takes *Timber*, and *makes thereof a Houſe*, this cannot be retaken; for the *Nature is alter'd* into Franktenement. Br. Property, pl. 23. cites 5 H. 7. 15. *But* if a Man takes my *Tree*, and *ſquares* it *into Timber*, yet the Owner may retake it; for it may be known. Br. Property, pl. 23. cites 5 H. 7. 15.——S. C. cited Arg. 2 Brownl. 117, 118.

In Treſpaſs &c. the Defendant *juſtified under a Leaſe, and that afterwards A. enter'd, and cut down Trees there growing, and made them into Timber, and brought it on the Land where the Treſpaſs was ſuppoſed, and gave it to the Plaintiff; whereupon he (the Defendant) enter'd on the ſaid Land, and retook his Timber.* Upon a Demurrer to this Plea it was objected, that by making them into Timber the Defendant could not know it to be his Tree, and ſo the Property alter'd; but adjudg'd, where any thing is wrongfully taken, and alter'd in the Form, yet if that which remains is the principal Part of the Subſtance, then the *Notice* is *not loſt*, and therefore if he ſaws them into Boards he may retake them; but if they are fix'd upon the Land, or a Houſe be made of the Timber, it is otherwiſe. Quære, The Houſe now is the principal Subſtance. Mo. 19. pl. 67. Mich. 2 Eliz. Anon.

10. If a Man *takes Fiſh*, he who has the Water may retake them; per Keble. Kelw. 30. a. pl. 2. Mich. 13 H. 7.

11. Treſpaſs for breaking his Cloſe, Et *quædam averia* ibidem exiſtent' cepit & aſportavit. Defendant pleaded, that the Cattle were his own Goods, and that *J. S. took the Cattle by Wrong, and put them into the Plaintiff's Cloſe by the Plaintiff's Aſſent*; and the Defendant finding them there, took them &c. The Court held the Plea good; for the Plaintiff does not aver the Property of the Beaſts to be in him, but ſays only Quædam averia. And when the Beaſts are taken from him by Wrong, and are *not out of his Poſſeſſion by his own Delivery*, he may juſtify the Taking of them in any Place where he finds them. Cro. E. 329. pl. 3. Trin. 36 Eliz. B. R. Chapman v. Thimblethorp.

12. A. *lends a Horſe* for Hire *to ride to D.* and within the Time the Horſe is lent, for A. meets the Rider at a Place further diſtant than D. yet A. within the Time can't ſeiſe his Horſe; for the Perſon that hired him has a good ſpecial Property for the Time he hired him for, againſt all the World. And if he miſuſes the Horſe in riding to any other Place, that is to be puniſh'd by Action on the Caſe, and not by ſeiſing the Horſe. Yelv. 172. Hill. 7 Jac. B. R. Lee v. Atkinſon and Brook. Cro. J. 236. pl. 8. S. C. adjudg'd accordingly.——Brownl. 217. S. C. adjudg'd; but ſeems to be taken from Yelv. 172.

13. A. *found* the Goods of B. and *bail'd them over* to C. for Money; in that Caſe the Owner may *take them* again; Per Doderidge J. Arg. 3 Bulſt. 17. in Caſe of **Waller v. Hanger**, cites 22 E. 4.

14. Milk *made into Cheeſe* cannot be retaken; Res Corruptæ & Tranſformatæ abeſſe videntur; A Thing ariſing from the Parts is not any of the Parts. Arg. Raym. 329. in Caſe of Bambridge v. Bates.

15. A *Maſter of a Ship* may keep the Goods till he be paid his *Freight*; but if he once parts with the Poſſeſſion of them, he can't retake them; Per Holt Ch. J. 12 Mod. 511. Paſch. 13 W. 3. B. R. Anon.

16. If A. makes *a Bill of Sale to B. a Creditor, and afterwards to C. another Creditor*, and *delivers Poſſeſſion* at the Time of the Sale *to neither*; and after *C. gets Poſſeſſion* of them, and *B. takes them out of his Poſſeſſion.* C. cannot maintain Treſpaſs, becauſe the *firſt Bill of Sale is fraudulent againſt Creditors, and ſo is the ſecond*; yet they both bind A. and B.'s is the Elder Title, and the naked Poſſeſſion of C. ought not to prevail againſt the Title of B. that is prior, where both are equally Creditors, and Poſſeſſion at the Time of the Bill of Sale is deliver'd over to neither; Per Holt Ch. J. 2 New Abr. 606. Baker v. Loyd, cites Trin. 1706.

(H. a. 4) *Plea good.* In Treſpaſs for taking or retaking Goods.

1. IN Treſpaſs of *Goods and Chattels*, the Plaintiff ſhall not count of *Monies* taken; for he ought to have had a ſpecial Writ. Br. Count, pl. 90. cites 34 E. 3. 23.

2. Treſpaſs of *Corn carried away.* The *Defendant ſaid that he was ſeiſed, and leaſed to W. N. for Life, who died, and* the *Defendant entred and ſowed the Land, and we came, and cut and carried away*, and awarded a good Plea; and therefore it ſeems that this is Colour in itſelf. Br. Treſpaſs, pl. 114. cites 38 E. 3. 28.

3. Treſpaſs *of Trees* cut and taken, Per Finch, *You yourſelf gave them to us*, and a good Plea. Br. Treſpaſs, pl. 394. cites 42 E. 3. 23.

4. If I *recover Damages*, and the *Sheriff delivers to me your Goods in Execution*, you cannot have Treſpaſs againſt me; for I am no Tranſgreſſor; Per Finchd. & tot. Cur. Br. Treſpaſs, pl. 48. cites 44 E. 3. 20.

5. Treſpaſs of taking of Goods; the *Defendant ſaid that they were caſt into the Sea by Tempeſt, and* the Defendant *took and kept them, and when he came to Land he bailed them to the Servant of the Plaintiff to his Uſe, abſque hoc that he took other Goods, or in other Manner*, and admitted for a good Plea; therefore Quære of the Vi & Armis. Br. Treſpaſs, pl. 54 cites 46 E. 3. 15.

6. Treſpaſs of Goods *taken in Middleſex*, a Taking by *Gift in London* is no Plea, *without traverſing the Taking in Middleſex*; Quod nota. Br. Treſpaſs, pl. 89. cites 11 H. 4. 3. 4.

Treſpaſs of Goods taken *at D. in the County of S.* the *Defendant juſtified by Gift of the Plaintiff at London, by which he took them in the County of S.* and a good Plea; the *Plaintiff ſaid that at the Time of the Gift he was within Age*, and a good Replication. Contrary if the Infant *had delivered the Goods to the Defendant*; for this is a good Excuſe in Action of Treſpaſs, but the Gift is void. Br. Treſpaſs, pl. 150. cites 22 H. 6. 3.

7. Treſpaſs *of a Mare*, the *Defendant juſtified as Diſtreſs for Rent of A. of whom the Land is held, and the Defendant at the Deſire of the Plaintiff*

tiff intreated A. ſo that the Diſtreſs was re-deliver'd to the Plaintiff, upon Condition that *if the Plaintiff did not pay* the Rent by ſuch a Day, that *he ſhould re-take* the Diſtreſs &c. and he did not pay &c. by which he re-took it and re-deliver'd it to the Plaintiff, and admitted for a good Plea without Argument. Br. Treſpaſs, pl. 410. cites 10 H. 6. 3.

8. Treſpaſs of Goods taken. The *Defendant ſaid, that the Plaintiff at D. in the County of C. ſold it to J. N. by which he took it*, as lawfully he might, *as Servant to J. N.* the Vendee, *and by his Command*; and admitted for a good Plea. Nota. Br. Treſpaſs, pl. 124. cites 19 H. 6. 8.

So elſewhere *of a Gift.* Br. Treſpaſs, pl. 124 —— See pl. 6.

9. In Treſpaſs the *Defendant ſaid, that the Property of the Goods was in J. N. who made the Defendant his Executor, and died*, and *we took as Executors*, and gave Colour to the Plaintiff as Executor, where he is not Executor &c. which is the ſame Taking, and a good Plea. Br. Treſpaſs, pl. 126. cites 19 H. 6. 12.

10. In Treſpaſs of Goods taken in C. it is a good Plea, *that the Plaintiff bail'd them to him at D. to bail them over, which he has done abſque hoc*, that he is guilty of the Carrying away at C. and a good Plea; Per tot. Cur. and yet C. and D. were in one and the ſame County. Br. Treſpaſs, pl. 386. cites 19 H. 6. 43.

11. Treſpaſs of Battery of his *Servant*, per quod ſervitium Servientis ſui prædicti &c. The Defendant ſaid, that he was *retain'd* with him before he beat him, and *departed and came to the Plaintiff*. And yet it ſeems that it is no Plea; for *he cannot retake him*, nor beat him, *without Requeſt to his ſecond Maſter*. Br. Treſpaſs, pl. 139. cites 21 H. 6. 8. 9.

Where a Man has *Ward or Servant* retain'd who *departs* from him, he cannot take them, and *bring them back by Force, nor put his Hands upon them* to bring them back; but he may require them &c. and *if they refuſe, he ſhall have his Action*; Per Cur. Br. Treſpaſs, pl. 225. cites 38 H. 6. 25.

12. In Treſpaſs it is no Plea, *That A. was poſſeſs'd as of his Property, and bail'd to the Defendant, and the Plaintiff took them, and the Defendant retook*; for there is no *Colour*. Contrary where he ſays, *that A. was poſſeſs'd, and bail'd to B. who gave to the Plaintiff, and A. retook and gave to the Defendant*. And per Newton, it is a good Plea, that the Defendant *was ſeiſed till by the Plaintiff diſſeiſed, upon which he re-enter'd and did the Treſpaſs*. Br. Treſpaſs, pl. 146. cites 21 H. 6. 36.

13. Treſpaſs *by Adminiſtrators of Goods carried away*. The *Defendant ſaid, that the Teſtator was poſſeſs'd as of his proper Goods, and made J. S. his Executor, and died, and after the Goods came to the Hands of the Plaintiff, and the Defendant by Command of the Executor took the Goods, and after the Executor refuſed before the Ordinary, who committed the Adminiſtration to the Plaintiff*, Judgment. And per Laicon, Priſot, and Moyle, this is a good Plea, and the *Colour* is good; for the Defendant acknowleg'd Poſſeſſion in the Plaintiff; and the Power of the Adminiſtrator, by the Committing of the Adminiſtration, ſhall have Relation to the Death of the Inteſtate; and therefore this is Matter in Law, at leaſt if the Juſtification be now good or not. And *when Matter of Law is, then there needs no Colour*; for it is Matter in Law (when the Adminiſtration is ſo committed) if the Adminiſtrator ſhall have Treſpaſs of the Taking before the Committing of the Adminiſtration or not. And by them the Plea is good; for when the Defendant had good Cauſe to juſtify at the Time &c. this ſhall not be loſt by the Refuſal of the Executor, ſince he is a third Perſon. Br. Treſpaſs, pl. 222. cites 36 H. 6. 7.

Br. Juſtification, pl. 12. cites S. C.

14. Treſpaſs *of Goods taken in T.* The *Defendant ſaid, that the Place where &c. is a Houſe of which J. B. was ſeiſed in Fee, and infeoff'd him, and he found the Goods Damage feaſant* &c. and ill Pleading; for *in Treſpaſs of Goods &c. it is not the Form to ſay, that the Place where &c. is* ſuch

ſuch a Houſe, or ſuch Land; for *by Intendment it is ſuppoſed that the Place is a Vill.* Contrary it is in Treſpaſs done of Land. Br. Treſpaſs, pl. 293. cites 5 E. 4. 124.

15. Treſpaſs *of a Cloſe broken, and Goods carried away.* The *Defendant, as to the Cloſe broken, pray'd Judgment of the Writ; for the Plaintiff has not* any Thing in it, *unleſs in Common,* & pro indiviſo *with W. N. not named in the* Writ. *And as to the Goods, he demanded Judgment of the Writ; for before the Plaintiff any Thing had, S. was poſſeſs'd ut de Propriis, and made the Plaintiff and A. his Feme his Executors, and died; and A. took the Goods, and was thereof poſſeſs'd, and made the Defendant her Executor, and died; and the Defendant found the Goods, amongſt other Goods, in the Houſe of A. and took them to keep to the Uſe of the Plaintiff*; and therefore the Plaintiff ought to have *Detinue,* Judgment of the Writ. And it ſeems there, that he ought not to take the Goods of the firſt Teſtator, *another Executor being alive*; wherefore *he ſaid, that his Teſtator put thoſe Goods, and others of his proper Goods, together in one Cheſt, and ſo he found them.* This is a good Juſtification, for he cannot ſever them; but where the Goods are ſever'd, it is not lawful for him to take them which do not belong to him; quod Fairfax and Choke conceſſerunt. And a good Plea, *without ſaying that he is, and at all Times has been, ready to deliver them*; for *if he may juſtify the Taking at one Time,* it cannot be tortious after without Special Matter, As *Miſdemeanor after,* as it ſeems. Br. Treſpaſs, pl. 311. cites 7 E. 4. 3.

16. In Treſpaſs of Goods carried away, it is a *good Plea, That they were the Goods of two Alien Enemies of the King, and the Defendant ſeiſed them,* as lawfully he might; for it was ſaid there, that every Man may ſeiſe the Goods of Enemies of the King brought into England, and retain them to their own Uſe. Per Vaviſor, it was adjudg'd in the Time of this King, that he who takes ſuch Goods ſhall retain them as above. Br. Treſpaſs, pl. 313. cites 7 E. 4. 13.

17. Treſpaſs *of taking his Hawk.* The *Defendant juſtified for Damage feaſant in his Pidgeon-Houſe*; and it was admitted. And per the Juſtices, Treſpaſs quare Columbas cepit does not lie, for he has no Property. Br. Treſpaſs, pl. 387 cites 16 E. 4. 7.

18. Treſpaſs *of taking his Horſe.* The *Defendant ſaid, that the Plaintiff lent it to him till he had finiſh'd his Buſineſs*; and ſaid, *that he had not yet finiſh'd his Buſineſs.* And a good Plea, per Brian and Littleton, notwithſtanding that the Time is uncertain. Quod nota. But no Mention of the Uncertainty of the Buſineſs. Br. Treſpaſs, pl. 337. cites 17 E. 4. 8.

19. *Treſpaſs of taking Beaſts in A. in D.* The *Defendant ſaid, that he was ſeiſed of Land call'd C. in D. aforeſaid; and the ſame Day found the Beaſts Damage feaſant in C. aforeſaid, and took them, and chaſed them towards the Pound, and they eſcaped, and went into A. aforeſaid, and the Defendant freſhly retook them,* which is the ſame Taking of which the Action is brought. Pigot *proteſtando, that the Place of C. is not the Franktenement of the Defendant,* and *pro Placito, that before the Taking alleged by the Defendant, the Defendant took the Beaſts in A aforeſaid, and chaſed them to his Land call'd C. aforeſaid, and they eſcaped into A and the Defendant took them prout* &c. *upon which firſt Taking we have brought this Action.* Bridges chang'd his Plea, and ſaid, That the ſame Day, before the Treſpaſs ſuppoſed by the Plaintiff, he found the Beaſts Damage feaſant in C. his own Soil, and took them, and they eſcaped into A. aforeſaid, and he freſhly purſued and took them in A. &c. Pigot ſaid, he took them in A. abſque hoc, that he firſt took them in C. &c. Modo & Forma, prout &c. and ſo to Iſſue. Br. Confeſs and Avoid, pl. 52. cites 21 E. 4. 64.

20. Treſpaſs *of Trees* and Oaks cut. The *Defendant ſaid, that the Plaintiff leaſed to him* 10 *Acres of Land for Term of Years, of which the Place* &c. by Force of which he *was thereof poſſeſs'd, and cut the Trees* &c.

&c. and a good Plea; and yet the Writ of Waſte lies. Br. Treſpaſs, pl. 430. cites 13 H. 7. 9.

21. *And* in Treſpaſs *of Goods* taken, the *Defendant ſaid, that the Plaintiff leaſed to him a Houſe in D. for a Year, and the Goods were his before the Leaſe, and he put them into the Houſe, and the Plaintiff immediately after the Year determined took the Goods Damage feaſant, and the Defendant retook them.* And no Plea, per Cur. for he ought to carry his Goods out at the End of the Term; and if he leaves them there, he cannot after juſtify to enter and retake them. Br. Treſpaſs, pl. 430. cites 13 H. 7. 9.

22. Treſpaſs of Goods taken. The *Defendant ſaid, that the Plaintiff put them within the Doors of the Defendant*; *and* after, *becauſe the Plaintiff was indebted to the Defendant in* 10*l. it was agreed between them, that the Defendant ſhould retain them till he was paid*, by which he took them, and the Plaintiff has not yet paid. And a good Plea, by the Opinion of the Court, *without ſhewing Cauſe of the Debt*; *and* a good Plea, without ſhewing *other Taking*; for the Putting into the Houſe is no Delivery; but when he accepted them by the Agreement, this is the Taking; for if he had pleaded Delivery, it had been Not Guilty argumentatively. Br. Treſpaſs, pl. 209. cites 21 H. 7. 13.

23. In Treſpaſs it is a good Plea *that the Plaintiff gave them* to the Defendant, *by which he took them.* Br. Treſpaſs, pl. 209. cites 21 H. 7. 13.

As in Treſpaſs of *taking of his Boat*, the Defendant *pleaded Gift of the Plaintiff of all his Goods by Deed* &c. at which Time the Boat belong'd to the Plaintiff, Judgment, and a good Plea; and ſo ſee Gift in Treſpaſs a good Plea; and the Plaintiff was not received to ſay, that at the Time of the Treſpaſs the Boat was his Boat without ſhewing how he came by it after &c. by which he ſaid that at the Time of the Gift it was the Boat of one A. who gave it to him after, and the Defendant carried it away; and the Defendant ſaid that at the Time of the Gift it was the Boat of the Plaintiff Priſt &c. Br. Treſpaſs, pl. 42. cites 42 E. 3. 1, 2.

In Treſpaſs the *Defendant pleaded a Gift*, the *Plaintiff ſaid that after the Gift and before the Treſpaſs the Defendant re-gave to him*; and the *Defendant maintain'd his Bar abſque hoc, that he re-gave after the firſt Gift*, and it was accepted; Quære if it be pregnant. Br. Negativa &c. pl. 55. cites 10 H. 6. 16, 17.

So in Treſpaſs *of a Boat taken*, and the *Defendant pleaded a Gift by J. N.* and the *Plaintiff ſaid that J. N. took it out of the Poſſeſſion of the Plaintiff, and gave &c.* The *Defendant maintain'd the Gift abſque hoc, that the Plaintiff had any Thing before the Gift*; and well, and not pregnant. Br. Negativa &c. pl 53. cites 38 H. 6. 25.

24. *Where things are not in ſuch Danger, but that the Owner may remedy it or have his Remedy* for this Treſpaſs *by Action* againſt the other, there a Man cannot juſtify the taking of the Goods to ſave them. Per Kingſm. Juſtice. Br. Treſpaſs, pl. 213. cites 21 H. 7. 27.

As in Treſpaſs *of Corn taken*, the *Defendant ſaid they were ſever'd from the 9 Parts, and were in Danger of being loſt by Beaſts in the Field, by which he took and put them into the Barn of the Plaintiff, Parſon of the Vill*; and by the Opinion of the Court it is no Plea; for they cannot be in ſuch Danger in the Field, but that Men may guard them. Br. Treſpaſs, pl. 213. cites 21 H. 7. 27.

And it is not lawful for a Man to *take my Horſe, ſaying that it was in Danger of being ſtole.* Per Brudnell. Br. Treſpaſs, pl. 213. cites 21 H. 7. 27.

Nor where *my Feme* is out of her Way, it is not lawful for a Man to take her to his Houſe, *if ſhe was not in Danger of being loſt in the Night, or to be drown'd with Water.* Per Brudnell. Br. Treſpaſs, pl. 213. cites 21 H. 7. 27.

But where *Goods of another are in Danger, by Water, Fire* &c. *of which the Party cannot have Remedy*, there I may take them to ſave them. Per Rede Ch. J. Br. Treſpaſs, pl. 213. cites 41 H. 7. 27.

(I. a) Treſpaſs. Juſtification. *Upon Default or Act of the Plaintiff* himſelf.

* Fol 565.

1. IF A. be ſeiſed in Fee of Copyhold Land next adjoining to the Land of B. and A. erects a new Houſe upon his Copyhold Land, and ſome * Part of the Houſe is erected upon the Confines of his Land next adjoining to the Land of B. if afterwards B. digs his Land ſo near to the Foundation of the Houſe of A. but on no Part of A's Land, by which the Foundation of the Houſe and the Houſe falls into the Pit, yet no Action lies by A. againſt B. becauſe it was A's own Fault that he built his Houſe ſo near the Land of B. for he by his Act cannot hinder B. from making the beſt Uſe he can of his own Land. P. 15 Car. B. R. between *Wilde and Minſterley*, per Curiam after a Verdict for the Plaintiff. But it ſeems that a Man who has Land next adjoining to my Land cannot dig his Land ſo near my Land that thereby my Land ſhall go into his Pit; and therefore if the Action had been brought for this it would ly.

Sty. 165. S. C. ſays that Roll Ch. J. held as here, and Jerman thought Judgment ought to be given for the Defendant, and that Ask J. ſaid the Caſe was hard on both Sides, but that the Court gave Judgment for the Plaintiff Niſi &c.

2. In Treſpaſs Quare Clauſum frègit call'd S. in the Pariſh of D. if Defendant juſtifies becauſe his Sheep were ſtolen by Perſons unknown, and that the Plaintiff afterwards chaſed the ſaid Sheep with his own Sheep in the ſame Pariſh, and that he ſuſpected that his Sheep were chaſed into the ſaid Cloſe of the Plaintiff, in which &c. and upon this he went into the ſaid Cloſe where &c. to ſearch for his Sheep, and not finding them there, he went out of the Cloſe as ſoon as he could, doing as little Damage in going and returning as he could. This is not a good Juſtification, becauſe he did not enter to ſearch for the Felon, which was for the Commonwealth, but for his private Intereſt to inquire for his Goods; for by the ſame Reaſon he may come into the Lands of any other Men, with a Pretence to ſearch for his Goods. And here he does not ſhew any Cauſe of Suſpicion that the Sheep were in this Cloſe. Mich. 1649. between *Toplady and Scaley*. Adjudg'd upon Demurrer per totam Curiam præter Juſtice Jermyn, who was e Contra. Intratur Mich. 24 Car. Rot. 596.

Br. Treſpaſs, pl. 192. cites S. C. and that the other replied that his Hedge was ſufficiently incloſed. [And ſo this Point was admitted.] ——— S. P. Br. Treſpaſs, pl. 143. cites 21 H. 6. 39. ———And in ſuch Caſe J. may purſue and retake them. Per Frowicke. Kelw. 30. pl. 2. Mich. 13 H. 7. Anon.——See Infra, pl. 26.

3. If a Man ought to repair a Fence between my Land and his Land next adjoining, if he does not repair it, by which my Beaſts enter into his Land for Default of Reparation, this is juſtifiable in a Treſpaſs brought by him. 19 H. 6. 34. 39 E. 3. 3 b.

4. So in the ſaid Caſe it is lawful for me to go into his Land to retake my Beaſts, and rechaſe them into my own Land. And this is juſtifiable in Treſpaſs, becauſe it comes by his own Act. 13 H. 7. Kelloway. 30.

Per Brian Ch. J. The Foreſter cannot enter into any Man's Land out of the Foreſt, nor into the Land which ſhould have been incloſed againſt the Foreſt, becauſe the *Property of Savages*

5. If a Man ought to impale againſt a Foreſt, and by his Default of impaling the Savages go into his Land, it is juſtifiable for the Foreſter in Treſpaſs there to enter into his Land, where the Savages eſcape, to rechaſe them into the Foreſt, becauſe they come in by his own Default. Dubitatur. 13 H. 7. Kelloway 30.

Savages is only during their being in the Foreſt (or Park) and no Purſuit will preſerve it; and in this Reſpect they differ from other Beaſts not Savage. Kelw. 30. b.

6. If Beaſts are impounded in a Place incloſed which has a Gate open, if the Sheriff comes to make Replevin, and the Owner of the Cloſe ſtands with Bowes and Arrows in the Gate to ſhoot at him, by which he is in * Fear of Death, he may, to avoid Death, break the Cloſe and enter there, and make the Replevin. And this Treſpaſs is juſtifiable. 20 H. 6. 28. The *ſame Law of Sheriffs Bailiff.* Br. Juſtification, pl. 2. cites S. C. *See (H.a. 2) pl. 19.

7. If my Land be open to the Highway, and the Beaſts of a Stranger enter upon the Land, this is not juſtifiable. 39 E. 3. 3.

8. If a Man does a Nuſance in his own Soil to my Mill, Houſe, or Land, I may juſtify the Entry into his Soil, and fling down this Nuſance, becauſe it was of his own Wrong. 9 E. 4. 35. Curia. 8 E. 4. 5. Co. 9. *Baten* 55. *As* if a Man *by a Ditch diverts the Water from my Mill*, I may *fill up the Ditch* with that which the other has dug out. Per Danby. Br. Treſpaſs, pl. 186. cites 9 E. 4. 35.

9. If a Man takes my Goods and carries them into his own Land, I may juſtify my Entry into the ſaid Land to take * my Goods again; for they come there by his own Act. 9 E. 4. 35. * Fol. 566. 2 Le. 202. pl. 254. cites S. C.

10. If a Man by Negligence ſuffers his Houſe to be on Fire, I, who am his Neighbour, may break down his Houſe to avoid the Peril, which may come to me by the burning of it. 9 H. 4. 35. b. S. P. Br. Treſpaſs, pl. 186. cites 9 E. 4, 35. per Littleton.

11. If a Man tortiouſly impriſons me in his Houſe, I may juſtify the breaking the Windows and Door to go out. 9 E. 4. 35. b. For the Tort commences on his Part.

Br. Treſpaſs, pl. 186. cites S. C. —— Br. Nuſance, pl. 14. cites S. C. —— Arg. 2 Le. 202. pl. 254. cites S. C.

12. If my Tenant, ſeeing me coming to diſtrain, drives his Beaſts out of the Land held of me into Land held of another Man, I may juſtify my Entry there to take the Diſtreſs becauſe it was by his own Tort. * 9 E. 4. 35. See Diſtreſs, (N) —— S. P. Co. Litt. 161. a. that if the Tenant, or any other, to prevent the Lord to diſtrain, drive the Cattle out of the Fee of the Lord into ſome Place out of his Fee, yet may the Lord freſhly follow and diſtrain the Cattle, and the Tenant cannot make Reſcous, albeit the Place wherein the Diſtreſs is taken, is out of his Fee; for now in Judgment of Law the Diſtreſs is taken within his Fee, and ſo ſhall the Writ of Reſcous ſuppoſe. *But if the Lord coming to diſtrain had no View of the Cattle within his Fee*, tho' the Tenant drive them off purpoſely, or if the Cattle of themſelves, after the View, go out of the Fee, or if the Tenant after the View remove them for any other Cauſe than to prevent the Lord of his Diſtreſs, then cannot the Lord diſtrain them out of his Fee; and if he does, the Tenant may make Reſcous.—2 Inſt. 131. S. P.—And altho' in ſuch Caſe the Diſtreſs be taken out of his Fee or Seigniory, yet it is within the Statute of 21 H. 8. cap. 19. For in Judgment of Law the Diſtreſs is lawful, and is as if taken within his Fee and Seigniory. Co. Litt. 268. b.——S. P. For when they are in his View they ſhall be adjudg'd in his Poſſeſſion. Br. Treſpaſs, pl. 296. cites 2 E. 4. 6. and ſays the Reaſon ſeems to be, becauſe they are tranſitory.

* Br. Treſpaſs, pl. 186. cites S. C.

13. If a Man has an Heap of Grain by my Heap of Grain, and takes an Handfull out of my Heap, I may juſtify the taking an Handfull again out of his Heap, becauſe he ſhall not take Advantage of his own Wrong. Tr. 12 Ja. B. R. S. P. Arg. by 3 Juſt. againſt Coke. Roll. R. 45. —— But per Haughton J. 7. & 8. and not to take more than the other took from him. Ibid. —— See Title Property (E) pl. 6. the Notes there.

14. If I have an Heap of Grain or Money, and another comes and caſts his Grain or Money into my Heap, I may juſtify the carrying away all, becauſe otherwiſe he will by his Tort bar me to take my own Cro. J. 366. S. C —— 2 Bulſt. 323. S. C. ——

Roll. R. 133. S. C. —— See Property (E) pl. 6 & 7. and the Notes there.

own Goods. H. 12 Ja. B. R. in *Ward and Aires's* Caſe, Per Curiam.

This is the 5th Reſolution in Tyrringham's Caſe. 4 Rep. 38. b. Mich. 26 & 27 Eliz. B. R. S P.

15. In Treſpaſs for chaſing of his Beaſts, it is good Juſtification that the Beaſts were in his Cloſe Damage feaſant, and he with a little Dog chaſed them out of the Land; For inaſmuch as they come there of their Wrong, the Owner is not bound to impound them, but may remove the Tort done to him, by chaſing of them out of the Land. Co. 4. *Tirringham* 38. b. Reſolved.

and ſhall not be compell'd to diſtrain for Damage feaſant.——Sav. 23. pl. 56. Paſch. 42 Eliz. Tirringham's Caſe, is not S. P.——See (N. a) pl. 12.

2 Roll. Rep. 141. Hill. 17 Jac. B. R. S. C. but S. P. does not plainly appear.—— Ibid. 207. S. C. and S. P. held by the Juſtices accordingly.——

16. If 2 Tenants in Common of Timber or other Goods are, and the one takes it, and puts into his ſeveral Land, the other cannot juſtify the Entry into the Land to retake it, becauſe tho' he may retake, yet inaſmuch as there is not any Tort in Law when one takes all to his own Uſe, becauſe the Law has allowed him ſo to do for the Truſt which is between them, he cannot juſtify a Treſpaſs in the Land to retake it; but he ought to take it when he can without Treſpaſs. H. 18 Ja. B. R. between *Maſters and Polley*. Per Curiam.

Godb. 282. pl. 403. Pollye's Caſe, S. C. and S. P. agreed by the Court.

17. If a Man comes into my Cloſe with an Iron-bar and Sledge, and there breaks my Stones, and after departs, and leaves the Sledge and Bar in my Cloſe, in an Action of Treſpaſs for Taking and Carrying of them away, I may juſtify the Taking of them and Putting of them in the Cloſe of the Plaintiff himſelf next adjoining, eſpecially giving Notice of it to the Plaintiff, as it was pleaded, inaſmuch as they were brought into my Cloſe of his own Tort; and in ſuch Caſe of Tort I am not bound to carry them to the Pound, but may well remove the Wrong done to myſelf by them by Tort of the Plaintiff. P. 11 Car. B. R. between *Cole and Maunder* adjudged upon a Demurrer. Intratur. Hill. 10 Rot. 502.

Br. Treſpaſs, pl. 50. cites 44 E. 3. 39. S. C. ſays it was admitted for a good Juſtification.

18. Treſpaſs quod Arbores ſuccidit & aſportavit; Fulth. ſaid the *Plaintiff ſold to the Defendant Horſley Wood, except* 40 *of the beſt Aſhes, and the Plaintiff to carry them within* 2 *Years* next; and after he came and *required the Plaintiff to cut and carry them, and he would not*; and becauſe the *Defendant by his Bargain had but* 3 *Years to take the Wood*, he left 40 of the beſt Aſhes, and cut and carried the reſt; Per Caund. You abated our Wood, abſque hoc that we were warn'd, prout &c. and ſaid no more. Br. Treſpaſs, pl. 399. cites 44 E. 3.

19. Treſpaſs of *Trees* [*Graſs*] *ſpoil'd, and fed with the Cattle of* the *Defendant, who ſaid that the Plaintiff to the Intent to have the Defendant in his Power, commanded his own Servant to chaſe the Beaſts of the Defendant into his Land, which he did accordingly, and the Defendant as ſoon as he knew of it, chas'd them out*; Judgment *ſi Actio*, and a good Plea, and was not compell'd to ſay Not guilty. Br. Treſpaſs, pl. 148. cites 21 H. 6. 39.

20. Treſpaſs of a Cloſe and Houſe broken, and Graſs ſpoil'd, his Servant beaten, and his Oxen taken. Laycon *ſaid that he had a Highway going to D. againſt the ſaid Houſe where &c. and the Defendant rode in the ſaid Way, and when he was againſt the Houſe, the Plaintiff and others came with Bows and Arrows &c. and aſſaulted the Defendant, and he left his Horſe, and fled into the Houſe, and over into the Cloſe, and came back into the Way*, which is the ſame Treſpaſs &c. and as to the Graſs ſpoil'd, pleaded the ſame Matter, *and when he came back into the Way his Horſe was in the Cloſe, by which he freſhly re-enter'd and retook his Horſe*, & hoc &c. and

to

to the Beating the Servant he ſaid as above, that they made an Aſſault upon him, and the Damage which they had was of their *own Aſſault* &c. Br. Treſpaſs, pl. 204. cites 37 H. 6. 37.

21. *And as to the Oxen he ſaid, that before the Treſpaſs A. B. affirm'd Plaint of Replevin before the Sheriff of Beaſts taken*, and he *made Precept to the Bailiff to make Deliverance, by which the Bailiff, and this Defendant by his Command, made the Deliverance three Days after the Treſpaſs ſuppoſed*, and attach'd the Plaintiff to anſwer, *abſque hoc* that he is guilty before the third Day. Choke ſaid he ought to ſhew if the Way be in the ſame Vill as the Houſe, or where elſe it is, and alſo he does not ſay whether the Doors of the Houſe were open when he entered, by which he ſaid ſo. Br. Treſpaſs, pl. 204 cites 37 H. 6. 37.

22. It was ſaid for Law, that *if all the Neighbours of the Vill carry their Grain out of the Common Field, except one who would not carry for Frowardneſs or Negligence*, there *the others may put their Beaſts in the Field*, and ſhall not be Treſpaſſors to the other. Br. Treſpaſs, pl. 352. cites 21 E. 4. 41.

23. Treſpaſs for chaſing his Cattle at S. the Defendant *juſtified for Damage feaſant in* a Cloſe called *Wh. Acre, which was his Franktenement.* The Plaintiff *replied that B. was ſeiſed* in Fee *of* a Cloſe called *Bl. Acre in R. which he leaſed to him; and that the Defendant was ſeiſed* in Fee of another Cloſe called *Gr. Acre*, which lay *contiguous to Wh. Acre, and ſo preſcribed for the Defendant and all thoſe whoſe Eſtate he had in Gr. Acre, to repair the Fences between thoſe two Cloſes; and that he put his Cattle into Bl. Acre, and they for Default of Encloſure eſcaped into Gr. Acre, and thence into Wh. Acre.* The Defendant *rejoined*, and confeſs'd *that the Plaintiff was poſſeſs'd of Bl. Acre, and himſelf ſeiſed of Gr. Acre, as above; but* ſaid, *that between Bl. Acre and Gr. Acre there is a little Brook, which on the Side of Bl. Acre has a Bank contiguous* to it, *which B. and thoſe whoſe Eſtate* &c. *have us'd* &c. *to repair, and for Want of Repairs the Beaſts eſcaped* out of Bl. Acre into Gr. Acre, and thence into Wh. Acre; whereupon the Defendant chaſed them &c. The Plaintiff demurr'd, and had Judgment; for the Defendant pleaded a *good Bar*, and the Plaintiff made a *good Replication*, and ſhewed the Fault to be the Defendant's, by not incloſing between Bl. Acre and Gr. Acre, and the *Rejoinder does not confeſs and avoid the Replication, but perplexes the Matter, by adding a Preſcription* on the Plaintiff's Part, *to repair a Bank* between Bl. Acre and Gr. Acre, whereupon Iſſue cannot be taken, becauſe then 2 Preſcriptions ſhall be tried together, which cannot be. Beſides, the Rejoinder is no Anſwer to the Replication but by way of Argument, and if true, is good Matter in Evidence againſt the Plaintiff, who muſt prove his Replication true; for the Plaintiff ſays that Bl. Acre and Gr. Acre are contiguous, which intends that there is no mean Space between them, whereas the Rejoinder ſays that there is a Bank between them, and if ſo, they are not contiguous. But the Defendant ſhould have travers'd the Preſcription alleg'd by the Plaintiff, which would have made an End of all; Per tot. Cur. Yelv. 217. Hill. 9 Jac. B. R. Durrant v. Child.

Brownl. 221. S. C. and is a Tranſlation of Yelv. but that ſome Words are miſprinted. —Roll. Rep. 11. pl. 12. S. C. but S. P. does not appear. —Cro. J. 337. pl. 1. S. C. but not S. P.— Bulſt. 157. S. C. but that is of Cattle ſtraying out of a Cloſe into the Highway, which was the Waſte of the Lord, who thereupon brought Treſpaſs, but the Court diſcountenanc'd the Action, which ſee at (N. a) pl. 11.

24. In Treſpaſs of treading his Graſs, entring his Cloſe called the Yard, and *pulling down his Gate* &c. The Defendant *juſtified for a Paſſage* by and thro' his Yard, *and that at the Time when* &c. a *Gate was erected in the Paſſage, ſo that he could not paſs with his Beaſts, whereupon he broke the Gate*, and in paſſing along he Aliquantulum trod the Graſs, which is Idem Reſiduum. The Plaintiff objected, that he could not juſtify pulling down and breaking the Gate, he *not having ſhewn that it was lock'd or nail'd*, ſo as he could not paſs. But per Cur. He having pleaded that the Gate was put there, ſo as he could not uſe his Paſſage, it *ſhall be intended* lock'd or nail'd, or that the Way is thereby ſo ſtraightened that he could not paſs, and the Plea good; and that the Replica-

tion being ſo general, is idle and vain. And per tot. Cur. Judgment for the Defendant. 3 Lev. 92. Mich. 34 Car. 2. C. B. Sprigg v. Neal.

25. In Treſpaſs of entring his Cloſe, and *killing two Maſtiffs*, the Defendant pleads that they were *ſet upon his Hogs, and were like to kill them*, to prevent which he entred into the ſaid Cloſe, and killed the Maſtiffs. And per Hale Ch. J. The Juſtification of killing the Maſtiffs is well enough; for one cannot ſet Maſtiffs upon Pigs to kill them, but he may hunt them with a little Dog. Freem. Rep. 347. pl. 432. Mich. 1673. King v. Roſe.

See pl. 3. ſupra.

26. *A. was ſeiſed of Bl. Acre, B. of Gr. Acre, and C. of Wh. Acre, which* 3 Cloſes *adjoined to one another. B. was to repair the Mound between A. and B. and C. was to repair* the Mound *between B and C.——A. puts his Beaſts into Bl. Acre, which ſtray'd into B.'s Cloſe for want of Repairs between Bl. Acre and Gr. Acre, and out of Gr. Acre into Wh. Acre, the Mounds being out of Repair between B. and C.—C. brought Treſpaſs*, and *A. pleaded the ſpecial Matter*. The Queſtion was, whether or no, when the Beaſts of A. ſtray into the Cloſe of B. for Default of Repairs by B. and ſo were no Treſpaſſers there, and then ſtray into the Cloſe of C. for Default of Repairs by C. this ſhould excuſe the Treſpaſs of A.'s Beaſts, as it would for the Beaſts of B.? The Court ſeemed to incline that it would not; for tho' C. was bound to repair between him and B. and ſo B.'s Beaſts would have been excuſed if they had ſtrayed into his Cloſe, yet the Preſcription that binds him to repair, is only perſonal againſt B. and his Beaſts, and not againſt all Beaſts that come into his Cloſe. Twiſden ſaid, if this were a good Plea, the Right of repairing the Fences between B. and C. would be tried between A. and C. but he thought A. muſt be put to his ſpecial Action on the Caſe againſt B. for not repairing, per quod &c. Sed Cur. adviſare vult. Freem. Rep. 379. pl. 495. Mich. 1674. Right v. Baynard.

(K. a) Treſpaſs. Juſtification. What ſhall be good Juſtification. *A Thing of Neceſſity.*

* Fol. 567.

1. **If a Man has a** Way over my Land for his Beaſts to paſs, * if the Beaſts feed the Graſs by Morſels in paſſing, **it is juſtifiable. P. 15 Ja. B. R.** *Reeve and Downs.* **Per Curiam, it being againſt his Will, as it is to be intended.**

If a Man has Way over the Land of another for his Cattle, and upon the Way he ſcares his Cattle, ſo that they run out of the Way upon the Land of the Owner, and the Driver *freſhly purſues* them &c. if Treſpaſs be brought, he that had the Way may plead this ſpecial Matter in Juſtification; Per Richardſon Ch J. Het. 166. Hill. 6 Car. C. B. Anon.

Roll Rep. 79. S. C. accordingly.—And ſee Tit. Neceſſity (A) pl. 12. S. C.

2. **If there are diverſe** Paſſengers in a common Paſſing Barge upon the Thames, and one **of them** has a Pack **with him, in which are bound up Monies and Things** of great Value, **and a** Tempeſt ariſing, all the Goods **in the Barge** are caſt into the Sea for Safeguard of their Lives, **among which the Pack aforeſaid is caſt into the Sea, the Maſter of the Barge not having Notice that there were any ſuch Things of Value in it; In an Action for the Pack, and Things therein, this is juſtifiable, becauſe it was done for the Preſervation of their Lives. M. 12 Car. B. R. by Coke ſaid, that it was ſo reſolved in Bank in the Caſe of** *Graveſend Barge.*

3. If

3. If a *Chimney be on Fire*, I may enter and *take the Goods* in Safety, which are *in Jeopardy to be loſt*; Per Palmes. Br. Treſpaſs, pl. 213. cites 21 H. 7. 27.

[K. a. 2] Things *of Charity*.

[1.] 3. IN Treſpaſs of his Houſe broken, if Defendant pleads, that her Daughter was retain'd in the Service of the Plaintiff, and was very ſick in the ſaid Houſe, being then the Plaintiff's Servant, and Defendant being her Mother, enter'd into the ſaid Houſe to ſee her Daughter, which is the ſame Treſpaſs; This is not a good Juſtification, without Licence of the Owner of the Houſe, or at leaſt demanding of Leave to ſee her Daughter. Hill. 1649. between *Parlet and Bowman*, adjudg'd upon Demurrer.

(L. a) Treſpaſs *juſtifiable. In what Caſes* a Treſpaſs may be juſtified.

1. IF a Man lets a Faulcon fly at a Pheaſant in his own Land, which purſues the Pheaſant into the Warren of another, and there takes him, yet he cannot juſtify the Entry into the Warren of the other to take the Faulcon and Pheaſant. 38 E. 3. 10. b. 12 H. 8. 10. See Tit. Hunting (A) pl. 1. and the Notes there.

2. If a Man hunts with a Tumbler in my Warren, yet I cannot juſtify killing the Tumbler with my Maſtiff by my Incitation. 3 Ja. B. *Lewin's Caſe*. In Treſpaſs of killing a Maſtiff-Dog at E. in Kent, the Defendant pleaded, that Sir F. W. was ſeiſed of a Warren in D. in the ſame County, whereof he is and was Warrener; and that the Dog was divers times there killing Conies, and therefore finding him there, tempore quo &c. running after Conies, he kill'd him. And all the Court held the Juſtification good, it being alleg'd, that the Dog uſed to be there killing of Conies. Cro. J. 44 pl. 13. Mich. 2 Jac. B. R. Wadhurſt v. Damme.——S. C. cited Saund. 84. Arg. in Caſe of Wright v. Ramſcot.

3. *In every Caſe where a Man may avow he may juſtify*; but *not e contra*, per Yong, & non negatur. But ſee elſewhere, that if he juſtifies he ſhall not have Return of the Beaſts. Contra upon Avowry. Br. Juſtification, pl. 16. cites 5 E. 4. 6.

4. If *A. takes the Cattle of W. S. without Cauſe*, it is *not lawful for J. N. to take them from him*; for he has Title againſt all, unleſs againſt the very Owner; Per all the Juſtices. Br. Treſpaſs, pl. 433. cites 13 H. 7. 10.

5. Treſpaſs. *Tenant at Will juſtified for digging a Trench to avoid the Water, which ſurrounded the Common in another's Land, appendant to the other Land which he had at Will, and to keep his own Land from being ſurrounded.* And it was held double; for there are two Matters, and the Plaintiff demurr'd. Therefore Quære; for two Juſtices were againſt two. And there are diverſe Caſes what a Man may do *for the Benefit of a Stranger*. And there is a Diverſity where it is *in Defence of the Perſon* of a Stranger, and where *of his Goods or Land*. And *for the Commonwealth*, a Man may extirpate the Suburbs of a Vill, or an Houſe which is on Fire.

Fire. Br. Treſpaſs, pl. 406. cites 12 H. 8. 2. 15. And cites the Time of E. 4. that a Man *may make a Bulwark* upon another's Land in Defence againſt Enemies.

6. If *Trees grow in my Hedge*, hanging over another Man's Land, and *the Fruit of them falls into the other's Land*, I may juſtify my *Entry to gather up the Fruit*, if I make no longer Stay there than is convenient, nor break his Hedge. Lat. 120. per Doderidge J.

Sid 336. pl. 1. S. C. accordingly.—Lev. 216. S C. and the Plea was adjudg'd ill, becauſe he did not ſay that he could not ſave the other Dog without killing the Maſtiff; and alſo becauſe it does not appear, that the Plaintiff's Dog was uſed to bite, nor that the Defendant's Dog was a Maſtiff.——2 Keb. 237. pl. 11. S. C. ſays, that Keyling Ch J. ſaid it was a ſufficient Juſtification; to which Moreton J. inclin'd. But adjornatur.

7. In Treſpaſs the Plaintiff declared, that the Defendant *kill'd his Maſtiff* &c. The Defendant *pleaded* in Bar, *that the Plaintiff the ſame Day* &c. *ſuffer'd his Maſtiff to go in the Street, not muzzled; and that he kill'd another Dog of B. his Miſtreſs, which ſhe kept for the Security of her Houſe; and that he, as her Servant, adtunc & ibidem moloſſum præd. occidit to ſave the Dog, and leaſt the Maſtiff ſhould do any further Damage.* And upon Demurrer it was argued, that a Maſtiff is a valuable Thing, and therefore the Defendant cannot juſtify the Killing it, without a reaſonable Cauſe; that he might juſtify the Beating the Maſtiff to prevent any further Miſchief to the other Dog, but not the Killing it, unleſs it could not otherwiſe be prevented; and he has not ſaid, that he could not have ſaved his Miſtreſs's Dog without killing the Maſtiff. And of this Opinion was the Court, and gave Judgment for the Plaintiff. Saund. 84. Trin. 19 Car. 2. Wright v. Ramſcott.

8. In Treſpaſs of *killing 2 Greyhounds*, the Defendant *juſtified, becauſe they chaſed a Deer in his Park, and kill'd him there.* The Plaintiff *replied, that the Deer was out of the Park in his Land eating his Graſs, and therefore he ſet his Greyhounds on to chaſe him out of his Land, and they follow'd him into the Park, and there kill'd him.* Adjudg'd upon Demurrer, that the Replication was ill, for *not ſaying that he did his Endeavour to ſtop the Greyhounds at the Side of the Park*, to hinder their entering into it. But it was then objected, that the Bar was ill; for tho' it was not lawful to chaſe in the Park, yet the Defendant ought not to have kill'd the Greyhounds, when he had taken them; and cited 2 Roll Abr. 567. [See Supra, pl. 2.] **Lewin's Caſe.** And e contra was cited 2 Cro. 44. * **Wadhurſt v. Dam.** And at another Day, upon Conſideration of both Books, Judgment was given for the Defendant. 3 Lev. 28. Mich. 33 Car. 2. C. B. Barrington v. Turner.

* See ſupra, pl. 2. in the Notes there.

(M. a) In what Caſes a Man may *juſtify*, *as incident* to another Thing.

See Tit. Grants (Z) pl. 16. and the Notes there.

1. **If a** Man bargains and ſells all his Trees growing **upon certain Land whereof he is ſeiſed, the** Bargainee has Power **given to him as incident to the Grant,** to come upon the Land, and cut down and carry away **the Trees at whatever Time he pleaſe; and the Coming upon the Land is juſtifiable. Tr. 15 Ja. between** *Stukeley and* **adjudg'd per Curiam.**

S. P. by Twiſden J. Vent. 43. Mich. 21

2. **If a** Man grants **to me,** to make a Trench in his Soil from ſuch a Fountain unto my Houſe, ſo that I may put a Pipe to convey the Water **to my Place [or Houſe] in a Conduit; if after my Pipe be ſtopp'd,** I may

I may dig the Ground to amend the Pipe; for it is incident to the Grant. 9 E. 4. 35. b. Curia.

Car. 2. B. R. in the Caſe of Pomfret v. Roycroft; for Quando aliquid conceditur, conceditur & id ſine quo res ipſa uti non poteſt.—— A Farmer of the King of a Capital Meſuage makes a Conduit to *convey Water* to his Houſe, *through the Land of a Copyholder* of the Manor, and afterwards the King grants the Capital Meſſuage to A. with the Appurtenances; and the Copyhold was granted to another Perſon. Adjudg'd, that the Farmer may *dig the Ground to amend the Pipe*; becauſe Terra tranſit cum Onere. Mo. 644. pl. 889. Trin. 43 Eliz. B. R. Guy v. Brown.

3. So if I have ſuch Pipe by Preſcription, I may juſtify the Digging of his Land to amend it, without preſcribing to do it; for it is incident to the Thing preſcrib'd. 9 E. 4. 35. Curia.

4. Treſpaſs *of taking his Servant and a Scaplery, viz. a Garment*, was brought by the Prior of Grey-Friars in London. The *Defendant ſaid, that the Friar took his Son and Heir apparent, now named Servant, and put him into a Friar's Habit*; and the Defendant came into the Church, and the Son came to him with the Scaplery, and was only 11 Years of Age, and by Award of the Mayor of London he took the Scaplery. And it was challeng'd to be treble, viz. that he was Son and Heir, and was taken and carried away, in which Caſe he might take him; and another, that he came to him; and the third, the Award of the Mayor of London. And per Hank, he may take his Son and Heir, if he be under 21 Years, if he be not profeſs'd. And by the Opinion of the Court, becauſe the Juſtification is good of the Taking of the Body; therefore it is good of the Garments upon his Back, and therefore a good Plea for the Scaplery. And it was held there, that where a Man puts another into Apparel, it is a Gift in Law. And per Hank, if an Adulterer takes the Feme of a Man, and cloaths her well with New Cloaths, the Baron may retake the Feme with the Cloaths. And after it was awarded, that as to the Entry into the Church, and the Taking of the Infant and the Scaplery, that the Plaintiff take nothing by his Writ. Br. Treſpaſs, pl. 93. cites * 11 H. 4. 31.

* Mo. 214. pl. 354. in the Viſcounteſs of Bindon's Caſe, cites 12 H. 4. S. P. [but is miſprinted, and ſhould be 11 H. 4. nor are there ſo many Pages in 12 H. 4.]

5. Treſpaſs *of a Houſe broken and Goods carried away*. The *Defendant ſaid, that the Plaintiff's Husband was ſeiſed in Fee of the Houſe, and poſſeſs'd of the Goods, and made the Defendant Executor*, and died; and the Defendant *found the Door open, and enter'd and took the Goods*, and the Plaintiff ſuppoſing that ſhe had been Executor, took them &c. And this was admitted good Colour, and the Plea was awarded good per Cur. notwithſtanding that the *Plaintiff brought the Action of her Goods, and the Defendant juſtified of the Goods of the Teſtator*. Wherefore the Plaintiff ſaid, that the Teſtator deviſed them to her, and the Defendant deliver'd them to her after the Teſtator's Death, and after took them. And the Defendant proteſtando, that they were not deviſed, and pro Placito ſaid, that he did not deliver them, and ſo at Iſſue. Br. Treſpaſs, 9. cites 2 H. 6. 15.

6. Treſpaſs Quare Clauſum fregit, & Averia cepit. The *Defendant ſaid, that the Plaintiff commanded N. to deliver to him the Beaſts, by which he enter'd and received them of N.* And per Huſſey and Brian, the Defendant may juſtify the Entry by the Command given to N. But per Choke, here the Party *may receive the Beaſts at the Park-Gate*, and cannot enter by the Command given to a Stranger, by which the Defendant chang'd his Plea. Br. Treſpaſs, pl. 342. cites 18 E. 4. 25.

7. Where *a Man is bound to make me a Houſe before Michaelmas, and he is no Carpenter*, he may juſtify to *bring a Carpenter* there to make the Houſe. Br. Treſpaſs, pl. 342. cites 18 E. 4. 25. Per Huſſey and Brian.

8. *And* where a *Man makes a Letter of Attorney to deliver Seiſin to W. S.* there *W. S. may juſtify the Entry to take the Livery*. Br. Treſpaſs, pl. 342. cites 18 E. 4. 25. Per Huſſey and Brian.

9. In Treſpaſs the Defendant *juſtified by Cuſtom of Faldage* by Preſcription of *all Cattle which paſture in ſuch a Common* &c. the Plaintiff ſaid

that De ſon tort Demeſne without ſuch Cauſe. Br. De ſon tort &c. pl. 31. cites 5 H. 7. 9.

Fol. 568.

(M a. 2 Treſpaſs juſtifiable. *By Lord.* [*Or Reverſioner. Entry.*]

Pl. C. 13. a. in Manxell's Caſe.

1. **He in Reverſion may well** enter the Houſe in Leaſe for Life, **to ſee whether it be well repair'd,** if the Houſe be open. 9 H. 6. 29. b.

2. But **he in Reverſion cannot enter into the Houſe where it is** faſten'd up or lock'd, and break the Windows. 9 H. 6. 29. b. Curia.

See Traverſe (L. b) pl. 11.

(M a. 3) Juſtification by *Command.* And *Pleadings.*

1. IN Treſpaſs *of Goods carried away*, it is a good *Plea that the Owner was outlaw'd, and he as Servant of the Eſcheator by his Command took the Goods*; Per Littleton. Br. Treſpaſs, pl. 339. cites 18 E. 4. 9.

2. In Treſpaſs the *Defendant pleaded the Franktenement of one A. and he by his Command entred and did the Treſpaſs*; the *Plaintiff ſaid that before that A. had any thing, he was ſeiſed till by A. diſſeiſed, and he re-enter'd, and the Treſpaſs meſne*; and no Plea, but was *compell'd to ſay* that he was ſeiſed till by the Defendant *diſſeiſed to the Uſe of A.* and he re-enter'd, and the Treſpaſs meſne, and well. Br. Treſpaſs, pl. 429. cites 11 H. 7. 21.

3. In Treſpaſs of Goods taken, Per Keble, Where a Man *derives Intereſt from the Owner, as by Command*, De ſon tort &c. is no Plea. Contra where he juſtifies in another's Right, as to ſay that the Franktenement is in a Stranger, and he by his Command &c. Br. De ſon tort &c. pl. 53. cites 16 H. 7. 3.

4. In Treſpaſs of chaſing his Cattle, the *Defendant as Servant to a Copyholder of the Manor of T. laid a Preſcription in the Lord for Common of Paſture for him and his cuſtomary Tenants* of the ſaid Houſe, *and ſo juſtified* the Chaſing *by Command*, and as Servant to the ſaid Copyholder, and that he Molliter drove them out of the Common. The Plaintiff *replied De injuria ſua propria abſque tali cauſa.* And upon Demurrer it was reſolved that theſe Words, Abſque tali cauſa relate to the whole Plea, and not to the Command only; for all makes but one Cauſe, and neither of them without the other is any Plea by itſelf; and that here the Iſſue will be full of Multiplicity of Matter, whereas an Iſſue ought to be full and ſingle; for in this Caſe Parcel of the Manor demiſable by Copy, Grant by Copy, Preſcription for Common &c. and Commandment will all be Parcel of the Iſſue. And Judgment againſt the Plaintiff. 8 Rep. 66. b. Mich. 6 Jac. Crogate's Caſe.

5. In *Battery* the Defendant *pleaded a Judgment, and Execution had by by E. his Father againſt J. S. and that the Plaintiff aſſaulted the Bailiff to reſcue the Goods, whereupon he in Aid of the Bailiffs, and by their Command Molliter manus impoſuit* upon the Plaintiff *to prevent the Reſcue.* The Plaintiff *replied De injuria ſua propria, and travers'd the Command* &c. The whole Court reſolved that the Traverſe was ill; for he might have done

ſo

ſo of his own Head to prevent a Reſcue, which is a Tort and Breach of the Peace. 3 Lev. 113. Mich. 35 Car. 2. C. B. Bridgwater v. Bethe-way.

(M a. 4) Juſtification by *Licence*. And *Pleadings*.

See (H. a 2) pl. 18.

1. TReſpaſs of *Chacing in his Free Chace*; the *Defendant pleaded Licence of the Plaintiff* to chace there; the Plaintiff ſaid that De ſon tort Demeſne abſque tali Cauſa, Priſt, and the others e contra. Br. De ſon tort &c. pl. 33. cites 42 E. 3. 2. Contra 8 E. 4.

Where Licence is pleaded, the Plaintiff ſhall not ſay De ſon tort Demeſne abſque tali Cauſa, but *ſhall anſwer to the ſpecial Matter.* Br. De ſon tort &c. pl. 30. cites 10 H. 6. 9. & 13.——S. P. Br. De ſon tort, pl. 41. cites 9 E. 4. 41.——S. P. Br. De ſon tort &c. pl. 50. cites 20 E. 4. 4——S. P. Per Keble and Townſend. Br. De ſon tort &c. pl. 53. cites 16 H. 7. 3.

2. In Treſpaſs it is a good *Plea that the Place where is the Common Gaol of the Sheriff of L. and that W. N. is Gaoler, who licenc'd the Defendant to enter to ſpeak with a Priſoner*, by which he did it, which is *the ſame Treſpaſs*; and a good Plea Per Choke J. Br. Treſpaſs, pl. 332. cites 14 E. 4. 8.

3. *So* where *a Parker licences a Man to drink with him in his Lodge*, tho' the Licence is derived by a Servant, and not by the Owner; Per Choke J. Br. Treſpaſs, pl. 332. cites 14 E. 4. 8.

4. *In Treſpaſs* the *Defendant pleaded Licence of the Plaintiff to enter*, and the *Plaintiff ſaid that he broke his Door and Windows*; this is no good Replication *without traverſing the Licence*, inaſmuch as it is a Licence in Fact. Br. Replicntion, pl. 55. cites 21 E. 4.

Contra of Licence in Law, as to enter into a Tavern to drink, or to enter *to ſee Waſte, take Diſtreſs*, and the like, it is a good *Replication that he broke a Cup, or ſtaid all Night, or kill'd the Diſtreſs*; for of miſuſing a Horſe borrow'd &c. lies Action upon the Caſe, and not Treſpaſs Vi & Armis; but it is a good *Replication after the Licence in Fact executed, that he came back after the ſame Day, and broke* as above &c. And the beſt Opinion was that the other may *rejoin to thoſe, as to ſay that he did not break the Cup, or ſtay there all the Night, or he did not kill the Diſtreſs*, and ſhall not be compell'd to ſay Not guilty. Ibid.

5. Treſpaſs for *entring his Houſe and taking his Goods*. The Defendant *pleads quoad the* Goods Not guilty, and quoad *the Entry that the Plaintiff's Daughter licenced him*, and that he entred by that Licence. The Plaintiff *replies Non intravit Per Licentiam ſuam*. The firſt Iſſue was found for the Defendant, and the ſecond for the Plaintiff, That he did not enter by the Licence, and Damages aſſeſs'd to 80 l. It was moved in Arreſt of Judgment that he ought to have travers'd the Licence, and not the Entry by the Licence, or the Entry by itſelf, or the Licence by itſelf, and not both together; And of that Opinion were Williams and Yelverton; to which Popham agreed, had it been at the Common Law; but being tried, it is made good by the Statute of 32 H. 8. which aids misjoining of Iſſues; for an Iſſue upon a Negative pregnant is an Iſſue; Per quod adjornatur. Cro. J. 87. pl. 13. Mich. 3 Jac. B. R. Myn v. Cole.

(M a 5) Juſti-

(M. a. 5) Juſtification. Pleadings.

1. TReſpaſs for *breaking his Houſe and Cloſe.* The *Defendant juſtified, that the Plaintiff was his Tenant for Years, and he enter'd to ſee if he did Waſte* &c. The *Plaintiff ſaid, that he ſtaid there by a Day and a Night*; and a good Replication. Br. Replication, pl. 12. cites 11 H. 4. 75.

So of Entry into a Tavern, and the other ſaid, that after his Entry he took a Cup and beat his Servant. Br. Replication, pl. 12. cites 11 H. 4. 75.

2. Treſpaſs of *Nuſance, and of ſtopping a Gutter*, to the Nuſance of the Plaintiff in ſurrounding his Land. The *Defendant preſcrib'd to amend the Gutter, and to ſtop the Water during that Time.* The Plaintiff ſaid, that De ſon tort Demeſne &c. and traverſed the Preſcription Modo & Forma; and ſo to Iſſue. Br. De ſon tort &c. pl. 48. cites 39 H. 6. 32.

3. In Treſpaſs for pulling down his Hurdles in his Cloſe, the Defendant *juſtified*, for that one B. was Lord of the Manor of D. and that the ſaid B. and all thoſe whoſe Eſtate he had in the ſaid Manor, had had *a free Courſe for their Sheep in the Place where* &c. *and that the Tenant of the ſaid Cloſe could not there erect Hurdles without the Leave of the Lord, and that B. let to the Defendant the ſaid Manor, and becauſe the Plaintiff erected Hurdles without Leave* &c. *in the ſaid Cloſe, he caſt them down*, as it was lawful for him to do. The Plaintiff *replied of his own Wrong without Cauſe* &c. It was holden by the Juſtices to be an ill Plea; for the Plaintiff ought to have traverſed the Preſcription. 4 Le. 16, 17. pl. 59. Trin. 26 Eliz. B. R. Ruiſhbrook v. Puſanies.

4. In Treſpaſs of breaking his Fences, and *eating up his Graſs with Hogs*, the *Defendant pleads, that the Fences were out of Repair.* The Plaintiff demurs, becauſe the Defendant does *not ſay that they are the Plaintiff's Fences, nor that the Plaintiff's Cloſe was contigue adjacens.* Per Hale Ch. J. The not alleging that it was the Plaintiff's Mound ſeems not good, and then the Plaintiff ſhall have Judgment; and ſo he had. Freem. Rep. 347. pl. 432. Mich. 1673. King v. Roſe.

5. All *Strangers* who juſtify *under Proceſs of Execution, (except Officers)* ought to *ſet forth the Judgment*; and ſo muſt the Party who is *Plaintiff*, if he juſtifies; Per Holt Ch. J. Carth. 443. Hill. 9 W. 3. B. R. in Caſe of Britton v. Cole.

6. In Treſpaſs, *Juſtification* without *ſhewing* the *Commencement of his Eſtate*, or that *Freehold* was in him, is not good, tho' Poſſeſſion is ſufficient to count upon. 12 Mod. 506. Paſch. 13 W. 3. B. R. * Pell v. Garlick.

Contra to former Judgments, as in Cro. C. 138. Skevil v. Avery.——And 2 Mod. 70. Searle v. Bunion.——And 3 Mod. 32. Langford v. Webber.——And Carth. 9. S. C. ——See Poſſeſſion (I) pl. 2.

* Lutw. 1492. S. C.

(N. a) Treſpaſs *excuſable.* What Act or Thing will excuſe a Treſpaſs.

1. IF my Beaſts eſcape (**not contra Pacem**) into the Land of J. S. and tramples his Corn, **this Eſcape ſhall not excuſe me of Treſpaſs, but a Writ of Treſpaſs lies againſt me for Default of good Keeping of them.** 27 Aſſ. 56. **adjudg'd.** 12 H. 7. Kell. 3. b.

2. **If A.** leaſes Land to B. for Life, and after **leaſes it** to C. for Years to commence after the Death of the Leſſee, **and then** B. ſows Part of the **Land, and** dies **before Severance of the Corn, and afterwards** C. enters **into the Reſidue of the Land not ſown, and puts in his Beaſts,** and the Beaſts go againſt his Will and feed the Corn; **This ſhall not excuſe him, but the Executor of B. ſhall have Action of Treſpaſs for it; for he ought to take care of his Beaſts, that they do no Damage to another Man. And here the Emblements belong to the Executor of B. and he has Liberty to permit them to grow there till a convenient Time for their Severance. M. 10 Car. B. R. between** *Pitts and Collibeare* **adjudg'd upon a Demurrer. Intratur Tr. 10 Car. Rot. 575.**

3. In Falſe Impriſonment, the *Defendant ſaid, that the Father of the Plaintiff held of his Maſter by Service of Chivalry, and died,* the *Plaintiff being within Age; and he, by Command of his Maſter, ſeiſed him, and detain'd him ſix Months; and after one E. an elder Brother of the Plaintiff, who was raviſh'd into Scotland, came back; and the Defendant perceiving it, waiv'd the Plaintiff, and ſeiſed* E. Judgment ſi Actio, and a good Plea. Br. Notice, pl. 19. cites 22 Aſſ. 85.

4. If *the eldeſt Brother goes over the Sea,* the *Youngeſt thinking that he is dead,* cannot juſtify to *enter into the Land*; Per Portington. Br. Treſpaſs, pl. 141. cites 21 H. 6. 14.

So where *a Man makes Executors, and goes beyond Sea,* the *Executors, thinking him dead, ſeiſe the Goods,* he ſhall have Treſpaſs; Per Portington. Br. Treſpaſs, pl. 141. cites 21 H. 6. 14.

5. If an *Infant delivers Goods to the Defendant,* it is a good Excuſe in an Action of Treſpaſs; but a Gift by an Infant is void. Br. Treſpaſs, pl. 150. cites 22 H. 6. 3.

6. In Treſpaſs *of cutting Trees* &c. it is a good *Plea, that the Plaintiff hired him to cut for 8 d. by which he cut,* as lawfully he might &c. Br. Treſpaſs, pl. 383. cites 33 H. 6. 55.

7. In Treſpaſs the *Defendant ſaid, that the Cloſe where* &c. *adjoins to the King's Highway from ſuch a Vill to ſuch a Vill, and he chaſed his Cattle in the Way, and they enter'd the Cloſe in Default of Incloſure of the Plaintiff,* which the Plaintiff, and thoſe whoſe Eſtate &c. have uſed to incloſe Time out of Mind. *And the Defendant freſhly purſued and rechaſed* &c. by which the *other ſaid,* that it was *ſufficiently incloſed,* priſt &c. Nevertheleſs, per Danby and Littleton, if Grain grows in a common Field near the Way, and the Beaſts feed, the Defendant ſhall render Damages; for there the Plaintiff is not bound to incloſe. Contrary above. And the *Iſſue was join'd upon the Sufficient Incloſure,* and *not upon the Incloſure only.* Quod nota. Br. Treſpaſs, pl. 321. cites 10 E. 4. 7.

8. *And* where a *Man has a private or particular Way,* which is not the King's Highway for all, there if he, who has Title, *chaſes Cattle which enter*

But if a *Man who has no Right* of

Wav there, chaſes there, and his Cattle enter, for Default of Incloſure Treſpaſs lies; for the not Incloſing is no Matter to him who has no Title to chaſe there; Per Moyle and Choke. Br. Treſpaſs, pl. 321. cites 10 E. 4. 7.

enter and feed, Treſpaſs does not lie, tho' it be not incloſed; Per Moyle and Choke. Br. Treſpaſs, pl. 321. cites 10 E. 4. 7.

9. If a *Man has Common in D. and* one *W.S. has Land adjoining, which he is not bound to fence*, As in the Field Country; there the *Commoner is bound*, when he puts his Beaſts in the Common, *to keep* them that they do not go into the Land of W. S. Per 2 Juſtices. Br. Treſpaſs, pl. 345. cites 20 E. 4. 10.

10. Juſtification in Treſpaſs for ſubverting his Soil, and feeding the Graſs, by a Cuſtom, *that where he ploughs he may turn his Plough upon the Land adjoining, by which he did ſo, and his Horſes in the turning ſubverted a Foot of Land, and took a Mouthfull of Graſs againſt his Will*; and well. Br. Treſpaſs, pl. 351. cites 21 E. 4. 28. and 22 E. 4. 8.

See (I.a) pl. 23 S. C. but D. P.

11. Treſpaſs Quare Clauſum fregit; it appear'd that the *Defendant had a Cloſe adjoining to the Highway*, which was *ſuppoſed to be the Lord's Waſte*, and that the *Cattle coming out of his Cloſe did caſually ſtray in the Highway*, and for this the Action was brought. Croke J. ſaid, that if the Cattle ſtay any Time on the Waſte, *and depaſture there*, the Lord may have an Action of Treſpaſs. And Fenner ſaid the Cattle ought not to feed in the Highway; and as it appear'd to be Alta Via Regia which made it the ſtronger againſt the Plaintiff, he was againſt the Action; and the whole Court diſliked much of it, and were of Opinion againſt the Plaintiff; but the Matter being upon Compromiſe, they deliver'd no Judgment. Bulſt. 157. Trin. 9 Jac. Durand v. Childe.

Jo. 131. pl. 1. Millen v. Fawtrey S. C. adjudg'd accordingly, and the Juſtices held further, that if the Dog

12. In Treſpaſs, the Defendant *pleaded that the Plaintiff's Sheep were treſpaſſing in his Ground, and that he chaſed them out with a little Dog*, and he *immediately re-call'd his Dog but the Dog purſued them into the Plaintiff's Ground adjoining*. Upon Demurrer, it was held that the Action does not lie. And Doderidge J. gave for Reaſon, that there was no Hedge. And Judgment was given for the Plaintiff. Poph. 161. Paſch. 2 Car. B. R. Millen v. Fandrye.

had chaſed them out of the Land where they were Damage-Feaſant *into the Land of a Stranger*, and the Party did his Endeavour to recal the Dog, no Treſpaſs lies; but Jones J. held it not lawful for the Party himſelf to chaſe them into the Land of a Stranger, but to a Highway only or a Common, or to the Land of the Owner only. ——— Lat. 13. Millen v. Fawery S. C. adjudg'd accordingly, and ſame *Difference* taken by Jones J. *as to the Party's doing it by himſelf or* by a *Dog*, and where they drive them into the Highway, and where into a Common &c. ——— Lat. 120. S. C. and S. P. by Jones and Crew Ch. J. and Doderidge J. held that the Action did not lie. And Jones agreed clearly, that the Chaſing with the Dog was lawful, and took the Difference between Chaſing by the Party himſelf and where he does it by a Dog; and ſaid, that the Party himſelf may *chaſe them into* the Land of *the Owner*, unleſs it be into *his Corn*, and even there *in Caſe of Neceſſity*. But that in all thoſe Caſes it ſeems that Treſpaſs lies for the Owners of the Beaſts, becauſe it is not lawful to do a Tort to another to eaſe myſelf; And that Doderidge ſaid, that here is a Damage to the Owner of the Beaſts, but no Injury; and that there never ſhall be Treſpaſs unleſs there is both Damage and Injury. But the Report ſays that notwithſtanding all this, Judgment was given for the Plaintiff.

13 *No Excuſe* is good in Treſpaſs, *but* by *inevitable Neceſſity*. 2 Jo. 205. Paſch. 34 Car. 2. B. R. Dickenſon v. Watſon. See (G) pl. 1. in the Notes, the Caſe more large.

(O.a) Treſ-

(O. a) Treſpaſs. What will be a *Diſcharge* of a Treſpaſs. *Death.*

1. IF Treſpaſs be done to the Goods of the Teſtator in the Hands of the Executor, if the Executor after dies, his Executor ſhall not have Treſpaſs for it, but Moritur cum Perſona. Contra. 18 H. 6. 22. b.

2. If a Man beats my Servant by which I loſe his Service by diverſe Months, and after he dies, yet I ſhall have Action of Treſpaſs againſt the Treſpaſſer; for this was a diſtinct Treſpaſs to me. Tr. 4 Ja. B. R. in *Huggin's* Caſe by Williams. Yelv. 89. Higgins v. Butcher, S. C. but S. P. by Williams does not appear; but Tanfield ſaid, that if one beat the Servant of J. S ſo that he dies of that beating, the Maſter ſhall not have an Action againſt the other for the Battery and Loſs of Service, becauſe the Servant dying of the Extremity of the beating, it is now become an Offence againſt the Crown, it being turn'd into Felony, and this has drowned the particular Offence, and private Wrong done to the Maſter before; And his Action by that is gone; which Fenner and Yelverton agreed to. ——— Brownl. 205. Huggins v. Butcher S. C. ſeems only a Tranſlation of Yelverton.

3. But if a Man beats my Feme, by which ſhe languiſhes by diverſe Months, and after dies, I ſhall not have Action of Treſpaſs againſt him after for this Treſpaſs, becauſe the Treſpaſs was not done to me but to the Feme, ſo that the Feme ought to have join'd in the Action, and I only for Conformity. Dubitatur Tr. 4 Ja. B. R. *Huggin's* Caſe. Yelv. 89. Trin. 4 Jac. B. R. Higgins v. Butcher S. C. and S. P. agreed; for Damages ſhall be given to the Feme for the Tort offer'd to the Body of her. ——— Brownl. 205. Huggins v. Buther S. C. and ſeems to be a Tranſlation of Yelverton. —— Noy. 18. Higgins's Caſe S. C. and S. P. by Tanfield: And per Cur. the Action will not lie; for the King only is to puniſh Felony, except the Party brings an Appeal.

(P. a) Treſpaſs. At what Time. In what Caſes it ſhall be *defeated by Matter Ex poſt Facto.*

Fol. 569.

1. IF one raviſh my Feme, and after we are divorced Cauſa frigiditatis, yet I may have Treſpaſs for Raviſhment of my Feme with my Goods taken &c. 43 E. 3. 23. 44 Aſſ. 13. adjudged.

2. So if a Man raviſh my Feme, I may have Treſpaſs againſt him after the Death of the Feme, for Raviſhment of my Feme with Goods taken; for in this Action he is not to recover the Feme, but Damages. 44 Aſſ. 13.

3. If a *Man who has no Right diſtrains in his own Right and after juſtifies as Bailiff in Right of the Lord*, this is no good Juſtification, tho' the rightful Lord agrees to it after. Br. Juſtification, pl. 14. cites 7 H. 4. 23. per Gaſcoigne. *But if he diſtrains as Bailiff of the right Lord, and is not* his Bailiff in Fact, *and after the Lord agrees* and he juſtifies as Bailiff, this is a good Juſtification, per Gaſcoign; but Brooke ſays the Law ſeems to be otherwiſe, for he *was once a Treſpaſſer*; for he had not any Authority at the Time of the taking, and therefore Agreement after will not ſerve. Ibid.

4. If

4. If *Treſpaſs* be brought *of Beaſts generally*, and the *Plaintiff has the Beaſts again*, this ſhall be given in Evidence; for otherwiſe the Plaintiff ſhall recover in Value. Per Culpeper. And per Hank. where the Value of the Beaſts is alleg'd in the Writ, it is a good Plea that the Plaintiff himſelf is ſeiſed of the Beaſts. And per Hill where the Value is alleg'd, the Juſtices of Niſi Prius ſhall enquire of the Value, not having Regard whether the Plaintiff has the Beaſts again or not. Br. Treſpaſs, pl. 93. cites 11 H. 4. 23.

5. If a Man *abates after the Death of my Father, and I re-enter*, I ſhall have Action of Treſpaſs; but contrary if I releaſe; Per Newton. Br. Treſpaſs, pl. 127. cites 19 H. 6. 23.

6. If Treſpaſs be done *upon Tenant for Years*, and *his Term expires*, he ſhall have Treſpaſs without Regreſs; for his Term is ended. Per Fulthorp. Br. Treſpaſs, pl. 127. cites 19 H. 6. 23.

(Pa. 2) [Defeated by] *Act of the Party.*

[1] 3. IF a Man takes my Beaſts **without Cauſe**, and I ſue a Deliverance, **yet Treſpaſs lies for the taking.** 46 E. 3. 26. b. **Contra.** 7 H. 4. 15.

Br. Treſpaſs, pl. 127. cites 19 H. 6. 23. per Aſcough.

[2] 4. After a Treſpaſs upon my Land, **if** I alien the Land, **yet I may have Treſpaſs for the Treſpaſs done before.** 19 H. 6. 28. b.

[3] 5. **If** Bailee of Goods brings Treſpaſs, and Bailor other Treſpaſs, **he that firſt recovers ſhall ouſt the other of his Action.** 48 E. 3. 21. 20 H. 7. 5. b.

13 Rep. 69. Per Cur. in Caſe of **Heydon v. Smith**, cites 11 H. 4. 23. S. P.

[4] 6. **If the** Owner retakes his Goods from the Treſpaſſer, **yet he ſhall have Treſpaſs for the Taking.** 11 H. 4. 24. b.

But he ſhall not have Treſpaſs in the Caſe of the Releaſe

5. If a Man *breaks my Houſe, and ouſts me*, and *another Man diſſeiſes him*, and *I releaſe to the 2d Diſſeiſor*, yet I ſhall have Treſpaſs againſt the firſt Diſſeiſor; Per Aſcough. Br. Treſpaſs, pl. 127. cites 19 H. 6. 23.

of the Treſpaſs done after the Diſſeiſin; but contrary of the Treſpaſs which is the Diſſeiſin; Per Newton. Br. Treſpaſs, pl. 127. cites 19 H. 6. 23.

6. If *A. recovers Land by Judgment againſt B.* and then *J. S. does a Treſpaſs*, and after *B. reverſes the Judgment for Error*, yet A. ſhall have Treſpaſs againſt J. S. For B. cannot have Remedy but only againſt A. and not againſt Strangers. And as the Law charges A. with all the Meſne Profits, ſo it gives him Remedy, notwithſtanding the Reverſal, againſt all Treſpaſſers in the Interim. 13 Rep. 21. 22. in Ninian Menvil's Caſe.

(Pa 3) [Defeated by] Acts *of a Stranger.*

Br. Contract &c. pl. 9. cites 11 H. 4. 23. con-

[1] 7. IF a Man takes Beaſts out of the Poſſeſſion of a Leſſee of them for a Year **to compoſt his Land, Treſpaſs lies againſt this Stranger; and if the** Leſſor after ſells the Beaſts to the Treſpaſſer, **yet** Treſpaſs

Treſpaſs lies for the Treſpaſs done before. Dubitatur. 11 H. 4. 24. b. tra. That it is in a Manner agreed that ſuch Sale extinguiſhes the Action of the Leſſee; and Hank. was preciſe in it; Quod mirum! for *Treſpaſſer has Property*, and *then the Sale of the firſt Owner is void*; Quod quære.——Br. Treſpaſs, pl. 92. cites S. C. accordingly by Hank, and compared it to the Caſe of a Diſſeiſin of A. by B. and then B. is diſſeiſed by C. and afterwards A. releaſes to C. now the Action of B. is determined.

(Q a) Treſpaſs. Gift of the Action. In what Caſes it *lies for an Act done by Virtue of an Office.*

1. **IF a Man be aſſeſs'd to pay a 15th by Force of a Commiſſion, and had been aſſeſs'd in Time before, yet** if he ought not to pay it, **Treſpaſs lies againſt the Collector, if he levies it.** 11 H. 4. 35. Br. Quinzime, pl. 3. cites S. C. Per Hank. That if a Collector diſtrains for Fifteenths him, who ought not to pay it, Treſpaſs does not lie. ——*But* it is ſaid there, that where a Man is *aſſeſs'd to Fifteenths for his Beaſts in D. where he has no Beaſts there, and is diſtrained by the Collector*, he ſhall have Treſpaſs againſt him, and he ſhall not have Aid of the King. Ibid.

2. If a *Sheriff ſerves a Capias where there is no Original*, Treſpaſs does not lie; Per Hank. Br. Quinzime, pl. 3. cites 11 H. 4. 35.

3. Where the King or the *Eſcheator ſeiſes by inſufficient Office*, which does not intitle the King by the Law, a Man ſhall have Treſpaſs againſt the Eſcheator or Grantee of the King &c. *Contra where* the Eſcheator *ſeiſes by Reaſon of a Writ where the King has not Title.* Br. Treſpaſs. pl. 15. cites 9 H. 6. 20. Br. Patents, pl. 3. cites S. C.

(Q a. 2) *One or ſeveral* Treſpaſſes. *What* ſhall be ſaid to be.

1. TReſpaſs *againſt 2 of Trees cut.* The *one juſtified for Himſelf of Common there*, and *the other for Common there for Himſelf*, and are found guilty, and Damages taxed entirely; And by the beſt Opinion it is well; for *it is but one and the ſame Treſpaſs*, tho' the Anſwer be ſeveral. Br. Damages, pl. 202. cites 11 H. 7. 19. 20.

2. *Contra* in Treſpaſs *againſt two of 2 Horſes taken*; for it is a ſeveral Treſpaſs. Br. Damages, pl. 202. cites 11 H. 7. 19, 20.

3. If a Man *cuts a Tree, and carries it away preſently*, it is not Felony, but one intire Treſpaſs; Per Hale Ch. J. Freem. Rep. 23. pl. 29. Hill. 1671. in Caſe of Emerſon v. Amell.

(Q. a 3) *Vi & Armis. In what Caſes* Treſpaſs lies Vi & Armis. *In Reſpect of the Perſons.*

This Branch is interpreted, that the Lord ſhall pay no Fine; and therefore by a Conſequent, ſince this Act no Action of Treſpaſs Quare Vi & Armis lies againſt the Lord in this Caſe; for then he ſhould pay a Fine. But at the Common Law Treſpaſs Vi & Armis did lie. 2 Inſt. 105.

1. *Marlb.* 3. 52 *H.* 3. ENacts, That *if any diſtrain his Tenant for Services and Cuſtoms, or other Thing for which the Lord of the Fee hath Cauſe to diſtrain; and after it is found that the Services are not due,* * *the Lord ſhall not therefore be puniſh'd by Redemption.*

* If the *Leſſor ouſts the Leſſee for Years*, Treſpaſs Vi & Armis lies, notwithſtanding the Statute that the Lord ſhall not therefore be puniſhed by Redemption; for he may diſtrain or ſee Waſte, but not retain the Poſſeſſion; for this Act is not done as Lord, and ſo out of the Caſe of the Statute. Br. Treſpaſs, pl. 384. cites 38 E. 3. 33. and 48 E. 3. 6. and 5 H. 7. 10.——2 Inſt. 106. S. P. and cites Same Caſes, and 28 E 3. 97.

Treſpaſs Quare Vi & Armis *Clauſum fregit, and taking his Beaſts*; the *Defendant ſaid that he leaſed the Land where &c. for* 10 *Years rendring Rent*, and ſo the Land is held of us, and within our Fee, Judgment of the Writ Vi & Armis; and as to the Cloſe broken he was compell'd to anſwer by Award; quod nota. And if the Writ Vi & Armis lies *between Leſſor and Leſſee* adjornatur; therefore quære. Br. Treſpaſs, pl. 65. cites 48 E. 3. 5. 6.—Br. Brief, pl. 513. cites S. C.

And another ſuch Caſe was brought *by the Leſſor and J. B.* and ſaid there, that becauſe Covenant lies of the Ouſter againſt the Leſſor only, and not againſt the other who was not Party to the Leaſe; therefore Treſpaſs Vi & Armis *lies againſt both.* Br. Treſpaſs, pl. 65. cites 48 E. 3. 6. 7. And ſays, See 38 E. 3. fol. 33. that it lies againſt the Leſſor alone; and herewith agrees 5 H. 7. 10. Ibid.

Treſpaſs Vi & Armis lies *by the Leſſee againſt his Leſſor for Years*, by the Opinion of the Juſtices; for Leſſee for Years ſhall do † Fealty, and therefore the Leſſor hath Fee there; by which the Plaintiff ſaid that the *Leſſor hath nothing but in Right of his Wife, who is dead ſince the Leaſe, and never had Iſſue.* Quære; for then it ſeems that the Reverſion is deſcended to the Heir of the Feme, and then the Defendant hath not Fee there; and the Defendant's Plea was that he leaſed for Years to the Plaintiff rendring 10 s. Rent, and for the Rent Arrear he entred and diſtrained; Judgment of the Writ Vi & Armis, and this Caſe was not adjudged. Br. Treſpaſs, pl. 18. cites 9 H. 6. 43.

† 2 Inſt. 106. ſays, that the Word (Dominus) in this Act is extended to the Leſſor upon a Leaſe for Life, or for Years; for the Leſſee for Years ſhall do Fealty alſo.——And Br. Treſpaſs, pl. 344. cites 20 E. 4. 2. accordingly, That it ſhall be intended as well to the Leſſor for Term of Years, as between other Tenant and his Lord; Per Cur.——But Ibid. pl. 273. cites 5 H. 7. 10. It is ſaid, per Cur. that it is intended between Lord and Tenant, and not between Leſſor and Leſſee.

Treſpaſs Vi & Armis, the *Defendant juſtified as Bailiff for Rent Arrear, within the Fee of his Maſter*, and demanded Judgment of the Writ Vi & Armis. Hill ſaid, that the Writ is good enough againſt the Bailiff Vi & Armis, notwithſtanding the Statute of Marlbridge, cap. 3. that the Lord ſhall not therefore be puniſh'd by Redemption. Contrary againſt the Lord himſelf. Br. Treſpaſs, pl. 98. cites 11 H. 4. 78. and 9 H. 5. 14.—S. P. ibid. pl. 220. cites 7 H. 6. 3. per Cur.— S. P. ibid. pl. 377. cites 2 H. 4. 4 for the Statute is to be taken ſtrictly.——S. P. 2 Inſt. 106. for the Bailiff is not Dominus.

2. In Treſpaſs the Defendant *avow'd for Heriot* Arrear &c. And the Plaintiff ſaid that De ſon tort Demeſne without ſuch Cauſe, and the Defendant tender'd *Demurrer, becauſe the Writ is Vi & Armis* where he is Lord, and yet the Defendant was compell'd to join the Iſſue as the Plaintiff had tender'd; Quod nota. Br. De ſon tort &c. pl. 5. cites 44 E. 3. 13.

Br. Treſpaſs, pl. 88. cites S. C. —S. P. Br. Brief, pl. 407. cites 10 H. 6. 24.

3. Treſpaſs Vi & Armis. The *Defendant ſaid that the Plaintiff held three Acres of him by Fealty and* 3 *d.* and *for the Rent Arrear he diſtrain'd*; Judgment of the Writ Vi & Armis, and a good Plea. Br. Brief, pl. 115. cites 8 H. 4. 16.

Held a good Plea per Cur. whether any Rent be Arrear, or not.

Br. Treſpaſs, pl. 92. cites S. C.

4. In *Treſpaſs*, if a *Feme Covert delivers the Baron's Goods to W. N.* Treſpaſs Vi & Armis lies againſt W. N. Per Skrene, which Hank. denied; the Reaſon ſeems to be becauſe Feme *has lawful meddling* with Goods of the Baron. And it is agreed that ſuch Taking is not Felony; but *quære* of Treſpaſs. Br. Baron and Feme, pl. 36. cites 11 H. 4. 24.

5. Treſ-

5. Treſpaſs of a Cloſe and Houſe broken Vi & Armis, the Defendant pleaded *Not Guilty to the Force and Arms*; and *to the reſt, that he was ſeiſed, and leaſed to the Tenant for Years, and came there to ſee if Waſte was done.* Judgment; and a good Plea; Per Hill and Hank; but Thirn contra. Br. Treſpaſs, pl. 97. cites 11 H. 4. 75.

6. If the *Lord diſtrains* his Tenant *for Rent, where none is Arrear*, or ſuch like, which may be intended to be done as Lord, Treſpaſs does not lie Vi & Armis. Br. Treſpaſs, pl. 16. cites 9 H. 6. 29. S. P. Ibid. pl 362. cites 22 E. 4. 5.

7. Where a Man *beats him who ſerves me at Pleaſure*, or an Infant whoſe Covenant is void, yet I ſhall have Action upon the Caſe for the Battery, for the Loſs of my Service. And the ſame Law where I retain a Man who is beat &c. and here it lies for the Maſter *Vi & Armis*. Br. Action ſur le Caſe, pl. 55. cites 21 H. 6. 8. 9. and Regiſter 102. and 182. Br. Labourers, pl. 29. cites S. C.

8. Treſpaſs Quare Vi & Armis Clauſum fregit, and cutting his Trees. And *to the Entry the Defendant ſaid, that the Plaintiff held of him by Fealty and Rent*, and demanded Judgment of the Writ Vi & Armis. And per Cur. it is no Plea, unleſs he *ſays that the Rent was Arrear, and that he came to diſtrain*; and yet it ſhall not be traverſed. But *if no Rent be Arrear, he cannot enter unleſs as a Stranger*, who ſhall be a Treſpaſſer; by which the Defendant pleaded accordingly, and as to the Trees cut, Not Guilty. And per Cur. this is no Plea to the Writ above, but to the Action; for the Action does not lie Vi & Armis againſt the Lord, who demeans himſelf as Lord; by which the Plaintiff ſaid, that he held of B. and not of the Defendant. And it was ſaid, that Writ of Treſpaſs *of Cloſe broken* does not lie without Vi & Armis; but Juſticies may be without Vi & Armis. Br. Treſpaſs, pl. 317. cites 8 E. 4. 15.

9. In Replevin, *if the Lord claims Property and will not avow*, Treſpaſs lies Vi & Armis, and he ſhall make Fine and Ranſom. Br. Treſpaſs, pl. 317. cites 8 E. 4. 15.

10. Treſpaſs Vi & Armis. The Defendant *juſtified for Diſtreſs by Tenure of him by Rent and Services*. And the *Plaintiff pleaded*, that *Riens arreare*, and *found for the Plaintiff*, by which he demanded Judgment. And the Defendant alleg'd the *Statute of Marlbridge, that the Lord ſhall not therefore be puniſh'd by Redemption*, and by all the Juſtices, becauſe the Statute is *Negative and reſtraining*; and it appears in the Record, that the Defendant is confeſs'd to be Lord, therefore the Plaintiff ſhall not have Judgment. Br. Judgment, pl. 121. cites 10 E. 4. 7.

11. Treſpaſs Vi & Armis does not lie where my *Bailiff cuts Trees without Cauſe, or* * *kills my Cows, Sheep* &c. nor where my *Bailiff or Butler breaks my Bowl* &c. for he has lawful Poſſeſſion of them. And yet ſee 13 E. 4 fo. 9. that if he ſteals them it is Felony; for it is the Poſſeſſion of the Maſter. But in the firſt Caſe, Treſpaſs lies upon the Caſe. Quod nota. Per Chocke and Catesby. Br. Action ſur le Caſe, pl. 99. cites 18 E. 4. 27. Br. Treſpaſs, pl. 343. cites S. C —— * S. P. per Collow. Br. Treſpaſs, pl. 8. cites 22 E. 4 5.

12. If a Man *takes my Cattle out of the Poſſeſſion of him to whom I bail them*, I ſhall have Treſpaſs Vi & Armis; Per Colow. Br. Treſpaſs, pl. 362. cites 22 E. 4. 5.

13. Treſpaſs Quare Vi & Armis *he cut his Trees*. The *Defendant juſtified as Servant, and by Command of the Tenant at Will of the Leaſe of the Plaintiff*. And per Brian, the Plea is not good; for the Tenant at Will himſelf cannot do it; becauſe he cannot grant the Land over, for he has ſtrict Intereſt, and therefore Treſpaſs Vi & Armis lies. Br. Treſpaſs, pl. 362. cites 22 E. 4. 5.

14. If Tenant at Will himſelf *cuts the Trees*, Treſpaſs lies Vi & Armis; Per Colow. Br. Treſpaſs, pl. 362. cites 22 E. 4 5.

15. Treſpaſs Quare *Clauſum fregit, & averia cepit*, & abduxit. The Defendant *ſaid, that the Place was his Franktenement, and the Cattle were Damage feaſant*, by which he took them. The *Plaintiff pleaded Leaſe for Years* *But it was in a manner agreed, that if the De-*

fendant had juſtified for Rent, as he juſtified for the Soil, that the Writ Vi & Armis had *abated*. Br. Treſpaſs, pl. 273. cites 5 H. 7. 10.

Years made by the Defendant, which yet continues. And the *Defendant demurr'd*, becauſe it was Vi & Armis; and yet the Writ is good, per tot. Cur. by reaſon of the breaking of the Cloſe. Br. Treſpaſs, pl. 273. cites 5 H. 7. 10.

As Lord of the Warren ſhall have Treſpaſs Vi & Armis, *againſt the Owner, Quare Vi & Armis Warrennam ſuam intravit.* Br. Treſpaſs, pl. 273. cites 5 H. 7. 10.

16. *In ſeveral Caſes* a Man who is *Tenant of the Franktenement ſhall be puniſh'd by Treſpaſs Vi & Armis for an Act done in his own Franktenement.* Br. Treſpaſs, pl. 273. cites 5 H. 7. 10.

And if a Man *grants Veſturam terræ for* Term of *Years*, and the *Grantor takes* the Veſture, there the *Grantee ſhall have Treſpaſs Vi & Armis.* Br. Treſpaſs, pl. 273 cites 5 H. 7. 10.

So if *a Man ſells his Trees, and after cuts them*, the Vendee ſhall have Treſpaſs Vi & Armis. Br. Treſpaſs, pl. 273. cites 5 H. 7. 10.

And ſo *of other Liberties and Profits in another's Land*, which was agreed by all the Juſtices. Br. Treſpaſs, pl. 273. cites 5. H. 7. 10.

* S. P. per Littleton. — Ibid. pl. 317. cites 8 E. 4. 15. — S. P. Ibid. pl. 362 cites 22 E. 4. 5.

17. *If the Lord does an Act in the Land of his Tenant, which does not belong to him to do as Lord*, as *labour the Diſtreſs, or* * *kill it, or* ‡ *cut Trees*, Treſpaſs lies Vi & Armis. Br. Treſpaſs, pl. 273. cites 5 H. 7. 10.

‡ S. P. *So* if he breaks a Door, or a Window &c. *which cannot be intended as Lord*, there the Tenant may have a Writ of Treſpaſs Quare Vi & Armis againſt the Lord, notwithſtanding the Statute of *Marlbridge, cap.* 3. Br. Treſpaſs, pl. 16. cites 9 H. 6. 29. ——— S. P. And ſo if he feeds the Ground of his Tenant, or the like. 2 Inſt. 106.

So if the Lord breaks the *Gates or Hedges*, Treſpaſs lies Vi & Armis. Br. Treſpaſs, pl. 344 cites 20 E. 4. 2.

18. *The Lord cannot break the Cloſe to diſtrain*; but ſhall have Aſſiſe, if it be ſo incloſed that he cannot enter to diſtrain. Br. Treſpaſs, pl. 273. cites 5 H. 7. 10.

19. Holt Ch. J. declared for Law, That no Action of *Treſpaſs* Vi & Armis would lie *for a Tenant at Will againſt his Landlord* for the Lord's Entring or Diſtraining for Rent &c. 11 Mod. 209. pl. 13. cites D. 119. 10 E. 4. 7. ——— 2 Inſt. 105. ——— Mo. 105.

(Qa. 4) Vi & Armis. In what Caſes Treſpaſs lies Vi & Armis. *In Reſpect of the Thing &c.*

Br. Quod permitat, pl. 5. cites S. C. — S. P. Br. Treſpaſs, pl. 47. cites 44 E. 3. 20.

1. IF a *Man ought to grind his Grain Toll Free*, and the *Miller takes Toll*, Treſpaſs lies Vi & Armis, and not Action upon the Caſe; quod nota. Br. Treſpaſs, pl. 41. cites 41 E. 3. 24.

2. It was awarded for Law to be a good Plea in Treſpaſs of taking of Goods Vi & Armis, to ſay *that the Defendant had Deliverance thereof by Replevin*; Judgment of the Writ; for after this the Plaintiff ſhall not have Treſpaſs, but ſhall purſue by the Replevin; and ſuch Deliverance is by the Law, and not as Treſpaſs, and therefore the Defendant who obtain'd Deliverance of it by Replevin, is no Treſpaſſor, nor Treſpaſs Vi & Armis does not lie of ſuch taking by Replevin; Quod nota. Br. Treſpaſs, pl. 48. cites 44 E. 3. 20.

3. If

3. If Vi & Armis be *at the Commencement*, it *ſhall refer to all the Matter enſuing*. Br. Treſpaſs, pl. 112. cites 38 E. 3. 15, 16.

4. Treſpaſs Quare Vi & Armis, *he took his Boat and Nets*, the *Defendant ſaid that* this taking was in the County of H. and there *was Deliverance made by the Sheriff*, Judgment of the Writ Vi & Armis, and adjornatur; it ſeems that of Deliverance made by the Sheriff Treſpaſs does not lie Vi & Armis. Br. Treſpaſs, pl. 76. cites 2 H. 4. 16.

5. Treſpaſs upon the Caſe, inaſmuch as the Defendant Vi & Armis *ſtopped a Sewer* in L. by which 40 Acres of his Land are ſurrounded to the Damage &c. And the Writ Vi & Armis awarded good of Stopping; *contra of Laches of Nonfeaſance*, or not repairing &c. by which the Land is ſurrounded, there the Writ ſhall not be Vi & Armis. Br. Action ſur le Caſe, pl. 46. cites 12 H. 4. 3.

6. In Aſſiſe, the Diſſeiſin ſhall not be ſuppoſed to be with Force, if it be not inquired and preſented. But *in Treſpaſs, if the Iſſue paſſes againſt the Defendant, it ſhall be intended to be with Force and Arms*, and the Party ſhall make Fine; Note the Diverſity. Br. Treſpaſs, pl. 119. cites 7 H. 6. 40.

7. In Treſpaſs, if a Man breaks my Hedge to the Damage of 4 d. and *Beaſts of the Common enter* and do much Damage, *I ſhall recover Damages* againſt him *in Reſpect of all the other Damage*, per Jenney and Finch. Brooke makes a Quære if he ſhall have Treſpaſs Vi & Armis, and give all in Evidence, or ſhall have it Vi & Armis of the Breaking, and Action upon the Caſe for the other Damage by the Entry of the Beaſts; and ſays it ſeems, that he ſhall recover all the Damages by the General Action of Treſpaſs Vi & Armis. Quære if Treſpaſs Vi & Armis, and upon the Caſe may be all in one and the ſame Writ. Br. Treſpaſs, pl. 179. cites 9 E. 4. 4.

8. Treſpaſs Quare Vi & Armis *Columbas* ſuas cum pantello & aliis ingeniis cepit; and by the Serjeants the Action Quare vi & Armis does not lie; *but de Columbario fracto & Columbis captis*, Action lies Vi & Armis; Quære, for there is no Property. But there in the next Caſe Treſpaſs was brought of a Goſhawke, and Hawk taken and carried away. Br. Property, pl. 30. cites 16 E. 4 7.

9. If a Man *comes into a Tavern, and takes the Cup*, or *beats the Servant* of the Houſe, Treſpaſs lies Vi & Armis for this *Miſuſage* after, and yet his firſt Authority was good; per Colow. Br. Treſpaſs, pl. 362. cites 22 E. 4. 5.

10. In Treſpaſs, the *Defendant ſaid that the Plaintiff himſelf was ſeiſed in Fee, and leaſed to the Defendant for 6 Years, and that* after *the Term ended*, the *Defendant held himſelf in, and did the Treſpaſs of which the Plaintiff has brought this Action before any Entry*. Judgment &c. And by all the Juſtices, Treſpaſs Vi & Armis does not lie before that the Plaintiff has made Regreſs, as here; quod nota. Br. Treſpaſs, pl. 365. cites 22 E. 4. 13.

11. *If the Writ* of Treſpaſs *be returnable*, then theſe Words Vi & Armis ſhall be in the Writ; and if it wants thoſe Words it ſhall abate, unleſs *they are Writs of Treſpaſs upon the Caſe*, which Writs ſhall not have theſe Words altho' they are returnable in C. B. or B. R. and if they have the Words Quare Vi & Armis, it ſhall be good Cauſe to abate them. F. N. B. 86. (H)

12. If Beaſts are *taken in a Common*, or other *Land which belongs not to the Owner of the Beaſts*, yet he ſhall have Treſpaſs Vi & Armis, but not Quare Clauſum fregit. Br. Treſpaſs, pl. 421. cites 3 M. 1.

13. In Treſpaſs *of Aſſault, Beating and Wounding the Plaintiff, and taking a Bag with 100 l. in it*, but becauſe there was no V & Armis in the Declaration, which muſt neceſſarily be in Treſpaſs, and is not Matter of Form but Subſtance, and not aided by any of the Statutes, a Judgment in B. R. was revers'd. Cro. J. 443. pl. 19. Mich. 15 Jac. in the Exchequer Chamber, Taylor v. Welſted.

14. Treſpaſs for *breaking his Houſe and taking away his Diſhes, the Defendant juſtified under a By-Law*; but that being ill the Plaintiff demurr'd; but becauſe the Declaration wanted the Words Vi & Armis, the Court held it naught upon a *General Demurrer*, being an Omiſſion of the Subſtance; for it *alters the Judgment from a Capiatur to a Miſericordia*; beſides it *belongs to the County Court* if it be Treſpaſs without Vi & Armis. 2 Salk. 637. pl. 3. Trin. 3 W. & M. B. R. Wildgooſe v. Kellaway.

But ſee now the Statutes of 16 & 17 Car. 2. cap. 8. and 4 & 5 Ann. cap. 16. at Tit. Amendment and Jeofail.

(Q. a. 5) *Contra Pacem. In what Caſes* it ſhall be Contra Pacem.

1. TReſpaſs *of taking his Beaſts contra Pacem*, the Defendant *juſtified for Diſtreſs for a Tenure, by which he diſtrain'd with the Peace, and not contra Pacem.* The Plaintiff ſaid, That De ſon tort Demeſne, and contra Pacem, without ſuch Cauſe; and the others e contra; and ſo to Iſſue without Exception. Br. De ſon tort &c. pl. 37. cites 24 E. 3. 72.

2. Treſpaſs of *Corn trampled.* The Defendant ſaid, that Not Guilty. The Jury found that the Beaſts trampled it *by Eſcape*, to the Damage of 5 s. but not contra Pacem. Tank. ſaid, in this Caſe he ought to have a Bill without theſe Words contra Pacem. And becauſe it was *in Default of good Keeping*, therefore the Plaintiff recover'd. Br. Treſpaſs, pl. 249. cites 27 Aſſ. 56.

3. Treſpaſs of *taking the Horſe of the Plaintiff at D.* of the Price of 10 l. *and carrying it to P. and there killing him contra Pacem*; and becauſe there is a mean Time between D. and P. and ſo the Defendant as Treſpaſſor had Property, and then the Killing at P. cannot be of the Horſe of the Plaintiff, therefore per Opinionem the Bill ſhall abate; by which he brought another Bill that the Defendant had *kill'd the Horſe of the Plaintiff at P. contra Pacem*, and then well. Br. Treſpaſs, pl. 250. cites 27 Aſſ. 64.

4. Treſpaſs upon the *Caſe, for not repairing and amending his Bank, and* [ſcouring his] *Rivers*, by which 30 Acres of the Plaintiff's Land was ſurrounded, ſo that he loſt the Profits thereof for 5 Years, to the Damage of 30 l. But becauſe the *Writ* was contra Pacem it was *abated.* Br. Action ſur le Caſe, pl. 20. cites 45 E. 3. 17.

5. In Treſpaſs the Plaintiff *declared of chaſing his Cattle, Vi & Armis, into the Cloſe of J. S. who took them Damage feaſant, and compell'd the Plaintiff to pay him* 40 *s. for the Damages.* After Verdict it was moved in Arreſt of Judgment, that the *Declaration had not contra Pacem*, as it ought to have; becauſe the Bill is in Placito Tranſgreſſionis, and the Declaration was Vi & Armis. But it was anſwer'd, that the *Action was not brought meerly for the Chaſing* the Cattle, *but* for chaſing them into another Man's Lands, *ſo as* they were Treſpaſſers, and *he was forced to compound for the Damage*; and its being Vi & Armis does not prove it to be an Action of Treſpaſs; for *theſe Words may be in an Action on the Caſe*, as in 9 Rep. 50. The **Earl of Salop's Caſe.** And tho' the Recital of the Bill be in Placito Tranſgreſſionis, it is not of Neceſſity to be Treſpaſs only, but may ſerve for Treſpaſs on the Caſe. And all the Court being of that Opinion, it was adjudg'd for the Plaintiff. Cro. C. 325. pl. 7. Mich. 9 Car. B. R. Tyffin v. Wingfield.

6. Treſpaſs.

6. Treſpaſs. The Words contra Pacem were omitted in the Declaration; and therefore *after Execution of a Writ of Inquiry, Judgment was arreſted* upon Motion. *But* Holt Ch. J. ſeem'd to incline, that it would have been *good after Verdict*. Mr. Knott. 1 Ld. Raym. Rep. 38. Eaſt. 7 W. 3. Melwood v. Leech.

7. It was ſaid, Arg. that ſince the Capiatur pro Fine is taken away, it is not neceſſary to allege the Treſpaſs contra Pacem. But Holt Ch. J. denied it, and ſaid, It is the *Vi & Armis* that may be omitted. 2 Ld. Raym. Rep. 985. Trin. 2 Ann. in Caſe of Day v. Muskett.

(Q. a. 6) *Writ* and *Declaration*. Good or not.

1. THE Writ in Treſpaſs contains only a *General Complaint, without* the Expreſſion of *Time or Damage*, which might have been at any Time done, and was intended to defend the Eſtate itſelf againſt the Invaſion of the Neighbours, and ſeems to have been thus generally allow'd *before the Diſtinction of Bounds*; and therefore *the Vill only was alleged* where the Treſpaſs was ſuppoſed to be done, and the Plaintiff might count of any Treſpaſs committed before the Suing out of the Original. G. Hiſt. C. B. 3. cap. 1.

2. In Treſpaſs Vi & Armis *for cancelling a Deed*, and ſet forth, that J. S. *the Defendant*, being ſeiſed of Land in Fee, *infeoff'd A. and his Heirs with Warranty, reſerving Rent*, with Clauſe of Diſtreſs; *and afterwards by Deed bargain'd and ſold the Rent to the Plaintiff, who caſually loſt the ſaid Deed, and the Defendant found and cancell'd it*; but did not expreſsly ſhew that he was at any Time, before the Action brought, poſſeſs'd of this Deed, but only by Implication argumentatively. By the whole Court, the *Plaintiff ought* here in his Declaration *to have ſhew'd, that he was poſſeſs'd of the Deed before*, which he has not done; and ſo, for this Omiſſion, the Declaration is not good. And the Rule of the Court was, Quod querens nil capiat, per Billam. 1 Bulſt. 214. Trin. 10 Jac. Suckfield v. Conſtable. Yelv. 223; S. C. by Name of Sutcliffe v. Conſtable, held accordingly, upon the 3d Exception there.—— Brownl. 222. S. C. accordingly, and ſeems to be only a Tranſlation of Yelverton.

3. In Treſpaſs for *entring his Cloſe* on ſuch a Day, *and detaining Poſſeſſion uſque Diem exhibitionis Billæ*; and did *not allege what Day the Bill was exhibited*. The Plaintiff had a Verdict. It was objected, that it ought to have appear'd to the Jury how long the Defendant had detain'd the Poſſeſſion, that they may proportion the Damages accordingly, and that its appearing to the Court of Record is not material; and of this Opinion was Doderidge J. And Broome inform'd the Court, that the Uſage was to limit a Day certain in the Declaration. 2 Roll Rep. 135. Mich. 17 Jac. B. R. Sliford v. Goodricke.

4. In Treſpaſs for taking his Goods and Chattels, it was adjudg'd, that if the Words *Pretii* and *ad Valentiam are omitted*, after a Verdict 'tis aided by the Statute of Jeofails. Sid. 39. pl. 1. Paſch. 13 Car. 2. B. R. Uſher v. Buſhell.

5. In Treſpaſs the Entry was *Quod cum prædict.* &c. and this being moved in Arreſt of Judgment, it was ſtaid per Cur. Keb. 130. pl. 52. Mich. 13 Car. 2. B. R. Shepherd v. Tomkins.

6. In Treſpaſs for *chaſing and driving his Cattle to Places unknown, ſo that he loſt them*, the Court was of Opinion, upon Demurrer, that the Declaration was ill, becauſe hereby the Plaintiff ſhall have Damages as well for Chaſing as for Driving to Places unknown, whereby he loſt his Cattle. Sid. 295. pl. 16. Trin. 18 Car. 2. B. R. Cooper v. Coatabed. 2 Keb. 76. pl 62 S. C. that the Demurrer was on 1 Cr. 20. pl. 24. [Cro. C. 20. pl. 13.] *The Treſpaſs of Driving being drown'd by the Treſpaſs of Chaſing away.* But the Court doubted on 10 H. 7. Debt on Contract and Obligation. But adjornatur.

7. In

Keb. 883. pl. 28. Mich. 16 Car. 2. B R. S.P. Robinſon v. Sayars.

7. In Treſpaſs for taking Goods it was moved in Arreſt of Judgment, becauſe it was *not ſaid (ſua.)* And per Cur. it is ill, and Judgment ſtaid; but *in Cuſtodia ſua exiſtent'* were ſufficient. 3 Keb. 100. pl. 44. Hill. 24 Car. 2. B. R. Gallant v. . . . . .

8. Treſpaſs of *entring a Cloſe, and pulling down and carrying away Poſts* &c. As to the Poſts, on Not Guilty, and Juſtification of Entry for a Way, found againſt the Defendant, and Damages 1 d. and Judgment. The Defendant aſſign'd for Error, that it was not ſaid Ad Valentiam, which as to Chattels, diſtinct from Freehold, ought to be; Sed non allocatur; for per Curiam, this is but Form, and aided by 21 Jac. cap. and Judgment affirm'd. 3 Keb. 728. pl. 13. Hill. 28 Car. 2. B. R. Hingly v. Saunders.

9. Treſpaſs for that on 1 May &c. he broke and enter'd his Cloſe, and *digg'd his Land, and carried away* 20 *Loads of Soil, Valoris* 40 *s. Continuando* the ſaid Treſpaſs *as to the Digging, Taking, and Carrying away the Earth* and Soil aforeſaid, *from* &c. *ad Damnum* 30. Adjudg'd ill, becauſe *no Value is mention'd of the Soil carried away during the Continuando.* 2 Lev. 230. Mich. 30 Car. 2. C. B. Strode v. Hunt.

10. Treſpaſs *for Taking* and Carrying away *Averia ipſius quer. viz. Unum equum* &c. *nec non unum Galerum* Anglice, one Hat. After Verdict it was moved in Arreſt of Judgment, that as to the Hat there's no Property laid in the Plaintiff; and Judgment was ſtay'd. 2 Show. 395. pl. 365. Mich. 36 Car. 2. B. R. Dannet v. Collingdell.

11. In Treſpaſs the Plaintiff declared *Quare Vi & Armis clauſum fregit*; And after Verdict for the Plaintiff Judgment was arreſted; for *Quare* is not poſitive but interrogatory, and much worſe than Quod cum. Salk. 636. pl. 2. . . . 1 W. & M. B. R. Hore v. Chapman.

12. Treſpaſs Quare Clauſum fregit & ſolum & fundum, viz. *Duas acras Terræ did Dig, Subvert, and Carry away.* After Verdict it was mov'd, that the Declaration was inſufficient as to the Digging and Carrying away the Soil; for Duas Acras Terræ *ſignifies only the Meaſure and Extent of the Ground where the Digging was,* and *not the Quantity of Soil* carried away. And for this Reaſon Judgment was ſtaid per tot. Cur. 2 Vent. 174. Paſch. 2 W. & M. in C. B. Highway v. Derby.

13. Treſpaſs &c. Quare Clauſum fregit, & *diverſas pecias Maheremii cepit* &c. After a Judgment by Default, and a Writ of Enquiry return'd, the Judgment was ſtay'd for the Uncertainty of the Declaration. 2 Vent. 262. Hill. 2 & 3 W. & M. in C. B. Anon.

14. The *Writ was* Quare *Vi & Armis* he broke the Plaintiff's Houſe, and took and carried away *Bona ſua*; *but the Declaration* was of Breaking the Houſe, and taking Bona & Catalla, but *left out (ſua) and alſo (Vi & Armis)* After Judgment by Default, it was moved in Arreſt of Judgment, 1ſt. That the Declaration was ill, becauſe of the Omiſſion of Vi & Armis. 2dly. Becauſe it did not allege that he had Property in the Goods, but it was anſwered that *in* * *C. B. the Writ is Part of the Declaration*; and that the Omiſſions objected in the Count are mentioned in the Writ to which it refers, and thereby the Declaration is made good; and the Plaintiff had Judgment. 2 Lutw. 1509. Hill. 12 W. 3. Daile v. Coates.

* See Tit. Property (M) pl. 10. Jones v. Pritchard.

15. Treſpaſs for breaking his Cloſe, and *throwing Bricks and other Materials there lying Erga Confectionem Domus de Novo erect. into the Sea.* It was held that the Declaration was repugnant and inſenſible; for there could not be Materials towards the Building a Houſe which was *De Novo erect.* for then it is already built. 2 Salk. 458. pl. 3. Mich. 9 W. 3. B. R. Lodie v. Arnold.

16. Treſpaſs of Aſſaulting and *Beating the Plaintiff* &c. *and Breaking and Entring his Houſe, and* alſo that they *aſſaulted and menaced his Sons and Daughters, nec non E. N. ſervam ſuam, & alia enormia* &c. Upon Not guilty pleaded the Plaintiff had a Verdict. It was objected that the

the Maſter could not maintain Treſpaſs for beating his Servant, without ſome ſpecial Damage, which ought to be ſhew'd; but reſolved that this Action was for Breaking and Entring the Houſe, and the further Deſcription is only to ſhew the Enormity of the Treſpaſs, and by Way of Aggravation of Damages for the Breaking and Entring the Houſe. 2 Salk. 642. pl. 14. Trin. 5 Ann. B. R. Newman v. Smith.

(Q. a. 7) *Pleadings* in Treſpaſs. Good, or not. *And what* ſhall be *a good Plea.*

1. TReſpaſs in *C. it is no Plea to the Writ that the Place where &c. is in K. and not in C.* but he *may juſtify in K. abſque hoc that he is guilty of any Treſpaſs in C.* And ſo he did for Common appendant in the Place where &c. and the Defendant was not compell'd to the General Iſſue Not guilty in C. but ſhall have the ſpecial Plea with Traverſe, as above, by which the Plaintiff was compell'd to reply that Guilty in C. prout &c. Priſt; Per Cur. Br. Treſpaſs, pl. 176. cites 4 H. 6. 13.

2. Treſpaſs *of Breaking his Cloſe, and ſpoiling his Graſs in D.* Chaunt. ſaid the Place is a Carve of Land called A. in which the *Defendant, and thoſe whoſe Eſtate he has, have held in Common with the Plaintiff and thoſe whoſe Eſtate he has Time out of Mind, and held in Common the Day of the Writ purchas'd,* by which he entered &c. and a good Plea per tot. Cur. Br. Treſpaſs, pl. 122. cites 8 H. 6. 16.

3. In Replevin it is a good *Plea that the Property is in a Stranger.* Contrary in Treſpaſs; for there he may plead *Not Guilty*; Note the Diverſity. Br. Treſpaſs, pl. 382. cites 20 H. 6. 18.

4. In Treſpaſs of *Goods taken in Coventry,* the *Defendant pleaded Delivery in London, by which he took them in London,* and no Plea, by which he *pleaded Delivery at L. by which he took them at C.* and no Plea; for if they were delivered he has Poſſeſſion immediately; *But Gift in L. by which he took them in C. is a good Plea*; Quod nota, per omnes & per Priſot. Br. Treſpaſs, pl. 33. cites 34 H. 6. 5.

5. *In* an *Action in which the Thing ſhall be recover'd,* as in *Quod Permittat, Aſſiſe* &c. and in *Treſpaſs of Goods,* it is no Plea to ſay *that the Plaintiff had no Goods*; for this amounts to Not guilty. Br. Treſpaſs, pl. 34. cites 34 H. 9. 28. 43.

6. *Treſpaſs of a Houſe broken, and Goods taken,* the *Defendant ſaid that the Plaintiff at the Time &c. held the Houſe of him by* 10 *s. Rent* &c. *and for ſo much Rent Arrear ſuch a Day, he took the Goods as Diſtreſs.* The *Plaintiff ſaid that he did not hold the Houſe of him, Priſt,* and the others e contra; And a good Iſſue per Cur. for in Replevin and Reſcous *Hors de ſon Fee* is a good Plea, Contra in Treſpaſs; for here he cannot diſclaim or anſwer to the Fee, for the *Defendant does not ſuppoſe that he has Fee* there, *but that he holds of him*; and therefore that he does not hold of him is a good Plea; Quod nota. Br. Iſſues Joines, pl. 26. cites 38 H. 6. 26.

7. In an Action by *Warden or Sheriff,* it is a good Plea that he *was not Warden nor Sheriff at the Time* &c. Br. Treſpaſs, pl. 326. cites 12 E. 4. 7.

8. *Treſpaſs for Breaking his Houſe and the Walls of the ſame,* the *Defendant to the Breaking of the Houſe pleaded Not guilty, and to the Walls juſtified.* And by the Opinion of the Court he ſhall not have both theſe Pleas; for one is *repugnant* to the other; for by the Juſtification he confeſſes himſelf guilty, tho' it be excuſable, and the Houſe and the Walls are all one, and he *cannot plead Not guilty, and juſtify to one and the ſame Thing.* Br. Bar, pl. 51. cites 21 H. 7. 21.

9. S. brought Treſpaſs againſt C. for divers Things; as to part the Defendant *pleaded* that it was in *Default of Incloſure by the Plaintiff*, and *as to the Reſidue Not guilty*; and Iſſue thereupon. But *before the Trial, the Plaintiff confeſs'd the Bar, and no Proſequi ulterius enter'd*, and *after the Iſſue is found for the Plaintiff*; and well. For the Defendant had relinquiſh'd that Part without Benefit of the Bar; and for that had pleaded Not guilty. So, by Popham if it had been for a Treſpaſs in two ſeveral Acres, and the Defendant juſtifies in one, and as to the other pleads Not guilty; the Plaintiff may *confeſs Part, and have Iſſue and Verdict for the other*. And Judgment in our Caſe for the Plaintiff. Noy. 42. 43. Stephen v. Carter.

Sty. 72. S. C. but S. P. as to the Manner of Pleading, does not appear.

10. In Treſpaſs of *breaking a Houſe and Cloſe*, the Defendant *pleaded that he* by Compulſion, and for Fear of his Life *enter'd the ſaid Houſe, and return'd immediately thro' the ſaid Cloſe, which is the ſame Treſpaſs* &c. The Plea was held ill, as well for the Matter as the Manner, becauſe he did *not ſhew that the Way to the Houſe was thro' the ſaid Cloſe*. All. 35. Mich. 23 Car. B. R. Gilbert v. Stone.

11. In *Treſpaſs*, the Plaintiff declared *of Chaſing and taking his Cattle, and carrying away three Heifers* of the Plaintiff; the Defendant *juſtified the taking* and carrying away three Heifers *of one P. another Defendant, by Virtue of a Warrant from the Sheriff* in Replevin &c. The Court took Exception that this was *no Anſwer to the Declaration*. And the Reporter ſays, that this without Queſtion was a fatal Exception; for he ought to have pleaded Not guilty to the taking and carrying away the Plaintiff's Beaſts. 2 Lutw. 1372. Hill. 3 & 4 Jac. 2. Dale v. Philipſon & al'.

2 Lutw. 1387. S. C.

12. In Treſpaſs of breaking his Cloſe and *digging Stones*; the Defendant *preſcribed* to enter and dig Stones *for Reparation of his Houſe, and Fences*, by which he dug and *took them for Repairs*, but does *not ſay that he uſed them*, which he ſhould, or at leaſt ſhould ſay *Penes ſe retinet ad reparand'*; and ſo Judgment was given for the Plaintiff. 3 Lev. 323. 3 W. & M. in C. B. Danby v. Hodgſon.

* 2 Lev. 111. Trin. 26 Car. 2. B. R. S. C. which was an Indictment of Treſpaſs, Forgery, and Publication; and the Jury found the Treſpaſs and Forgery, but omitted the Publication. The Court held, that

13. In *Treſpaſs of Aſſault, Battery, Wounding and Impriſoning* &c. The Defendant, as to the Force and Wounding, pleads Not guilty, and *Quoad reſiduum tranſgreſſionis, Inſultus & Impriſonamenti* he juſtifies as Bailiff by Virtue of an Execution. It was objected that the Plea was ill, becauſe in the Quoad reſiduum he had *omitted the Battery*, and ſaid only Quoad reſiduum tranſgreſs' Inſult' & Impriſonamenti; ſo that the not anſwering the Battery was a Diſcontinuance of the whole. The Court agreed that Quoad reſiduum had been ſufficient, *but* when in the Quoad he *enumerates all the other Particulars*, omitting the Battery, by this the Battery is excluded in the Quoad reſiduum; but upon citing the Caſe of * the King v. Newton Curia adviſare vult. But the Plaintiff being afterwards ſatisfied that the Exception would not aid him, he † to prevent the Judgment of the Court againſt him, diſcontinued. 3 Lev. 403. Mich. 6 W. & M. in C. B. Patrick v. Johnſon.

the finding him Guilty De Tranſgreſſione Prædicta, included it; as in Treſpaſs of Aſſault and Battery, the Jury found Defendant Guilty of the Treſpaſs and Aſſault. The Court ſaid it had been adjudg'd that this includes the Battery.

† This is denied by Serjeant Lutwich. 2 Lutw. 929. S. C.

14. In Treſpaſs of taking Goods, the Defendants *juſtified under a Precept to the Bailiffs of the Borough, deliver'd to the Defendants, then Bailiffs of the Court* to be executed; but Judgment was given for the Plaintiff, becauſe *they aver* that they were Bailiffs of the Court and Officers, but *not that they were Bailiffs of the Borough*; and if they were not, then, tho' they might be Bailiffs and Officers of the Court, yet the Precept was not directed to them, and ſo could not execute it or juſtify under it; for there might be both Bailiffs of the Borough, and Bailiffs of the Court too, and they

they might be diſtinct Officers. 2 Ld. Raym. Rep. 1530. Trin. 2 Geo. 2. Watkins v. Weſt.

(Q. a. 8) Pleadings. - How. *Where there is a Diſſeiſin and Re-entry.*

1. IN Treſpaſs, the *Defendant ſaid* that he was *ſeiſed till by D. diſſeiſed, which D. was ſeiſed till by the Plaintiff diſſeiſed, upon whom the Defendant enter'd at the Time of the Treſpaſs*; which was adjudg'd a good Plea. Br. Treſpaſs, pl. 320. cites 10 E. 4. 6.

2. Treſpaſs Quare Clauſum fregit &c. and the *Defendant ſaid that it was the Franktenement of A. and he by his Command, enter'd and did the Treſpaſs*; the *Plaintiff ſaid that he himſelf was ſeiſed till by the Defendant and the ſaid A. diſſeiſed to the Uſe of A. and the Plaintiff re-enter'd, and the Treſpaſs meſne* &c. And per Cur. this had been no Plea, unleſs the Plaintiff had *made the Defendant privy to the Tort*; for he who does a *Treſpaſs after the Diſſeiſin ſhall not be puniſh'd by the firſt Diſſeiſee.* Br. Treſpaſs, pl. 348. cites 20 E. 4. 18.

3. It is no *Plea* in Treſpaſs *that A. was ſeiſed till by D. diſſeiſed, who infeoffed the Plaintiff, upon whom the ſaid A. re-enter'd, whoſe Eſtate the Defendant has, becauſe the Eſtate of the Defendant is not immediate upon the Eſtate and the Poſſeſſion of the Plaintiff*; per Brian. Br. Treſpaſs, pl. 274. 5 H. 7. 11.

But if he had ſaid that he himſelf was ſeiſed till by D. diſſeiſed, who infeoffed the Plaintiff, upon whom the Defendant re-enter'd; this had been a good Plea; per Brian. Br. Treſpaſs, pl. 274. cites 5 H. 7. 11.

4. *And* in Treſpaſs it is a good *Plea that the Plaintiff diſſeiſed the Defendant, upon whom he enter'd*; *but it is no Plea in Aſſiſe*, for it amounts but to Nul tort; per Brian. But Vaviſor held all one, immediate Entry or not, and no Diverſity between Treſpaſs and Aſſiſe. Nevertheleſs all the King's Bench held with Brian. Br. Treſpaſs, pl. 274. cites 5 H. 7. 11.

5. In Treſpaſs, the *Defendant juſtified in* 40 *Acres for Common Appendant*; the *Plaintiff ſaid to* 20 *Acres that they were Parcel of his Waſte, and he approved them, ſaving to the Tenants ſufficient Common, and the Defendant enter'd after the Approvement and did the Treſpaſs*; and *to the other* 20 *Acres, he ſaid that he was ſeiſed and diſſeiſed by the Defendant, and re-enter'd*; and the Treſpaſs, *meſne* &c. Note good Pleading. Br. Treſpaſs, pl. 423. cites 10 H. 7. 14.

(R. a) *Bars* of a Treſpaſs.

1. IF Monies are paid in Satisfaction of Treſpaſs, it is a good Bar. 12 H. 4. 8. b. S. P. of *Graſs ſpoil'd.* Br. Treſpaſs, pl. 195. cites 39 E. 3. 20.

2. If a Treſpaſs be done to the Lord of a Leet, for which he is amerced in the Leet, which is not lawful, if the Amercement be levied and

So of putting Mud and Ordure to the

and * received, **this ſhall be a Bar of the Treſpaſs. 12 H. 4. 8. b. 39 E. 3. 20 b. adjudged.**

* Fol. 570.

Walls of his Houſe; for tho' the Amerciament is not lawful for Treſpaſs to the Lord himſelf, but only of common Nuſance, yet as it is paid, it is a Satisfaction and good Bar in Treſpaſs. Br. Treſpaſs, pl. 100. cites 12 H. 4. 8. ——Br. Replication, pl. 13. cites S. C.

So in Treſpaſs, the Defendant ſaid that the *Defendant was amerced for the ſame Treſpaſs in the Court of the Plaintiff, and affeer'd to* 10 *d. which the Plaintiff had levied*; *Judgment* &c. And the Plaintiff ſaid that he did another Treſpaſs there, priſt; and the others e contra. And ſo ſee that a Recompence *is admitted for a Bar* and Satisfaction. Br. Treſpaſs, pl. 61. cites 47 E. 3. 19.

So where the *Defendant ſaid that he was amerced, which was affeer'd to* 2 *s. of which he had made Gree to the Lord*; and held a good Plea by the Acceptance of it, tho' the Amerciament in the Court Baron be *Extortion*; quod nota. Br. Treſpaſs, pl. 66. cites 48 E. 3. 8—S. P. Ibid. 234. cites 22 Aſſ. 51.

3. So if he had held Court in his Chamber, and amerced him, and levied it, **this ſhall be Bar of Treſpaſs (for he has a Satisfaction.) 12 H. 4. 8. b.**

4. **A** Nonſuit in an Appeal of Maihem, **is not any Bar in Action of Treſpaſs of the ſame** Battery. **Contra** 43 Aſſ. 39.

But a Recovery in Treſpaſs for

5. **If a Man** recovers in an Appeal of Maihem, **this ſhall not be any Bar in Treſpaſs for the Battery. 22 Aſſ. 82. by Thorpe.**

Aſſault and Battery, and Execution had, is a good Bar in Appeal of Maihem againſt the ſame Perſon upon the ſame Matter; Per Ayliff J. Le. 19. cites Cobham's Caſe.

So in Treſpaſs *of a Horſe taken brought in C. B. the Defendant ſaid that the Plaintiff has Replevin pending in B. R. of the ſame Taking*; and a good Plea per tot. Cur. Br. Treſpaſs, pl. 171. cites 14 H. 7. 12, 13.——S. P. Per Newton Ch. J. Br. Treſpaſs, pl. 152. cites 22 H. 6. 15.—— Same Caſes cited 5 Rep. 61. b. in Sparrie's Caſe.

6. Treſpaſs of Beaſts taken *brought in B. R.* it is a good Plea *that the Plaintiff has Replevin pending of the ſame taking in C. B.* to which the Plaintiff has appeared, Judgment of the Writ; Quod nota. Br. Treſpaſs, pl. 257. cites 40 Aſſ. 31.

So of Writ of Detinue pending of the ſame Beaſts; for theſe affirm Property in the Plaintiff; Per Newton Ch. J. Br. Treſpaſs, pl. 152 cites 22 H. 6. 15.

Contrary, to ſay *that the Plaintiff has another Writ of Treſpaſs pending* of the ſame Taking; Per Newton Ch. J. Note the Diverſity. Br. Treſpaſs, pl. 152. cites 22 H. 6. 15.

Br. Iſſues Joines, pl. 46. cites S. C.

7. Treſpaſs *of a Horſe taken.* The *Defendant ſaid that he had a Leet* in D. *and J. N. was amerc'd there for Purpreſture*, by which he was amerc'd *to* 10 *s. by which we diſtrain'd the Horſe of J. N.* for the Amercement, and the *Iſſue was* taken *if the Horſe belong'd to the Plaintiff at the Time of the Taking, or to J. N.* Brooke makes a Quære of this Pleading at this Day. Br. Treſpaſs, pl. 59. cites 47 E. 3. 12.

8. Treſpaſs by a Prior *of Trees cut, and Franktenement broken, and Servants beaten*; the *Defendant pleaded Arbitrement*, which by Proteſtation he is ready to perform, & pro placito that the Treſpaſs was in the Time of his Predeceſſor; to which the Plaintiff taking the Arbitrement by Proteſtation ſaid for Plea that the Treſpaſs was in his own Time, Priſt, and the others e contra; and this Plea was pleaded to the Writ. Br. Treſpaſs, pl. 69. cites 2 H. 4. 4.

9. Treſpaſs in Bank of Goods carried away; the *Defendant ſaid that the Plaintiff ſued Plaint of the ſame Treſpaſs in the County, and had Deliverance*, and a good Plea; for by this Action he is to recover the Value &c. which ought not to be where he has received the Goods. Br. Treſpaſs, pl. 82. cites 7 H. 4. 15.

But it is no Plea that the Defendant was *ſeiſed till by the Plaintiff diſſeiſed upon whom he enter'd.*

10. In Treſpaſs the Defendant ſaid that he himſelf was *ſeiſed till by one A. diſſeiſed, who infeoff'd the Plaintiff upon whom the Defendant entered*, of which Entry the Plaintiff has brought his Action, and admitted clearly for a good Bar, and all the Argument was upon the Replication of the Plaintiff. Br. Treſpaſs, pl. 17. cites 9 H. 6. 32.

And the ſame Law in Aſſiſe as it was ſaid for Law. And the Reaſon ſeems to be inaſmuch as it *amounts to the General Iſſue*, and then he may give the Matter in Evidence. Br. Treſpaſs, pl. 24. cites 27 H. 6. 5.

11. *Treſpaſs*

11. *Treſpaſs againſt J. N.* who *ſaid that at another Time the Plaintiff brought Treſpaſs of the ſame Goods againſt him and T. N.* [*who*] *appeared, and the Plaintiff recovered againſt him*, which T. N. is in full Life not named, Judgment of the Writ; And the beſt Opinion was, that it is a good Plea, *without ſaying that he had Execution*; for *Recovery without Execution*, if it was againſt this ſame J. N. *is a good Bar in Treſpaſs*. Br. Treſpaſs, pl. 20. cites 20 H. 6. 11. and 40 E. 3. 27. 39.

12. Treſpaſs of *Trees cut and carried away*. The *Defendant to the Trees pleaded Gift of the Plaintiff before the Treſpaſs*, by which he took them &c. and *to the Cutting Not guilty*. Littleton ſaid Not guilty of the Cutting goes to all. But Priſot ſaid No, he ſhall have both; for he may be found guilty of the one, and acquitted of the other. And the ſame Law that Gift is a good Plea. 42 E. 3. 23. Br. Treſpaſs, pl. 27. cites 33 H. 6. 12.

13. It is a good *Plea* in Treſpaſs, *that the Plaintiff was ſeiſed, and leaſed to him for Years, by which he entred and cut the Trees*, and yet it is *Waſte*, but Treſpaſs does not lie; Per Moyle Juſt. Br. Treſpaſs, pl. 291. cites 5 E. 4. 64.

14. Treſpaſs. The *Defendant pleaded Leaſe to him for Life made by the Plaintiff*; Per Wood, this is no Plea, no more than in Aſſiſe. But Brian and Vaviſor contra; for the Leſſor has *Colour by the Reverſion to enter and ſee the Waſte*. Br. Treſpaſs, pl. 280. cites 6 H. 7. 14.

15. In Treſpaſs of *breaking his Houſe, and carrying away* 3000 *l. in Bags*, the Defendant *pleaded that he and one A. were indicted by Procurement of the Plaintiff for the ſame Offence*, and *that A. was found guilty as Principal, and the Defendant as Acceſſary, and had his Clergy*, Judgment ſi Actio &c. Jones J. thought the Action would not lie, becauſe being found Felony, the Party ſhall not be admitted now to make it Treſpaſs; but Doderidge and Whitlock J. e contra, becauſe an Indictment is at the King's Suit; but otherwiſe had it been by Appeal. Noy 82. Markham v. Cobb.

Jo. 147. pl. 6. Mich. 2 Car. B. R. the S. C. and the ſaid Juſtices held accordingly. ——Lat. 144. S. C. accordingly. ——But all the Books agree that Judgment was unanimonſly given for the Plaintiff upon the Defect of the Plea, by not ſhewing that the Plaintiff gave Evidence; for otherwiſe he ſhall not have Reſtitution, and the alleging his Procurement is not ſufficient.

16. Treſpaſs *for Riding his Horſe*; the Defendant *pleaded that poſtea*, viz. ſuch a Day, *the Plaintiff Exoneravit eum of the ſaid Treſpaſs*. Upon Demurrer it was held no Plea, and Judgment for the Plaintiff; and it ſeems it cannot be a Plea in Treſpaſs in any Caſe, tho' it may in Aſſumpſit before Breach of the Promiſe. Sid. 293. pl. 12. Trin. 18 Car. 2. B. R. Weſtlake v. Perve.

2 Keb. 69. pl. 44. Weſtlake v. Pearle, S.C. that it is ill without pleading a ſpecial Accord; and Judgment for the Plaintiff Niſi.

17. Where a *Diſtreſs eſcapes*, the Diſtrainer cannot bring Treſpaſs, unleſs it be *ſhewn* to be wholly *abſque Defectu ſuo*; (for abſque aſſenſu ſuo is not ſufficient;) *But* if the Diſtreſs had *died*, the Action revives, becauſe it was by the Act of God. Adjudged by 3 J. Contra Gould J. 1 Salk. 248. pl. 3. Paſch. 12 W. 3. B. R. Vaſper v. Eddowes.

12 Mod. 658; S. C. adjudged accordingly, and there pag 664 Holt Ch. J. ſaid, if he had *ſhewn that* the *Defendant had taken it out* of the Pound, it might be ſomewhat, *or* even that it *eſcaped* out of the Pound, *and run home to the Defendant*, *and* that he came *upon Freſh Purſuit* to take it, and had *been hinder'd by the Defendant*. ——Ld. Raym. Rep. 719 Hill. 13 W. 3. S. C. adjudged accordingly. ——[And it ſeems by all the Books that the Pig was loſt, and that the Defendant never had it afterwards, ſo as if Judgment ſhould have been given againſt him, he would have been puniſh'd doubly, as was obſerved in the Reports, and which it is ſaid there, would have been very hard.]

18. It was agreed, that if a *Diſtreſs* is *taken Damage feaſant*, it is a good Bar in Treſpaſs ſo long as it is detain'd. 12 Mod. 663. in Caſe of Vaſper v. Edwards.

1 Salk. 248. pl. 3. S. C. and S P.

See Tit. Tender (M) and (S)

(S. a) Treſpaſs. Bar. What ſhall be a good Bar of Treſpaſs. [*Tender.*]

1. IN an Action of Treſpaſs for a negligent Eſcape, as where Beaſts eſcape into my Land, it is a good Plea in Bar that he tender'd to me ſufficient Amends before the Action brought. Tr. 9 Ja. *Sir G. Walgrave's Caſe*, by Popham and Williams.

3 Lev. 37. Baſely v. Clarkſon, S. P.—— Treſpaſs of a Cloſe broken, and Graſs ſpoil'd.

2. But in an Action of Treſpaſs for a voluntary Treſpaſs, As for putting in my Beaſts into his Land, or breaking his Hedges, it is not any Plea, that I tender'd to him ſufficient Amends before the Action brought. Tr. 3 Ja. B. R. Sir *G. Walgrave's Caſe*, by Popham and Williams. P. 7 Ja. B. *Hawton's Caſe*, Per Curiam.

The *Defendant ſaid, that the Treſpaſs did not exceed* 10*s. and he tender'd to him ſufficient Amends*; and was held no Plea, but a void Tender. *Contrary in Avowry* for Damage feaſant, elſewhere. Br. Treſpaſs, pl. 214. cites 21 H. 7. 30.

(T. a) Pleadings. *New Bar* &c. In what Caſes the Defendant may plead a New Bar.

1. IN *Treſpaſs in D.* the *Defendant ſaid, that the Place is an Acre, and pleaded in Bar.* And the *Plaintiff ſaid, that it is* 4 *Acres otherwiſe than in the Bar*; and inaſmuch as he did not anſwer to the Treſpaſs in this, Judgment &c. the *Defendant may plead a new Bar to this.* Br. Treſpaſs, pl. 359. cites 21 E. 4. 75, 76.

2. *And* in *Aſſiſe of Rent*, the *Tenant pleads Hors de ſon Fee.* The *Plaintiff makes Title* to the Rent, the Tenant may plead in Bar of this Title; per Vaviſor. And all the Juſtices ſaid, that it is clear that he ſhall have a *new Bar* in thoſe Caſes. Br. Treſpaſs, pl. 359. cites 21 E. 4. 75, 76.

3. *And where the Defendant juſtified by Licence to enter* into his Houſe, and the *Plaintiff ſaid, that the Defendant enter'd the ſame Day, and came back, and after the ſame Day enter'd and broke his Door and Windows, of which Treſpaſs the Action is brought. And* to this the *Defendant pleaded Not Guilty.* But per Catesby J. in ſuch Caſe the Defendant ſhall not be compell'd to plead Not Guilty, but *may make Bar or juſtify*; for now it is as if it had been compriſed in the Count. But per Brian Ch. J. he ſhall plead Not Guilty. Br. Treſpaſs, pl. 359. cites 21 E. 4. 75, 76.

4. *And where the Matter in the Declaration, and in the Replication, is of one and the ſame Nature*, the *Defendant ſhall take the General Traverſe*; and of killing of Diſtreſs, he ſhall ſay that he did not kill; Per Choke. Br. Treſpaſs, pl. 359. cites 21 E. 4. 75, 76.

(U. a) Pleadings

(U. a) Pleadings by *Que Eſtate*. Good or not.

1. IN *Treſpaſs* the *Defendant juſtified the Taking as Diſtreſs in the Hundred by Default of the Plaintiff, who was Decener, becauſe he and all his Predeceſſors, and all thoſe Que Eſtate he has, have been ſeiſed of the Hundred* &c. *Time out of Mind.* And per Hill, clearly he *cannot preſcribe* by Que Eſtate *without ſhewing Deed thereof*; and Hull accordingly, in Action upon the Caſe, 1 H. 4. 7. Br. Que Eſtate, pl. 9. cites 11 H. 4. 89.

2. In Treſpaſs the *Defendant made Title by Aſſignment of Dower to E. S. Que Eſtate* the ſaid E. has, *which E. is yet in full Life.* And ſo it ſeems that he who conveys by Que Eſtate of him who has but a particular Eſtate, ought to aver the Life of the particular Tail, by which &c. Br. Que Eſtate, pl. 46. cites 10 H. 6. 1.

3. In *Treſpaſs upon the Statute 5 R. 2.* the *Defendant ſaid, that W. was ſeiſed in Fee, and infeoff'd N. in Fee, Que Eſtate he has, and gave Colour* &c. and a good Bar by Que Eſtate, *without ſhewing How* he has his Eſtate, and this in this Action, and the like in Præcipe quod reddat. Br. Que Eſtate, pl. 32. cites 4 E. 4. 15.

4. In *Treſpaſs* of ſpoiling his Graſs, and breaking his Cloſe, Catt. ſaid *the Place where* &c. *is* 120 *Acres of Land* &c. *and his Father brought Aſſiſe of Common, and recover'd againſt J. then Tertenant, by which he uſed the Common at the Time of the Treſpaſs* &c. Que Eſtate in the Land the Plaintiff had at the Time of the Treſpaſs. *Jenney ſaid, that W. was ſeiſed, and infeoff'd us, by which we were ſeiſed till the Treſpaſs, abſque hoc, that he has the Eſtate of J. againſt whom the Recovery was.* And the others e contra; and a good Iſſue, per Littleton; for now the Plaintiff claiming by J. ſhall be eſtopp'd as J. himſelf ſhould be. Br. Que Eſtate, pl. 35. cites 12 E. 4. 5. Br. Traverſe, per &c. pl. 240. cites S. C.

5. In *Treſpaſs* the *Defendant ſaid, that J. N. was ſeiſed in Fee, Que Eſtate he has*, and *gave Colour*; and by the Opinion of the Court a good Plea. Brooke ſays Quod mirum? for he *ought to ſay, that A. was ſeiſed* &c. *and infeoff'd J. N. in Fee, Que Eſtate he has*, or the like. But the Plaintiff demurr'd as above, and the Defendant durſt not ſtand to his Plea, but pleaded another Plea; and the ſame Term a Que Eſtate was traverſed, and Iſſue join'd upon it; quod nota. Br. Que Eſtate, pl. 43. cites 9 H. 7. 14.

6. In *Treſpaſs* it is no *Plea, that A. was ſeiſed in Fee, and infeoff'd B. Que Eſtate C. has, who infeoff'd the Defendant*; for the Que Eſtate ſhall be *allow'd in the Defendant*, and *not in any who is in the meſne Conveyance*; quod nota. Br. Que Eſtate, pl. 49. cites 1 E. 6.

(U. a. 2) Pleadings. *Regreſs.* In what Caſes a Regreſs muſt be *ſhewn.*

1. THERE is a *Diverſity where the Defendant pleads his Franktenement, and where* he ſays, *that J. S. was ſeiſed in Fee, and infeoff'd him*, and gives *Colour* to the Plaintiff by J. S. *There it is a good*

Plea

Plea for the Plaintiff, that he was ſeiſed till by the Defendant diſſeiſed, abſque hoc, that J. S. infeoff'd the Defendant without ſhewing Regreſs; for there is a Diverſity where the Defendant makes Title to himſelf in his Bar, which is traverſed by the Plaintiff, and when not; Per Aſcough. Br. Treſpaſs, pl. 127. cites 19 H. 6. 23.

As where the Defendant makes Bar by Diſcent as Heir, and the Plaintiff claims as Heir where he is a Baſtard &c. there *it is ſufficient for the Plaintiff to ſay, that he is Mulier, and not Baſtard, without ſhewing Regreſs*; Per Aſcough. Br. Treſpaſs, pl. 127. cites 19 H. 6. 23.

2. *Where* the Defendant in his Bar *gives to the Plaintiff a Title, and deſtroys it*, it is ſufficient for the Plaintiff to maintain the ſame Title without Regreſs; Per Aſcough. Br. Treſpaſs, pl. 127. cites 19 H. 6. 23.

As in Treſpaſs the *Defendant ſays, that J. N. was ſeiſed in Fee, and infeoff'd him, and gives Colour* to the Plaintiff by J. N. by which he enter'd, and the Defendant re-enter'd, and did the Treſpaſs &c. Now it may be that he enter'd, and yet no Diſſeiſin to the Plaintiff; for it may be that both were upon the Land together, and then this is no Ouſter nor Diſſeiſin to the Plaintiff; and there it is *ſufficient to ſay that the Defendant had not nothing of the Feoffment of the Stranger*; Per Newton. Br. Treſpaſs, pl. 127. cites 19 H. 6. 23.

3. *And* it is ſufficient to deſtroy the Title of the Defendant without more; and *when the Title of the Plaintiff may ſtand with the Bar, there it is ſufficient* for the Plaintiff, without ſhewing Regreſs, *to traverſe the Title of the Defendant*; Per Newton. Br. Treſpaſs, pl. 127. cites 19 H. 6. 23.

4. In Treſpaſs, if the *Defendant pleads, that it is his Franktenement*, the *Plaintiff may ſay that he was ſeiſed, and diſſeiſed by the Defendant, without alleging Regreſs* in the Land, Houſe, or Cloſe. *Contrary of Trees cut* &c. there Regreſs ſhall be alleged, which is traverſable; Per Priſot. Br. Treſpaſs, pl. 417. cites 37 H. 6. 35.

Br. Treſpaſs, pl. 238. cites S. C.—S. P. Br. Eſtates, pl. 46. cites 22 E. 4. 38.

5. *After Diſſeiſin or tortious Ouſter* the Party cannot have Treſpaſs before that he makes Regreſs, and there *in Treſpaſs of the Treſpaſs Meſne the Regreſs is traverſable*. Br. Treſpaſs, pl. 322. cites 11 E. 4. 3.

If a *Man diſſeiſes me*, I may have *Treſpaſs for the Meſne Profits*, tho' I do not re-enter, but in Pleading I *ought* to *allege Re-entry*; but this ſhall not be traverſed, quod nota per Pigot, and none denied it. Br. Traverſe per &c. pl. 131. cites 9 E. 4. 38. at the End there.

6. Treſpaſs does not lie *againſt Diſſeiſor* before Regreſs. Br. Eſtates, pl. 46. cites 22 E. 4. 38. per Huſſey Ch. J.

So where the *Leaſe is determined*, Treſpaſs does not lie without Re-entry, and this of Land and *Things local*, but *contrary of Things tranſitory*; for there a Man ſhall be in Poſſeſſion without Entry or Seiſure; per Brudnell. Br. Treſpaſs, pl. 169. cites 14 H. 8. 23.

7. Second Deliverance; where a Man *leaſes for Years upon Condition*, and after the *Condition is broken*, the *Leſſor ſhall not have Action of Treſpaſs before that he has enter'd again*; per Brudnell. Br. Treſpaſs, pl. 169. cites 14 H. 8. 23.

(Ua. 3) *Plea in Abatement. What* is a *good* Plea in Abatement.

1. TReſpaſs *in C. near S.* it is no *Plea that C. is a Hamlet of S.* And ſo ſee that Action of Treſpaſs may be brought in a Hamlet. Br. Treſpaſs, pl. 371. cites 29 Aſſ. 33.

2. Treſpaſs *of Cattle taken in C.* Vi & Armis, the *Defendant ſaid that the Plaintiff himſelf had brought Replevin of the ſame taking in N. which is a Hamlet of C.* return'd at this Day, to which Writ he has counted, *and by this Writ he does not ſuppoſe the taking to be Vi & Armis*; Judgment of this Writ Vi & Armis; and a good Plea, by which the Plaintiff averr'd that the Replevin was ſued of another taking. Br. Treſpaſs, pl. 115. cites 38 E. 3. 35.

3. Treſpaſs *againſt three*, the one ſaid that the *two were dead before the Writ purchaſed*; Judgment of the Writ; Et non Allocatur, but againſt the two. And ſo ſee that the Death of ſome ſhall not abate the Writ againſt all, but Mirum, as here before the Writ purchaſed; for then it is falſe &c. But Death pending the Writ, ſhall not abate all the Writ. And after the other *ſaid that the two bought the Wood of the Plaintiff to the Uſe of the King; and this Defendant came to meaſure the Wood* &c. And *Iſſue* tender'd *upon the Bargain*. Br. Treſpaſs, pl. 60. cites 47 E. 3. 18.

4. In Treſpaſs, *the Defendant ſaid that before the Treſpaſs the Plaintiff leaſed to J. N. which Term yet continues*; Judgment. This is no Plea, per Caund. without *Privity of the Leſſee*. Br. Treſpaſs, pl. 62. cites 47 E3. 19.

5. Treſpaſs *of Cattle taken generally*, Paſton prayed Judgment of the Writ, for the *Plaintiff himſelf is poſſeſs'd of the Cattle*, by which he ought to have had Writ Quod cepit & Detinuit per tantum tempus per quod proficuum &c. amiſit. To this Bab. bid him to Anſwer, quod nota. Br. Treſpaſs, pl. 221. cites 1 H. 6. 7. —— And cites M. 11 H. 4. the like Matter in Treſpaſs; and ſaid there that the *Defendant in this Caſe* is not at any Miſchief; for he *may give it in Evidence to diminiſh the Damages*; Quod nota. Br. Treſpaſs, pl. 221.

6. Treſpaſs *in C. It is no Plea to the Writ that the Place where &c. is in K. and not in C.* Br. Treſpaſs, pl. 176. cites 4 H. 6. 13.

7. Treſpaſs *in D.* It is no Plea to the Writ *that there are two D's, and none without Addition*; for it ſuffices if he be Guilty in one. Br. Treſpaſs, pl. 14. cites 9 H. 6. 5. *But* per Babb. by 9 H. 6. 29. * *Nul tiel Vill as D.* &c. Judgment of the Writ is a good Plea, and 6 H. 7. 3. is accordingly Ibid.

Treſpaſs *in D.* the *Defendant ſaid that there are in the ſame County D. over and D. nether, and none without Addition, abſque hoc* that there is any Vill, Hamlet, or Lieu Conus out of Vill or Hamlet call'd D. only in the ſame County. And a good Plea for the Viſne by the Reporter. Br. Treſpaſs, pl. 299 cites 2 E. 4 10.

* S. P. Br. Treſpaſs, pl. 19. cites 9 H. 6. 62.

8. In Treſpaſs, it is *no Pleat hat the Vill is in Another County*; but ſhall ſay that *Nul tiel Vill in This County*; nota. Br. Treſpaſs, pl. 19. cites 9 H. 6. 62.

9. It is no Plea in Treſpaſs, *that the Treſpaſs was done by the Defendant and another, who is alive, not named* &c. Br. Treſpaſs, pl. 20. cites 20 H. 6. 11 & 40 E. 27. 39.

10. Treſpaſs of entring into his Houſe and breaking his Cloſe; Danby ſaid, the *Houſe and the Cloſe are all one and the ſame Place*, and not diverſe, Judgment of the Writ; but per Aſcough and Porting. then you may plead *Not guilty to the one, and juſtify to the other*; and therefore it was awarded no plea to the Writ. And yet in Præcipe quod reddat it is

a good Plea; note the Diverſity. Br. Treſpaſs, pl. 151. cites 22 H. 6. 7.

11. Treſpaſs De clauſo fracto *by B. and C.* the *Defendant ſaid that the Place is* 20 *Acres, of which D. and the Plaintiff are poſſeſſed in Common,* and *ſhew'd how*, Judgment Si Actio; and *againſt C. he ſaid Not guilty.* The Court held that he could not *juſtify againſt the one*, but that this *is a Juſtification againſt both*, and he cannot be *Guilty againſt the one but againſt both, for it is a Joint-Action*; but per Moyle *he may plead to the Writ againſt the one who has nothing in the Soil, as to ſay that the Soil is to the one only, and juſtify abſque hoc that the other on the Day of the Writ purchaſed had any Thing in the Soil*, As in Replevin by two, he may ſay that the Property is in the one abſque hoc, that the other has any Thing; Judgment of the Writ; quære for after he pleaded Not guilty againſt both. Br. Treſpaſs, pl. 300. cites 2 E. 4. 22.

12. Treſpaſs of breaking his Cloſe *in O. and H.* Young demanded Judgment of the Writ, for *H. is a Hamlet of O.* and was &c. And per tot. Cur. it is no Plea in Treſpaſs. Contra in Præcipe quod reddat, and yet the Miſchief of the Viſne was mention'd, & non Allocatur, but the Defendant awarded to Anſwer. Br. Brief, pl. 363. cites 7 E. 4. 18.

13. *Treſpaſs* was brought *by the Baron and Feme of Battery of them.* The Defendant pleaded Not guilty, and the *Damages tax'd for the Baron* 10 *l. and for the Feme* 40 *s.* And becauſe the Feme cannot join with her Baron for Battery of the Baron; therefore for this Part the Writ was abated; and for the Battery of the Feme they recovered, for of this they may join in Action. Br. Treſpaſs, pl. 190. cites 9 E. 4. 51.

14. Treſpaſs of Trees cut, and Land depaſtured in K. Norton ſaid there is *no ſuch Vill as K. without Addition* in the ſame County, Priſt; and the Plaintiff was compell'd to anſwer to it by Reaſon of the Viſne; Quod nota. Br. Treſpaſs, pl. 94. cites 11 E. 4. 61.

15. Treſpaſs by Baron and Feme of Cloſe broken and Graſs ſpoil'd, the *Defendant ſaid that A. was ſeiſed in Fee, and had Iſſue the Feme of the Plaintiff and the Feme of the Defendant*, and died, and the Daughters enter'd, and the one married the Plaintiff and the other the Defendant, and ſo *the Defendant and his Feme held in Common with the Plaintiff's*; Judgment ſi Actio; quod nota, by which the other made ſole Title. Br. Treſpaſs, pl. 163. cites 15 E. 4. 2.

(U a. 4) Pleadings. Where there is a *New Aſſignment.*

1. TReſpaſs *of a Cloſe broken, and Graſs ſpoil'd in D.* Chaunt. ſaid the Place is a Carve of Land call'd A. in which the *Defendant and thoſe Que Eſtate he has have held in Common with the Plaintiff and thoſe Que Eſtate he has Time out of Mind, and held in Common the Day of the Writ purchaſed*, by which he entered &c. and a good Plea per tot. Cur. by which the Plaintiff aſſign'd the Treſpaſs in this Land and another, and that of this Land he was ſole ſeiſed, abſque hoc that the Defendant held in Common, and the others e contra; and as to the Treſpaſs in the reſt, Not guilty. Br. Treſpaſs, pl. 122. cites 8 H. 6. 16.

2. In Treſpaſs in one Acre of Land in D. the *Defendant pleaded the Leaſe of the Plaintiff of the ſame Acre*, by which he did the Treſpaſs &c. To which the *Plaintiff ſaid that he was ſeiſed of 2 Acres, and made a Leaſe of the other Acre.* And the beſt Opinion was, that it is no Plea, but *ſhall ſay that he did not leaſe the Acre in which the Treſpaſs was done* &c. But per Paſton, He *may ſay that he leaſed one Acre, and the Defendant enter'd, and*

and did the Treſpaſs in the one and the other, abſque hoc *that he leaſed the Acre in which he ſuppoſes the Treſpaſs.* Br. Traverſe per &c. pl. 15. cites 9 H. 6. 64.

3. Treſpaſs for Breaking his Cloſe, and Digging and Spoiling his Land with Carts and Plows. Defendant ſaid the Place where &c. is 3 Acres, and that he and *all thoſe whoſe Eſtate he has in ſuch a Houſe, have had a Way* there Time out of Mind to 12 Acres &c. with Carts and Plows to carry and re-carry, and that he at the Time of the Treſpaſs &c. came with his Carts and Plows &c. Plaintiff *replied, that beſides the ſaid Way the Defendant had broke his Cloſe in another Place*, and that Defendant anſwered nothing to that; whereupon Defendant *juſtified in this Place alſo for another Way*, as above &c. Per Moyle and Priſot, this is good; for as well as the Plaintiff may aſſign the Treſpaſs in a new Place, and the Defendant ſhall have a new Anſwer, ſo where he *aſſigns it in another Place in the ſame Land*, as here the * *Defendant cannot juſtify for both together*; for a Man may have two Ways in one and the ſame Land, and Common in the ſame Land and Eſtovers, and Digging of Turves, or of Clay, *and he cannot allege all thoſe at the Commencement, but one only; but if he has Way thro' all the Land, there it ought to be alleg'd accordingly at the Commencement. Contrary where he has a Way in the one End only, and another Intereſt in another Parcel*, there he may be a Treſpaſſor in another Parcel of the ſame Land; quod Cur. conceſſit. And per Priſot, the *Plaintiff in his new Aſſignment ought to allege in what other Part of the ſame Land the Defendant has done the Treſpaſs; and the Defendant in his Juſtification ſhall ſhew in what Place of the Land, viz. in the Eaſt End or Weſt End &c. and* the *Plaintiff in his new Aſſignment ſhall ſhew how that the Defendant did the Treſpaſs in the South Part or North Part of the ſame Land*, ſo that a Diſtinction may appear between them; *and* by him, *where the Plaintiff aſſigns the Treſpaſs in other Land*, the Plaintiff *ought to give it a Name*, and *if he aſſigns it in the ſame Land where the Defendant has juſtified, he ought to give ſuch ſpecial Notice that the Difference may be perceived*; by which the Plaintiff amended his Replication according to the Opinion of Priſot; Quod nota bene. Br. Treſpaſs, pl. 203. cites 37 H. 6. 36.

* Moyle ſaid that the Defendant is at large to plead at large ſuch Matter as he has done here. 37 H. 6. 37. a. pl. 26.

4. Treſpaſs *Ubi ingreſſus non datur per Legem*; the *Plaintiff after Bar pleaded* by the Defendant *ſhall not aſſign the Treſpaſs in a new* Place, becauſe the *Writ comprehends Certainty*, viz. *quod ingreſſus eſt in 4 Acres of Land and 8 Acres of Meadow* &c. Br. Treſpaſs, pl. 224. cites 38 H. 6. 7.

S. P. Per Cur. Br. Treſpaſs, pl. 284. cites 9 H. 7. 6.—*Contra in general Writ of Treſpaſs*; for there is no ſuch Certainty in the Writ; Per Moyle and Choke. But per Priſot, it is no good Plea in *Treſpaſs upon the* 8 *H.* 6. and therefore it ſeems the like in this Action, and after the Averment was received, and the Plaintiff maintained his Writ. Br. Treſpaſs, pl. 224. cites 38 H. 6. 7.——S. P. Per tot Cur. Br. Treſpaſs, pl. 284 cites 9 H. 7. 6.

5. Treſpaſs *of a Cloſe broken, and 20 Stacks of Corn taken and carried away*, the *Defendant ſaid that the Place is 5 Acres called White Acre, and juſtified there for Damage feaſant.* The *Plaintiff ſaid that the Place is 3 Acres called O. whereof he was ſeiſed in Fee, and there was poſſeſs'd of the Stacks till the Defendant took them* &c. And no Plea, by which he ſaid as above, *abſque hoc that they were Damage feaſant at the Time* &c. *in the 5 Acres called W.* prout &c. Br. Traverſe per &c. pl. 193. cites 5 E. 4. 53.

6 In Treſpaſs, where the *Plaintiff in his Count gives the Place*, where the Treſpaſs is ſuppoſed, *a Name*, there the Plaintiff ſhall not aſſign the Treſpaſs in a new Place; Per Choke, which none denied. Br. Treſpaſs, pl. 422. cites 9 E. 4. 24.

Br. Deputy, pl. 11. cites S. C. Per Choke.

7. Treſpaſs *of Breaking his Cloſe, and Subverting his Soil* with his Cart, and *ſhew'd how much of the Land was ſubverted*, as he ought, as it is ſaid, viz. two Acres of Land. The *Defendant ſaid that the Place where &c.*

is

is 2 Acres of Land called E. and pleaded in Bar. Per Townſend, where the Treſpaſs is alleged in Certainty, as here, the Defendant ſhall not give the Place a Name, no more than in Treſpaſs upon 5 *Rich.* 2. or upon 8 *H.* 6. And the whole Court held contrary to him, that *in this Action he may plead, as above, and give Name, notwithſtanding the Certainty in the Count*; for it may ſtand with his Count, and it was not denied but that he ſhall do ſo in Action upon 5 *R.* 2. or 8 *H.* 6. Br. Treſpaſs, pl. 350. cites 21 E. 4. 18.

And ſo ſee a *Diverſity* where the Plaintiff in Treſpaſs counts in 30 *Acres, and the Defendant makes Bar that this is Parcel of a Manor*; and where the *Defendant ſays that the Place is* 30 *Acres, and that the Plaintiff leaſed to him* &c. for *there the Plaintiff may aſſign the Treſpaſs in a new Place*, Br. Treſpaſs, pl. 284. cites 9 H. 7. 6.

8. Treſpaſs of Breaking his Cloſe, and Subverting his Soil, viz. 30 *Acres*. The *Defendant pleaded Feoffment of the Manor of D. of which the Place* &c. at the Time of the Treſpaſs was Parcel, and gave *Colour* to the Plaintiff; and the *Plaintiff ſaid that the Place where is a Rod of Land called S. other than the Defendant has anſwered to*; and becauſe the Defendant had not anſwer'd to it, he prayed his Damages; To which the *Defendant pleaded Not guilty, and found for the Plaintiff* to the Damage &c. And there the Opinion of the Court was clear, that he *ſhall not make another Aſſignment when he has ſhew'd it in his Count, viz.* 30 *Acres*; *to which the Defendant has anſwered* that this is Parcel of the Manor &c. For the Certainty appears; *and there is no Diverſity when the Certainty appears in the Count, and when in the Replication.* Br. Treſpaſs, pl. 284. cites 9 H. 7. 6.

But where the *Plaintiff aſſigns the Treſpaſs in another Place*, the *Defendant may juſtify to it, or plead Not guilty*. Br. Treſpaſs, pl. 168. cites 14 H. 8. 4. and 24.

9. In Treſpaſs, the *Defendant juſtified in a Place called Black-acre*; the *Plaintiff aſſign'd* the Treſpaſs *in White-Acre*; the *Defendant ſaid that the Places are all* * *one and the ſame Place.* And per Cur. He ſhall not have it for a Plea, but may plead the ſame Juſtification to it. And per Brudnell, Pollard, and Brook, in this Caſe the *Defendant may plead Not guilty to this new Aſſignment*; for the *Plaintiff by this has confeſs'd that he claims nothing in the Place where the Defendant juſtified*, and ſo he ſhall be trick'd upon the Evidence; Quod nota. Br. Treſpaſs, pl. 168. cites 14 H. 8. 4. & 24.

But upon ſuch an Aſſignment the *Defendant cannot juſtify in another Vill, abſque hoc that he is guilty in the Place ſuppoſed* by the Plaintiff; for this *amounts to Not guilty there.* Br. Treſpaſs, pl. 168. cites 14 H. 8. 24.

Hence it follows, that *if the Plaintiff counts the Place certain at the Commencement*, the *Defendant ſhall not have this Pleading* as above. Br. Treſpaſs, pl. 168. cites 14 H. 8. 24.

* S. P. And upon a Demurrer it was adjudged without Argument to be no Plea; for it is *repugnant to ſay they are both one, when the Plaintiff by his Replication has affirm'd upon Record that it is another*; for when he ſays Alius it cannot be Idem; and ſo are 14 H. 8. 4. 27 H. 8. 7. And Walmſly ſaid it was ſo adjudged 28 Eliz. wherefore it was adjudged for the Plaintiff. Cro E. 355. pl. 13. Mich. 36 & 37 Eliz. in C. B. Freeſton v. Standford & al' ——— Poph. 109. pl. 5. Mich. 38 & 39 Eliz. S. C. by Name of **Fenner's** Caſe, ſays it was adjudged for the Plaintiff, becauſe that in ſuch a Caſe upon a ſpecial Aſſignment, it ſhall be taken meerly another than that in which the Defendant juſtifies, inaſmuch as the Plaintiff in ſuch a Caſe cannot maintain it upon his Evidence given, if the Defendant had pleaded Not guilty to this new Aſſignment, that the Treſpaſs was done in the Place in which the Defendant juſtifies, altho' it be known by the one and the other Name, and that the Plaintiff hath good Title to it, becauſe by his ſpecial Aſſignment, ſaying it is another than that in which the Defendant juſtifies, he ſhall never after ſay that it is the ſame in this Plea; for it is quite contrary to his ſpecial Aſſignment. And upon this a Writ of Error was brought in the King's Bench, and the Judgment was there affirm'd this Term for the ſame Reaſon; Quod nota.— Cro. E. 492. pl. 10. S. C. by the Name of **Freſton v. Crouch** accordingly, by Popham, Clench, and Fenner; and becauſe the Plaintiff is eſtopp'd to give Evidence in that which the Defendant hath pleaded, the Defendant ſhould have pleaded in Bar to the Place newly aſſign'd, or have pleaded Not guilty, according to 14 H. 8. 4. and 27 H. 8. 7. But Gawdy e contra, who held the Law to be with 21 H. 6. 21. For it is not reaſonable, that if they are all one Place, but he may plead it, and not to ſtand upon an Eſtoppel, and put it upon Evidence to a Jury; but becauſe the other Juſtices were of a contrary Opinion, he aſſented that Judgment be affirm'd ——Mo. 460. pl. 641. S. C. by the Name of **Couch v. Freeſtone**, that where the Plaintiff makes a new Aſſignment the Defendant ought to plead Not guilty, and cannot aver that the Place where &c. is one and the ſame.

10. Treſpaſs. The *Defendant juſtified in a Place called A. which is his Franktenement*; the *Plaintiff aſſign'd a new Treſpaſs in B.* which is other Place than A. *and becauſe the Defendant did not anſwer to the Treſpaſs in B.* &c. The *Defendant ſaid that A. and B. are one and the ſame Place*, and not diverſe. And per Cur. This is no Plea; for *by the new Aſſignment* of the Treſpaſs *the firſt Bar is waived, and the Defendant may plead Not guilty to the Treſpaſs in B.* and if the Plaintiff gives Evidence in A. the Defendant may eſtop him by the firſt Matter in the Refuſal of A. Quod nota, and then the Defendant pleaded other Matter; and in Aſſiſe if the Defendant pleads Hors de ſon Fee, and the Plaintiff makes Title, the firſt Bar is waived. Br. Treſpaſs, pl. 3. cites 27 H. 8. 7.

11. In Treſpaſs for *breaking his Cloſe*, the Defendant *ſays the Place where is* 6 *Acres in D.* which are his Freehold, the Plaintiff *replied His Franktenement, and not the Franktenement of the Defendant.* If the *Plaintiff has* 6 *Acres* there, *and the Defendant has other* 6 *Acres*, the Defendant cannot give in Evidence that he did the Treſpaſs in his own 6 Acres, but his *Plea ſhall be intended to relate to theſe* 6 *Acres of the Plaintiff*, becauſe *till Defendant gives a Name* to the Place where the Treſpaſs was done, *the Plaintiff need not make any new Aſſignment*; ſince the Defendant hath not varied the Meaning of the Plaintiff, as by ſaying that the Place where &c. is 6 Acres call'd Greenmead &c. D. 23. b. pl. 147. Mich. 28 H. 8. Anon.

12. If the Plaintiff in Treſpaſs *makes a new Aſſignment, and gives a ſpecial Name to the Place, and* alſo *aſſigns Boundaries on every Part* of the Place, viz. Eaſt, Weſt, North, and South, *and names the Boundaries*, it was held by ſeveral that *he ought to prove thoſe to be true*, as well as the Name of the Place, becauſe every Word, which is put in the new Aſſignment to make the Place plain and certain to the Jury before the Words Alias quam in Barra, is effectual, and the Buttals are Parcel of the new Aſſignment; but quære, becauſe the Opinions are differing. D. 161. b. pl. 46. Trin. 4 & 5 P. & M. Saunders v. Lord Burgh.

13. In Treſpaſs Quare Clauſum fregit &c. the *new Aſſignment was* (viz.) *in one Acre of Land or Meadow lying in a Field in S. aforeſaid call'd Northfield &c.* The *Defendant, as to the Treſpaſs de novo Aſſignat' in præd' Acra terræ, pleaded Not Guilty.* But the Jury was diſcharg'd, by the Opinion of the Court, for the Uncertainty in the new Aſſignment, it being of *Land or Meadow, and* there being *no Buttals or Name to the Acre*; and alſo the *Anſwer was to the Acre of Land only.* And the Plaintiff might have 2 Acres, one Land and the other Meadow. D. 264. pl. 39. Trin. 9 Eliz. Anon.

And. 31. pl. 73. in the Caſe of Lee v. Payer, cites this Caſe, and that the Writ abated for this Uncertainty. And adds, ſo Nota, that this *new Aſſignment is as Parcel of the Declaration*; otherwiſe could not be that the Writ abate it, but rather ought to be a Repleader, and ſo to commence at the new Aſſignment, which was not done for the Reaſon aforeſaid.——Bendl. 177. pl. 222. S. C. that the Pleading was adjudg'd void of both Parts.

14 Treſpaſs of breaking his Cloſe and Houſe. The Defendant in his Plea put the Plaintiff to a new Aſſignment, (viz.) an *Houſe call'd a Stable, a Barn, and another Houſe call'd a Cart-Houſe, and Granary.* Per Gawdy J. the ſame is good enough; that the Word Domus in the Declaration is nomen Collectivum, and contains every Thing mention'd in the new Aſſignment, and ſo was the Opinion of the whole Court. 2 Le. 184. pl. 230. Mich. 32 Eliz. B. R. Hore v. Wridleſworth.

4 Le. 15. pl. 56. 33 Eliz. S. C. in almoſt the very ſame Words.

15. When in Treſpaſs the Defendant pleads in Bar, and the Plaintiff makes a new Aſſignment, it is reaſonable that the Defendant may anſwer to this new aſſign'd Wrong; for by 27 H. 8. *after a new Aſſignment the old Bar is waived*, and out of the Book, *and the Defendant ſhall plead to the new Aſſignment as if he had never pleaded before*; Per Gawdy J. - To which

The Declaration was of *taking an Ox in Dale.* The Defendant *juſtified* the Taking

which the other Juſtices agreed. Goldsb. 191. pl. 128. Hill. 43 Eliz. in Caſe of Bodyam v. Smith.

in Bl. Acre, and that it was his Freehold, for Damage feaſant. The Plaintiff made a *new Aſſignment, that the Place* where the Taking was, *was Wh. Acre in Dale*; and the Defendant juſtified for Heriot Service. Goldsb. 191. Bodyam v. Smith.——The Court were all clear of Opinion, that the Defendant might vary in his Juſtification upon the new Aſſignment, and ſo a Judgment in C. B. was revers'd, and this upon Conference with the Juſtices of C. B. and great Deliberation. Mo. 540. pl. 713. Mich. 35 & 36 Eliz. Odiham v. Smith. ——And. 298. pl. 306. S. C. but S. P. does not appear.——Cro. E. 589. 590. pl. 27. Mich. 39 & 40 Eliz. B. R. the S. C. And the Court held the Pleading well enough; for by the new Aſſignment the Bar is out of Doors, as if it never had been pleaded; and cited 27 H. 8. 7. And it may be that he took the Ox in Bl. Acre, being his own Land, for Damage feaſant, and another in Wh. Acre, as for the Heriot, and ſo they may well ſtand together; and if the Caſe be ſo, he could not have pleaded it otherwiſe. And Judgment in C. B. was revers'd. —Goldsb. 191. pl. 128. Bodyam v. Smith, S. C. accordingly.

16. Treſpaſs of taking his Beaſts at K. *and chaſing them* &c. The Defendant *juſtifies in ſuch a Cloſe for Damage feaſant.* The Plaintiff *replies, that the Place where was another Cloſe* &c. Whereupon the Defendant demurr'd, pretending that the Plaintiff never made any new Aſſignment, but where the Writ is Quare Clauſum fregit. But the Court held the contrary, wherefore it was adjudg'd for the Plaintiff. Cro. J. 141. pl. 18. Mich. 4 Jac. B. R. Batt v. Bradley.

S. C. cited by North Ch. J. who ſaid that it has formerly been doubted whether a new Aſſignment might be in a Treſpaſs for taking Goods, till it was reſolved in this Caſe that it may, but that it is generally uſed in Treſpaſs Quare clauſum fregit. Freem. Rep. 238. pl. 250. Mich. 1677. Cockley v. Pagrave.

17. In an Action of Treſpaſs, and a new Aſſignment made &c. the *Iſſue* is *found for the Plaintiff*, and the Writ of *Enquiry of Damages was General, without any Mention of the new Aſſignment.* And yet 'twas ruled by the Court, that Judgment ſhall be enter'd for the Plaintiff, altho' that the Clerks ſay in ordinary Courſe it is otherwiſe; and with that Judgment agreed the Caſe of **Pullen and Eaſon**, H. 43 Eliz. B. R. Rot. 941. for the new Aſſignment is not the Declaration of the Certainty of Accompt. Noy 26. Sendall v. Sendall.

18. In Treſpaſs for taking and *carrying away* 100 *Loads of Turf at L. the Defendant pleaded, that the Locus in quo* &c. (whereas there was no Place alleg'd) *was* 2 *Acres call'd Bl. Acre in L. which was his Freehold.* The Plaintiff *replied, that the Locus in quo* &c. *was a Piece containing* 20 *Acres in L. alias quam* &c. The Defendant *rejoin'd, that quoad aliquam Tranſgreſſionem in prædictis* 20 *Acres, Not Guilty.* After Verdict for the Plaintiff it was moved, that this was *no Iſſue*, becauſe there were neither 20 Acres, or any Place certain in the Declaration. But adjudg'd for the Plaintiff; for tho' it was not in the Declaration, yet it was no Departure, becauſe both Parties agreed that the Treſpaſs was done at L. ſo that the aſſigning a more particular Place in L. ſtands with and reduces the Declaration to a greater Certainty, and ſupplies it; and ſo is help'd by the Statute of Jeofails. Hob. 176. pl. 197. Hill. 14 Jac. Plant v. Thorley.

19. In Treſpaſs of his Cloſe broken, againſt J. and 2 others, the *Writ was General; but the Declaration was of plowing half a Rood, and in digging another half Rood*; and after in his *new Aſſignment ſhew'd it to be a Sellion, containing by Eſtimation an Acre.* And it was found for the Plaintiff, and Damages aſſeſs'd to 20 s. And now it was moved in Arreſt of Judgment, becauſe the new Aſſignment is more large than the Declaration; and the Opinion of the Court was, that becauſe this was but an Action of Treſpaſs, where Damages only is to be recover'd, that this is very good; but otherwiſe it is, perchance if it had been in an Ejectment. Win. 65. Eaſt 21 Jac. C. B. Avis v. Gennie & al'.

20. *Battery* was laid *at D.* The Defendant *juſtified at S. in the ſame County, in Aid, and the Command of Bailiffs, to prevent a Reſcue of Goods taken*

taken by them in Execution. But the Plea was held to be ill; for the Bailiffs have Authority throughout the whole County, and ſo the Cauſe of Juſtification in the ſame County not local; and therefore he *ſhould have juſtified in the ſame Place (being in the ſame County) where the Plaintiff declared*; and if the Place had been material, he ſhould have traverſed all other Places in the ſame County. And Judgment for the Plaintiff. 3 Lev. 113. Mich. 35 Car. 2. C. B. Bridgwater v. Betheway.

21. Treſpaſs for taking his Cattle in Newmore. The Defendant *pleads that the Place where was Stone-Hill, and juſtifies that it is his Franktenement.* The Plaintiff *replies that there is a River runs through Newmore, and on the North-ſide of it is Stone-Hill, but that he took the Cattle on the South-ſide of the River*; *and* concludes *Hoc paratus eſt verificare*; *and becauſe the Defendant has not anſwered to the Treſpaſs in this Place now aſſign'd, demands Judgment.* The Defendant demurs generally; and it was urg'd that this Replication was not well concluded; for he ought to have ſtopp'd at Hoc paratus eſt verificare, and not have demanded Judgment for not anſwering the Treſpaſs new aſſign'd, when it was impoſſible he ſhould anſwer it before it was alleged. But per Curiam, this is but Matter of Form, and tho' not ſo formal, yet the Defendant not having ſhewed it for Cauſe, cannot take Advantage of it, altho' it had been proper only to have averr'd it, or elſe he might have travers'd, abſque hoc that he took the Cattle at Stone-Hill. Freem. Rep. 238. pl. 250. Mich. 1677. Cockley v. Pagrave.

22. If a Man brings Treſpaſs for *taking* his *Cattle in Black Acre on ſuch a Day*, and the Defendant *juſtifies the Taking at another Place Damage feaſant*, the Plaintiff may make a novel Aſſignment, if there were 2 *Takings*. *So* if there were 2 *Batteries on one Day*, and the *one* were *on the Plaintiff's own Aſſault*, and *the other not*, if he will juſtify one De ſon Aſſault demeſne, he may make a new Aſſignment of the other Battery. Agreed per tot. Cur. 6 Mod. 120. Hill. 2 Ann. B. R. in Caſe of Elwis v. Lombe.

(W. a) Pleadings. *Quæ eſt eadem Tranſgreſſio.* Good or neceſſary in what Caſes.

See Record (N) pl. 19.

1. TReſpaſs. The *Defendant ſaid, that the Land is* 4 *Acres, of which he was ſeiſed in Fee till by the Plaintiff diſſeiſed, upon which he enter'd*; which is *the ſame Entry* of which the Action is brought. And a good Plea, per tot. Cur. becauſe the Action was of Entry into the Cloſe of the Plaintiff, and the Defendant has averr'd that it is the ſame Entry, for otherwiſe it is no Plea; for if *otherwiſe*, then it ſeems that *he ſhall ſay that it was his Franktenement &c. or make Title and give Colour* &c. Br. Treſpaſs, pl. 357. cites 21 E. 4. 74.

2. Treſpaſs of *breaking his Cloſe the 1ſt Day of May.* The *Defendant pleaded Licence of the Plaintiff the ſame Day, by which he enter'd.* Judgment ſi Actio, and a good Plea, *without ſaying that it is the ſame Treſpaſs.* Br. Treſpaſs, pl. 219. cites 21 H. 7. 39.

Jenk. 92. pl. 78. cites S. C. ——*So* in Treſpaſs *of Goods carried away*, if the *Defendant juſtifies the ſame Day and Place.* Br. Treſpaſs, pl. 219. cites 21 H. 7. 39.

So in Treſpaſs *of Battery*, and he juſtifies the ſame Day and Place, it is good, without ſaying that it is the ſame Treſpaſs. Br. Treſpaſs, pl. 219. cites 21 H. 7. 39.

But if he juſtifies *at another Day, or another Place*, then he ought to ſay, which is the ſame Treſpaſs &c. And this per Conſtable, Serjeant, which was affirm'd by all the Court for clear Law. Br. Treſpaſs, pl. 219. cites 21 H. 7. 39. ——Jenk. 92. pl. 78. cites S. C. ——S. C. cited by Williams J. Bulſt. 138. Trin. 9 Jac. in Caſe of Vaſtenope v. Taylor.

3. Treſpaſs

3. Treſpaſs for *Aſſault, Battery, and Wounding at D. in the County of Suff.* 26 *Sept.* 21 *Eliz.* The Defendant *pleaded, that P. Earl of A. was ſeiſed of* 60 *Acres of Paſture call'd S. in Thetford in the ſaid County, and let them to R. W.* 28 *Eliz. for* 21 *Years; and that the Plaintiff tempore quo Clauſum prædict' fregit & cuniculos ipſius R. ibidem inventos cum retibus & aliis ingeniis capere voluit, for which the Defendant, as Servant to the ſaid R. and by his Commandment,* molliter manus impoſuit upon the Plaintiff at T. in the ſaid 60 Acres, to hinder him from carrying away the ſaid Conies quæ eſt eadem &c. Abſque hoc, that he is guilty de Tranſgreſſione & Inſultu &c. alibi vel alio modo in dict' Com' Suff. prout &c. & hoc &c. And upon Demurrer it was adjudg'd for the Plaintiff. Cro. E. 242, 243. pl. 7. Trin. 33 Eliz. B. R. Barret v. Haveſett.

4. Treſpaſs for taking his Cattle at D. and driving them to Places unknown. The Defendant *pleaded, that S. was ſeiſed in Fee of* 12 *Acres in M. and that the Cattle were there Damage feaſant, and he by the Command of S. drove them to D. and thence to F. in the ſame County, where he impounded them, which is the ſame Taking; abſque hoc, that cepit averia prædict. apud D.* Adjudg'd the Plea was ill, for that the Traverſe is a Departure from the firſt Plea, and repugnant to the Matter which induces it. And it was ſaid there needed no Traverſe, becauſe the Matter of the Juſtification is tranſitory, and not local; but it ſuffices that he juſtifies in another Place. Cro. E. 667. pl. 21. Paſch. 41 Eliz. C. B. Sir Walter Sands v. Lane.

5. Treſpaſs of *Aſſault and Battery in London.* The Defendant *pleaded, That the Plaintiff enter'd into his Houſe in Waltham, in the County of Eſſex, and* he *molliter manus impoſuit upon him, to put him out of his Houſe,* quæ eſt eadem &c. Abſque hoc, that he is culpabilis extra Waltham. Upon Demurrer it was moved, that this Treſpaſs being tranſitory, the Place is not traverſable; but if it was, yet he ought not to conclude his Plea Quæ eſt eadem &c. But all the Court held the contrary; for the Cauſe of the Juſtification being local, viz. the maintaining of the Poſſeſſion of his Houſe, he may well juſtify there, but not elſewhere, and he may traverſe every other Place; as where one juſtifies as Conſtable, or by Force of a Warrant. And therefore Popham ſaid, The *Difference* is *betwixt this Caſe and the Caſe of* **Partridge**, which was adjudg'd in this Court, That where one juſtifies by reaſon of an Aſſault in another County, and traverſes the County in the Declaration, that is not good; becauſe the Juſtification is perſonal and tranſitory, and might be alleged in any Place as well as the Battery. But where it is local, as here, it is otherwiſe, and the Concluſion Quæ eſt eadem Tranſgreſſio &c. is good enough; for it concludes, that it is the ſame Cauſe of Action, but with a Traverſe, as it ought to be of Neceſſity. But if the Averment Quæ eſt eadem Tranſgreſſio had been omitted, it had been good enough. Wherefore, upon the firſt Argument, it was adjudg'd for the Defendant. Cro. E. 705. pl. 27. Mich. 41 Eliz. in B. R. Peacock v. Peacock.

2 Keb. 860. pl. 14 Hill. 23 & 24 2. B. R. **Parſhal v. Ditchen** ſeems to be S. C. and it was of Treſpaſs of cutting Trees 1 May; the Defendant juſtified at another Day Que eſt eadem tranſgreſſio; but the Court held it ill, unleſs it was tranſitory only, but there ſhould be a Traverſe abſque hoc, that he is Guilty at the Day, in the Declaration; for the Plaintiff cannot reply that he did the Treſpaſs as ſuppoſed, becauſe that would be infinite, and ſo ill on a general Demurrer.

6. If a *Declaration* be general, Quare Clauſum fregit, and *does not expreſs what Cloſe,* there the *Defendant may* mention the Treſpaſs at another Day, *and put the Plaintiff to a new Aſſignment*; but if he ſay Quare Clauſum vocat' Dale fregit &c. there the Concluſion, Quæ eſt eadem tranſgreſſio, will not help; Per Hale Ch. J. 1. Mod. 89. pl. 54. Mich. 22 Car. 2. B. R. Anon.

7. In Treſpaſs for *breaking and entring his Houſe* on the 10 Novemb. &c. the Defendant *juſtified* his Entry 11 Nov. *by Proceſs out of an inferior Court* &c. Quæ eſt eadem fractio & intruſio, *and traverſed that he was Guilty Aliter vel alio Modo*; upon a Special Demurrer, it was reſolv'd

inter

inter alia, that if Treſpaſs be alleged on 10 Nov. and the Juſtification on 11 Nov. yet if there be an Averment Quæ eſt eadem tranſgreſſio, as here the Plea is good without the Traverſe; And that tho' the Plea was ſufficient in Matter of Subſtance, yet the *adding the Traverſe (tho' merely Surpluſage) being ſpecially ſhewn for Cauſe of Demurrer* has *made it ill.* 2 Lutw. 1452. Hill. 9 W. 3. Hargrave v. Ward.

(X. a) Pleadings. *Giving a Name to the Place* where the Treſpaſs was done. In what Caſes and how.

See (U.a.4)

1. *Treſpaſs in W. of breaking his Cloſe and ſpoiling his Graſs*; the *Defendant juſtified in T.* abſque hoc, *that he is Guilty in W. Modo & Forma*; the *Plaintiff ſaid that T. is a Hamlet of W.* And per Newton and Markham, by this Replication they are agreed that W. and T. are all one and the ſame Vill, and then the Juſtification remains not anſwer'd. Quære if the Plaintiff ſhall anſwer to the Juſtification in his Replication; for it was not adjudg'd, but Iſſue was taken that T. was a known Place Priſt, and the others e contra; and per Newton and Markham, it is not ſufficient to ſay that T. is not a Hamlet of W. but *ſhall ſay that it is a Hamlet of another Vill, or Vill by itſelf, or Place known.* Br. Replication, pl. 4. cites 20 H. 6. 28.

Treſpaſs in D. the *Defendant juſtified in C. abſque hoc that he is Guilty in D.* it is a good Replication that *C. is a Hamlet of D.* and to the Plea pleaded by the Manner &c. and demurred &c. For now the *Plea amounts to a Juſtification, and the Traverſe amounts to Not guilty, which are repugnant.* Br. Replication, pl. 56. (58) cites 22 E. 4. 50.

2. In Treſpaſs, the Plaintiff, in his *Count*, *gave* the Place a *Name certain*, viz. *Greencloſe*, and the *Defendant anſwer'd to a Houſe only*; and per Brian and Littleton, this giving of the Place a Name is *Surpluſage*, and not traverſable. Br. Nugation, pl. 15. cites 15 E. 4. 24.

Br. Treſpaſs, pl. 164. cites 15 E. 4. 23, 24. S.C. And ſays, that the Word Greencloſe was ſtruck out. Brooke ſays, quod nota, that the Name of the Place ſhall not compel the Defendant to anſwer to it.

3. Treſpaſs of breaking his Cloſe *and ſubverting his Soil, viz. 2 Acres of Land* &c. the *Defendant ſaid, that the Acres are called White Acres, and pleaded Bar*; and well per Brian and Choke Juſtices; for the *Defendant may give Name in his Bar, tho' the Plaintiff has not given Name in his Count, and if the Defendant pleads in Bar without giving Name to the Place*, there *the Plaintiff in his Replication may give Name to the Land where* &c. For otherwiſe, if the Plaintiff have ſeveral Acres in the ſame Vill, and the Defendant has juſtified in ſome, and in ſome not, he ſhall loſe his Juſtification; and when the Plaintiff has given Name in his Replication, he may ſay that the Treſpaſs was done in this Land named &c. But in Action upon the Stat. of 5 *Rich.* 2. he *ſhall not plead* ſo *by a Name, for there the Certainty of Acres is compriſed in the Writ*; contrary in Treſpaſs, quod Catesby conceſſit; *but* by him, *where the Plaintiff gives Name* in his Count the *Defendant may vary* from it; and ſo note the Diverſity. Br. Treſpaſs, pl. 360. cites 21 E. 4. 80.

4. Treſpaſs, *the Writ and the Count were* Quare Clauſum fregit, viz. *one Acre of Meadow, and half an Acre of Paſture*; the *Defendant ſaid that the Place is called B. and was his Franktenement* &c. Per Fairfax Juſtice, *where he gives Name in his Writ* you cannot *vary* from it, but *contrary* where the Writ is Clauſum fregit generally, without ſhewing Name or Quantity, there he may vary, tho' he gives Name *in his Count*; but not where he gives Name in his Writ, or in the Writ and Count: And per

Huſſey Ch J. where the Writ is Quare Clauſum fregit *containing* 20 *Acres* or 10 Acres, the *Defendant cannot ſay that the Place &c. contains* 6 *Acres* &c. or more, by which *he may plead by Proteſtation that the Place is named B. and pro Placito that the Place is his Franktenement*; and therefore he pleaded accordingly; quod nota. Br. Treſpaſs, pl. 366. cites 22 E. [4] 17.

5. *In Replevin of taking in D.* the *Defendant juſtified in C. abſque hoc that he took in D.* The *Plaintiff ſaid that the Place is known by the one Name and the other*; and to the Plea pleaded by the Manner, No Law puts him to anſwer &c. Br. Replication, pl. 56. cites 1 H. 7. 21.

6. Action upon the Statute of 8 H. 6. of *Entry into a Houſe, and* 20 *Acres* of Land with Force, the *Defendant pleaded in Bar and gave the Acres a Name, and was not ſuffered* to give Name any more than in Aſſiſe or Præcipe quod reddat, *becauſe the Plaintiff has given Certainty in his Declaration*; and ſo the Defendant ſhall plead to it at his Peril; As in Writ of Entry in Nature of Aſſiſe, he ſhall not give a Name. Br. Pleadings, pl. 134. cites 5 H. 7. 28.

7. In Treſpaſs, the Plaintiff ſuppoſes the Treſpaſs to be done in the *breaking of his Houſe and Cloſe in ſuch a Town*; the Defendant *juſtifies in a Houſe and Cloſe in the ſame Town, and ſhews which*, to put the Plaintiff to his new Aſſignment; to which the Plaintiff *replied that the Houſe and Cloſe of which he complains is ſuch a Houſe, and gives it a ſpecial Name*, upon which the Defendant demurs; and adjudg'd that the Plaintiff take nothing by his Writ; for albeit a Houſe may have a Curtilage which paſſes by the Name of a Meſſuage with the Appurtenances, yet this ſhall not be in this Caſe, for *by the Bar the Plaintiff is bound to make a ſpecial Demonſtration in what Meſſuage and what Cloſe he ſuppoſes the Treſpaſs* to be done, as to ſay that the Houſe has a Curtilage, the which he broke, and it ſhall not be taken by Intendment that the Meſſuage had ſuch a Curtilage to it, if it be not ſpecially named. Poph. 109. pl. 4. Mich. 38 & 39 Eliz. Anon.

8. Treſpaſs of *breaking his Houſe and Cloſes*; the Defendant *pleaded that the Houſe is call'd C. and one of the Cloſes is Bl. Acre, and the other Wh. Acre, and that they are his Freehold*, and ſo juſtifies. The Plaintiff *replies that the Treſpaſs done was in C. and in Bl. Acre, which are his Freehold abſque hoc, that they are the Freehold of the Defendant; and that the Treſpaſs was done in another Place containing* 20 *Acres, alias quam Wh. Acre* &c. Upon Demurrer, all the Juſtices, præter Walmſley, held that in Regard the Defendant has hit ſome of the Places wherein the Plaintiff intended the Treſpaſs, and pleaded thereto; the Plaintiff may well anſwer to that Part, and the Defendant ſhall have no other Anſwer; as if the Defendant had hit one Place and had confeſſed the Action therein, the Plaintiff needed not make any Anſwer thereto; and the *Defendant ſhall not* wave his Anſwer, *and Anſwer to all de Novo.* Wherefore it was adjudg'd for the Plaintiff. Cro. E. 812. pl. 18. Hill. 43 Eliz. C. B. Prettyman v. Lawrence.

9. Treſpaſs &c. for immoderately *beating, wounding, and chaſing Horſes and Beaſts at R.* &c. The Defendant *pleaded that the Place where* &c. *was call'd Speltriggs in R. and is his Franktenement, and ſo juſtified for Damage-Feaſant by gently chaſing and ſtriking them with a little Stick doing no Damage* Quæ ſunt eadem &c. The Plaintiff *replied*, that *de injuria ſua propria abſque Cauſa the Defendant Graviter & immoderate percuſſit* the Horſes &c. It ſeems that upon Demurrer, Judgment was given for the Defendant, becauſe the Words *(Apud R. prædict')* were *omitted in the Replication.* See 2 Lutw. 1394. and 1398. Trin. 4 W. & M. Cundal v. Hodgſon.

(Y.a) Plead-

(Y. a) Pleading *Deed of the Anceſtor.*

See (C. b) pl. 3.

1. IN Treſpaſs, the Defendant *pleaded Feoffment of the Father of the Plaintiff with Warranty*, whoſe Heir &c. *made to the Defendant*; and no Plea per Aſhton, Newton, and Porting. by which he waived it and pleaded the ſame Plea *with Colour*; to which no more was ſaid. Br. Treſpaſs, pl. 156. cites 22 H. 6. 42.

2. In Treſpaſs, the *Defendant ſaid that Place is* 20 *Acres*, and *pleaded a Releaſe of all the Right with Warranty from the Anceſtor* of the Plaintiff, whoſe Heir he is, *made to J. N. Tenant of the Land whoſe Eſtate he has, and relied upon the Warranty.* Per Suliard this is no Plea, but if he had given *Colour* it had been a good Plea; but ſeveral contra, and that it is no Plea, unleſs *when the Franktenement comes in Debate and by Way of Concluſion*, it is then a good Plea, and not as here; for the Action ſtands indifferent, for it may be brought by Tenant of Fee-Simple, Fee-Tail, for Term of Life or for Years; and *this is a Real Bar*, which is no Plea in an Action merely perſonal; for it may be that the Plaintiff is Tenant for Years, or by Execution by Elegit, Statute Merchant or ſuch like, and therefore no Plea. Br. Treſpaſs, pl. 361. cites 21 E. 4. 82. — And cites 22 E. 4. 4. by the Opinion of the whole Court there, except Catesby it is no Plea; quod nota.

(Z. a) *Title. In what Caſes* a Title *muſt be ſhewn* in the Count or after Pleadings.

See (Q. a 6)

1. IF A. brings Treſpaſs againſt B. *of Goods carried away*, and B. *ſays that the Property was in C. who made D. his Executor, and died, and the Ordinary ſequeſtred, and committed the Adminiſtration to A. and A. adminiſtred*, and *after D. proved the Will and adminiſtred*, Judgment &c. This is a good Plea without making Title to B. And the ſame in Debt by Executor, to ſay that the Teſtator died outlaw'd without making Title. Br. Treſpaſs, pl. 347. cites 21 E. 4. 5. per Brian Ch. J.

2. Where a Man *juſtifies* in Treſpaſs *for Diſtreſs for Rent, which he recover'd of a Stranger, iſſuing out of the ſame Land*, it *is no good Juſtification to plead the Recovery only*, but ought to ſhew Title alſo; for if he has no Title, the Ter-tenant who is a Stranger, is not bound by it; per Moyle and Billing. Br. Judgment, pl. 7. cites 35 H. 6. 10. — But ſee 39 H. 6. thereof; for by them Avowry is in the Poſſeſſion, and Seiſin ought to be alleged and not the Recovery only. Ibid.

3. Treſpaſs. The Defendant *juſtified that W. was ſeiſed in Fee, and leas'd to him for Years; that the Plaintiff claiming by Colour of a Deed of Feoffment, where nothing paſs'd enter'd* &c. The Plaintiff *replies* by Proteſtation, *that W. was not ſeiſed in Fee, pro Placito, ſays Quod non dimiſit.* And being found for the Plaintiff, it was moved that the Plaintiff has not made any Title to himſelf in his Replication. But all the Juſtices held it good enough; for in this Action a Man need not make any Title to himſelf; but otherwiſe in an Aſſiſe or other real Action; Alſo by the *Defendant's Plea, that the Plaintiff entred by Colour of a Deed of Feoffment*, he

Poph. 1. 2. S. C. adjudged accordingly; and Popham, who ſeems to differ from Clench and Gawdy, ſaid he agreed that

in Treſpaſs in ſome Caſes the Plaintiff may traverſe the

he *admits him to be Tenant at Will*, which is not deſtroyed. And it was adjudged for the Plaintiff. Cro. E. 288. pl. 4. Mich. 34 & 35 Eliz. in B. R. Juſtice Fenner v. Fiſher.

Bar, or Part of it, without making any other Title than what is acknowledged to the Plaintiff by the Bar; but this always ought to be where a Title is acknowledged to the Plaintiff by the Bar, and by another Means deſtroyed by the ſame Bar; for there it ſuffices the Plaintiff to traverſe that Part of the Bar which goes to the Deſtruction of the Title of the Plaintiff comprized in the Bar, without making any other Title; but if he will traverſe any other Part of the Bar, he cannot do it without making an eſpecial Title to himſelf in his Replication, where by the Bar the firſt Poſſeſſion appears to be in the Defendant, becauſe although the Traverſe there be found for the Plaintiff, yet notwithſtanding by the Record in ſuch a Caſe the firſt Poſſeſſions will ſtill appear to be in the Defendant, which ſuffices to maintain his Regreſs upon the Plaintiff; and therefore the Court has no Matter before them in ſuch a Caſe to adjudge for the Plaintiff, unleſs in Caſes where the Plaintiff ſhews a ſpecial Title under the Poſſeſſion of the Defendant.

As for Example; in Treſpaſs for breaking of his Cloſe, the Defendant pleads that J. G. was ſeiſed of it in his Demeſne as of Fee, and infeoff'd J. K. by Virtue of which he was ſeiſed accordingly, and ſo being ſeiſed, infeoff'd the Defendant of it, by which he was ſeiſed, until the Plaintiff claiming by Colour of a Deed of Feoffment made by the ſaid J. G. long before he infeoff'd J. K. (where nothing paſs'd by the ſaid Feoffment) entred, upon whom the Defendant did re-enter, here the Plaintiff may well traverſe the Feoffment ſuppoſed to be made by the ſaid J. G. to the ſaid J. K. without making Title, becauſe this Feoffment only deſtroys the Eſtate at Will made by the ſaid J. G. to the Plaintiff, which being deſtroyed, he cannot enter upon the Defendant, albeit the Defendant comes to the Land by Diſſeiſin, and not by the Feoffment of the ſaid J. K. For the firſt Poſſeſſion of the Defendant is a good Title in Treſpaſs againſt the Plaintiff, if he cannot ſhew or maintain a Title Paramount. But the Feoffment of the ſaid J. G. being travers'd and found for him, he has by the Acknowledgment of the Defendant himſelf, a good Title againſt him, by Reaſon of the firſt Eſtate at Will acknowledged by the Defendant to be to the Plaintiff, and now not defeated; but in the ſame Caſe he cannot traverſe the Feoffment ſuppoſed to be made by the ſaid J. K. to the Defendant without any ſpecial Title made to himſelf; for albeit that J. K. did not infeoff the Defendant, but that the Defendant diſſeiſed him, or that he comes to the Land by another Means, yet he has a good Title againſt the Plaintiff by his firſt Poſſeſſion not deſtroyed by any Title Paramount by any Matter which appears by the Record upon which the Court is to judge; and with this accords the Opinion of 31 E. 4. 1.

4. Treſpaſs &c, *Quare fœnum ſuum cepit*; Upon Not guilty pleaded the Plaintiff had a Verdict; and it was moved in Arreſt of Judgment that the Declaration was ill, becauſe he had not purſued his Title made in the Declaration. But Coke Ch. J. ſaid, that Quare fœnum ſuum cepit *is ſufficient*. And the Court held clearly the Declaration good; for it is only Matter of Surpluſage for a Plaintiff in Treſpaſs to make Title in his Declaration; and if he makes a Title, and does not purſue it, or if his Title be not good, it is not material, being only Matter of Surpluſage, and Nugatory. And by Doderidge J. *the Plaintiff needs not make any Title*, in an Action of Treſpaſs, the ſame being a poſſeſſory Action; *but if he do* make a Title in the Way of Evidence, *he ought* then *to purſue the ſame, and make it good*; but he needs not to make any Title in his Declaration, ſaying that this Hay was for Tithe belonging to his Farm, which is more than he needed to have done; this is but Surpluſage. And Judgment for the Plaintiff. 2 Bulſt. 288. Mich. 12 Jac. Williamore v. Bamford.

5. In Treſpaſs for Striking and *Killing Accipitrem ipſius the Plaintiff*. After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Plaintiff did *not ſhew what Kind of Hawk it was*, whether a Gotſhawk or Lanner &c. for Accipiter is the Genus, and he ought to ſhew the Species thereof; *nor* does he ſhew *that the Hawk was reclaimed*; for being Feræ Naturæ, no Man can have Property, unleſs reclaimed. But the Court held the Declaration good enough, being in Treſpaſs for Striking and Killing &c. which he only may have who has the Poſſeſſion. Cro. C. 18. pl. 11. Mich. 1 Car. C. B. Sir Fra. Vincent v. Leſney.

6. In an Arreſt of Judgment in an Action of Treſpaſs for *carrying away 24 Load of Timber*, the Exception was, that the Timber is *not ſaid* to be the Timber *Ipſius querentis*, and ſo no Cauſe of Action. Upon this, Judgment was arreſted. Styl. 53. Mich. 23 Car. Wood v. Salter.

7. In

7. In Treſpaſs Quare *clauſum fregit, and threw down his Fences.* The Defendant pleaded Not guilty to all, but the breaking of the Fences, and for that he *juſtifies; for that he was poſſeſs'd of certain Corn in the Place where, as of his proper Goods, and made a Breach in the Fence, as was neceſſary for the carrying of it away.* The Plaintiff demurs ſpecially, becauſe he did *not ſhew by what Title he was poſſeſs'd of the Corn.* And the Court were of Opinion that for that Cauſe the Plea was inſufficient; And Twiſden ſaid, if the Sheriff upon a Fieri facias ſells Corn growing, the Vendee cannot juſtify an Entry upon the Land to reap it, until ſuch Time as the Corn is ripe. 1 Vent. 221. 222. Trin. 24 Car. 2. in B. R. Perrot v. Bridges.

8. Treſpaſs Quare *clauſum fregit, herbas conculcavit, & diverſas carectatas tritici ibidem aſportavit.* After Verdict it was mov'd in Arreſt of Judgment, becauſe the Plaintiff did *not ſet forth whoſe Wheat it was*; for it was *not ſaid Ibidem creſcen'*, but Ibidem aſportavit. Adjornatur. Vent. 278. Mich. 27 & 28 Car. 2. B. R. Holland v. Ellis.

S. C. cited 2 Lev. 156. Hill. 27 & 28 Car. 2. in B. R. in Caſe of Terry v. Stradwicke, as a Caſe of the Michaelmas Term before, as in Treſpaſs for eating up ſo many Load of Wheat then and there being, with Cattle; and becauſe the Plaintiff did not ſay Blada ipſius, Judgment was ſtay'd.——3 Keb. 524. pl 6. S. C. but that had it been Ibidem creſcent' it would be intended ſua; but here being Carectat' it is [to be intended] ſever'd, and may be a Stranger's Goods; Per Wild J. which the others agreed, and Judgment ſtaid.——S. C. cited Arg. Ld. Raym. Rep. 239. in Caſe of Fontleroy v. Aylmer, and ſays that Hale Ch. J. then ſaid, that if it had been a new Point, he would not have arreſted Judgment for this Cauſe; for ſince the Plaintiff has ſaid that it was his Cloſe, the Corn there ſhould be intended prima facie his Corn; but he ſaid that there were ſo many Precedents to the contrary, that becauſe he would not over-rule them, he arreſted the Judgment for this Cauſe. And there in the Principal Caſe of Fontleroy v. Aylmer, the Count in Treſpaſs was of *Fiſhing in his ſeveral Fiſhery, & Piſces cepit*; and Exception being taken for *not ſaying* (*ſuos*) and ſo had not intitled himſelf to the Action, he not having laid any Property of the Fiſh in him, the Court ſeem'd to incline ſtrongly that this Exception was not very conſiderable for the Reaſons that Hale Ch. J. gave againſt his own Judgment in that Caſe of Holland.

9. In Treſpaſs of *Breaking his Cloſe, and taking his Goods*, the Defendant *juſtified the taking Nomine Diſtrictionis, by Command of the Lord of the Manor for Non-payment of Rent.* The Plaintiff *replied that the Place where* &c. *is extra, abſque hoc that it is Infra feodum.* The Defendant demurr'd ſpecially, becauſe the Plaintiff, pleading Hors de ſon Fee, ſhould have taken the Tenancy upon him. But the Court held that this is is to be intended in Caſes of Aſſiſe, and ſo Co. Litt. 1. b. is to be underſtood; but the Principal Caſe is an Action of *Treſpaſs brought upon the Poſſeſſion, and not upon the Title*; ſo that if the Plaintiff deſtroys the Defendant's Juſtification, it is well enough. 2 Mod. 103. Trin. 28 Car. 2. C. B. Sherrard v. Smith.

10. Treſpaſs Vi & Armis for *taking the Mare Ipſius querentis, nec non Bona & Catalla ſequentia, viz.* and ſums them up, but does *not ſay they were the Goods Ipſius querentis*; and thereupon the Defendant demurs; and reſolved the Plaintiff may have Judgment for the Mare, and releaſe the Action for the Reſidue. Raym. 395. Trin. 32 Car. 2. B. R. Cutforthay v. Taylor.

11. In Treſpaſs for *Chaſing of his Sheep*, the *Defendant made Conuſance as Bailiff to T. for Damage feaſant in the Acre of Ground, of which T. was poſſeſs'd*; and there was a Demurrer to the Plea, becauſe he did *not ſhew what Title or Eſtate he had, nor any Seiſin or Freehold*; and therefore Judgment was given for the Plaintiff. Arg. 4 Mod. 419. Paſch. 7 W. 3. B. R. in Caſe of Strode v. Byrt, cites it as Trin. 4 Will. & M. in C. B. Godfrey v. Rock.

12. Treſpaſs for *Breaking his Cloſe at D. Et duos Equos apud D. and 20 Buſhels of Wheat de Bonis propriis ipſius* &c. did take &c. the Defendant *pleaded Not guilty as to all but the Horſes*, and *as to them juſtified by Diſtreſs for Rent.* After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the *Horſes were not alleg'd to be the Goods of the Plaintiff.* It was held that the Plea did not confeſs a Property; for a

6 Mod. 14. Mich. 2 Ann. Joſe v. Mills. S. C. held accordingly; and the

Court ſaid the Caſe was no more than this; Plaintiff in Treſpaſs declares, that the Defendant took away two Cows from his Land in Dale, and alſo 2 Horſes of the Goods of the Plaintiff from the ſaid Dale; ſo that laying a Venue for the taking of the 2 Cows cloſes up the Sentence, and interrupts its being coupled with the 2d Sentence, or the Matter of Deſcription which follows.

Diſtreſs might be of a Stranger's Goods for the Rent, and that *the Copulative (&) did not let it into the ſubſequent Part of the other Sentence*, ſo as to make the Horſes come under the Words (De Bonis Propriis.) 2 Salk. 640. pl. 9. Trin. 2 Ann. B. R. Joce v. Mills.

13. In Treſpaſs for *taking Cows in the Plaintiff's Cloſe*, Defendant *pleads in Bar, That they were Damage feaſant in Clauſo ſuo*. Plaintiff demurs, becauſe he *ſet forth no Title to the Cloſe*. Reſolved that it was well without it; for a poſſeſſory Right is ſufficient to maintain an Action of Treſpaſs. And this Difference was taken, that where the Defendant juſtifies to a *Place ſpecially laid down in the Declaration*, there a Title muſt be ſhewn; but where no Place is ſpecially laid down, as here there is none, there he need not. 10 Mod. 37. Trin. 10 Ann. B. R. Oſway v. Briſtow.

(A. b) Plea good, *without ſhewing Title* in himſelf, *or Authority* from him who has.

Br. Treſpaſs, pl. 254. cites 30 Aſſ. 36.

1. TReſpaſs *againſt* 2, the *one ſaid that the Plaintiff was his Villein*, Judgment &c. and the *other ſaid that the Plaintiff would not be juſtified, but eſloin'd himſelf, and the Lord took him as his Villein, and the Defendant came in Aid of him*; and the *other ſaid that Frank, and of Frank Eſtate*; and ſo ſee there and in ſeveral other Books, *he who juſtifies by coming in Aid, does not ſay that he by Command, or as Servant of the other, nor at at his Requeſt*, came in Aid, and yet well; therefore quære if the Law implies Requeſt or Command; for it ſeems that he cannot do it De ſon tort Demeſne. Br. Treſpaſs, pl. 193. cites 39 E. 3. 16.

But in Mortdanceſtor &c. it is agreed that the *Tenant may ſay that the Plaintiff has an Elder Brother alive, or that he is not next Heir* &c. *without making Title*; for the Action affirms him. Contrary againſt a Treſpaſſor; Note the Diverſity. Br. Treſpaſs, pl. 57. cites 47 E. 3. 5.

2. In Treſpaſs the *Defendant ſaid that the Plaintiff himſelf leaſed the Land to J. N. for* 40 *Years, which Term yet continues*, Judgment &c. and no Plea by Award, *without anſwering that he by his Command, or as Servant to the Leſſee, did the Treſpaſs*; for this amounts but to Not guilty, and that the Termor ſhould have the Action, and not the Plaintiff, who is Leſſor. Br. Treſpaſs, pl. 57. cites 47 E. 3. 5.

(B. b) Plea. *What* ſetting forth of *Title is ſufficient.*

1. TReſpaſs of breaking his Cloſe, and ſpoiling his Graſs; Littleton ſaid *the Place is a great Field incloſ'd round, thro' which Field is a Way common for Horſe and Man to paſs, and the Plaintiff made there a Gate over the Way, and* at the Time of the Treſpaſs the *Defendant open'd the Gate, and went on by the Way*, & hoc &c. and a good Plea, tho' he did not ſay the Field is the Franktenement of the Plaintiff; for this ſhall be implied

implied by the Declaration, when it ſays Clauſum ſuum fregit, and the Defendant did not deny this by the Plea above, and therefore it ſhall be intended ſo; quod nota. Br. Treſpaſs, pl. 298. cites 2 E. 4. 9.

2. In Treſpaſs, the *Defendant ſaid that J. S. was ſeiſed in Fee whoſe Eſtate he has*, and the *Plaintiff demurr'd, and gave Colour* by J. S. And by the Opinion of the Court in a Note, it was a good Plea. Contra by the Reporter. And Brooke ſays it ſeems to him that it is not a good Plea; for *he does not convey Title to the Defendant*; but if he had convey'd Title to any whoſe Eſtate the Defendant has, then well, as *to ſay that J. S. was ſeiſed in Fee, and died ſeiſed, and the Land deſcended to M. who entred* &c. *whoſe Eſtate he has*, or that J. S. *was ſeiſed in Fee, and infeoff'd N.* &c. *whoſe Eſtate he has*, 'tis good. Br. Bar, pl. 74. cites 9 H. 7. 14.

3. Treſpaſs of a Cloſe broken. The *Defendant ſaid, that the Place where* &c. *is an Acre of Land, of which he and M. his Feme were ſeiſed in their Demeſne as of Fee before, and at the Time of the Treſpaſs.* And the Defendant enter'd, and did the Treſpaſs, and *Exception was taken, becauſe he did not ſay that they were ſeiſed in Jure Uxoris, or jointly*, & non Allocatur; for per Fineux Ch. J. it is * ſufficient for the Defendant to *intitle himſelf to any Part of the Land, in whatſoever manner it be.* Br. Pleadings, pl. 84. cites 12 H. 7. 24.

* S. P. Br. Treſpaſs, pl. 286. cites 12 H. 7. 14.

4. In Treſpaſs the Defendant *pleaded, that he leaſed the Land to the Plaintiff for another Man's Life, and that he, for whoſe Life it was, was dead, upon which he enter'd.* And it is adjudg'd, that it *ſuffices for the Plaintiff to maintain that Ceſtuy que Vie was yet living, without* making any *other Title.* Poph. 1, 2. pl. 1. Mich. 34 and 35 Eliz. in B. R. in Caſe of Fenner v. Fiſher, Arg. cites 2 E. 4. fol.

5. In Treſpaſs for *taking his Cattle*, the Defendant *pleaded, that he was poſſeſs'd of a Cloſe for a Term of Years, and the Cattle treſpaſs'd therein* &c. The Plaintiff demurr'd, and Judgment was given for the Defendant, tho' he ſhew'd no Title, but juſtified upon a bare Poſſeſſion. And this *Difference* was taken by Holt Ch. J. where the *Action* is *tranſitory*, as Treſpaſs for taking Goods, the Plaintiff is foreclоſed to pretend a Right to the Place, nor can it be conteſted upon the Evidence who had the Right, therefore Poſſeſſion is Juſtification enough. *But* in Treſpaſs Quare *Clauſum fregit* it is otherwiſe, becauſe there the Plaintiff claims the Cloſe, and *the Right may be conteſted.* 2 Salk. 643. pl. 16. Paſch. 8 Ann. B. R. Anon.

(C. b) Pleadings. *His Franktenement.* That the Place where &c. is his Franktenement, *or* the Franktenement *of his Maſter.*

1. TReſpaſs of *trampling his Graſs*, the *Defendant pleaded his Franktenement.* The *Plaintiff ſaid, that the Defendant took his Graſs* Modo & Forma, prout &c. and was not ſuffer'd to have this General Averment againſt this Special Matter, by which he made Title to the Land. Br. Averment, pl. 7. cites 38 E. 3. 11.

2. In Treſpaſs the *Defendant ſaid, that the Place was his Franktenement the Day of the Treſpaſs ſuppoſed*, Judgment ſi Actio. The *Plaintiff ſaid, That the Defendant diſſeiſed his Father, who died, and the Plaintiff enter'd*; Judgment &c. And the Defendant durſt not demur in his firſt Plea;

Plea; for, by all the Juſtices, the *Diſſeiſin may* well *be tried in Treſpaſs* &c. And it does not appear if the Treſpaſs was before the Entry or after, but it was tempore Ingreſſus &c. as it ſeems by the Pleading, and was of Graſs ſpoil'd &c. Br. Treſpaſs, pl. 80. cites 7 H. 4. 4.

Br. Treſpaſs, pl. 102. cites S. C.

3. *Warranty to him, his Heirs, and Aſſigns, it is a good Eſtoppel againſt the Defendant to ſay, that the Land where* &c. *is his Franktenement* Quod nota, (by the Aſſignee;) but the other took Iſſue with him gratis; therefore quære &c. For *in Treſpaſs* the ſame Year, fo. 35, 36. the *Defendant pleaded his Franktenement*; and the *Plaintiff pleaded a Feoffment by Deed of J. P. Anceſtor of the Defendant, whoſe Heir he is, to N. S. whoſe Eſtate he has*; and demanded Judgment, if he againſt the Deed of his Anceſtor, whoſe Heir he is, ſhall be admitted to ſay his Franktenement; but at laſt he was compell'd to conclude upon the Franktenement, becauſe 'tis only an Action of Treſpaſs; quod nota. Br. Eſtoppel, pl. 68. cites 14 H. 4. 13.

4. In Treſpaſs of ſpoiling his Graſs the *Defendant ſaid, that the Place*, at the Time of the Treſpaſs, *was the Franktenement of his Maſter*, by which, *by his Command, he enter'd and did the Treſpaſs*, Judgment &c. The *Plaintiff ſaid, that De ſon tort Demeſne, without ſuch Cauſe*; and held a good Plea. And yet if the Maſter himſelf had been Party, and had pleaded his Franktenement, there this had been no Plea; but the Plaintiff had been compell'd to have made Title, or to have anſwer'd to the Franktenement; but now the *Authority of the Defendant is in Iſſue, and not the Franktenement*. Br. De ſon tort &c. pl. 13. cites 8 H. 6. 34.

Br. Traverſe per &c. pl. 84. cites S. C.

5. In Treſpaſs the *Defendant juſtified, that it was the Franktenement of his Maſter* E. by *which he, by his Command, enter'd and did the Treſpaſs*. The *Plaintiff ſaid, that before that E. any Thing had, W. was ſeiſed, and infeoff'd the Plaintiff, who was ſeiſed till by T. diſſeiſed, who infeoff'd the ſame E. and the Plaintiff re-enter'd, and the Treſpaſs meſne between the Diſſeiſin and the Re-entry*. The *Defendant ſaid, that N. was ſeiſed, and infeoff'd E.* Judgment & non Allocatur; by which he ſaid as above, *and traverſed the Diſſeiſin*, and ſo to Iſſue. Br. Treſpaſs, pl. 138. cites 21 H. 6. 5. 6.

But in the Time of E. 6. he ſhall ſay, *abſque hoc, that J. S. was ſeiſed in Fee, prout* &c. Ibid.

6. In Treſpaſs of entring into his Cloſe, if the *Defendant ſays, that J. S. was ſeiſed, and infeoff'd him*, and gives *Colour*, the *Plaintiff may ſay that R. was ſeiſed, and leaſed to J. S. at Will, who gave to the Defendant, and R. re-enter'd, and infeoff'd the Plaintiff, abſque hoc, that J. S. any Thing had, unleſs at Will*; and admitted for a good Plea. Br. Treſpaſs, pl. 308. cites 5 E. 4. 1.

7. If a Man *juſtifies in Treſpaſs as his Franktenement*, it is no Plea that it was the Franktenement of the Defendant, abſque hoc, that the other leaſed. Br. Counterplea de Aid, pl. 21. cites 5 E. 4. 2.

8. In Treſpaſs the *Defendant ſaid, that the Place is* 20 *Acres, which was the Franktenement of S. and he, as his Servant, and by his Command, enter'd, and S. took the Beaſts Damage feaſant, and deliver'd them to the Defendant, to put them in Pound* &c. *which he did* &c. and it was held a good Plea; for *by ſuch Taking, the Property is not out of the Plaintiff*; for if it was, then the Plaintiff cannot have Treſpaſs againſt the ſecond Treſpaſſer; and the Plaintiff *traverſed the Franktenement*, and would have pleaded another Plea for the Beaſts, and was not ſuffer'd, for the firſt goes to all; for if it be not the Franktenement of the Defendant, he cannot diſtrain Damage feaſant. Br. Treſpaſs, pl. 329. cites 12 E. 4. 10.

9. Treſpaſs *of Beaſts taken in A. in B.* The *Defendant ſaid, that he himſelf was ſeiſed of* 4 *Acres call'd C. in B. aforeſaid, and* the ſame Day *found the Beaſts Damage feaſant in C. and took them and chaſed them towards the Pound, and they eſcaped into A. and the Defendant freſhly re-took them, which is the ſame Taking* &c. Pigot ſaid, of your own Tort without ſuch Cauſe. And, per Brian and Chock J. this is no Plea; for

where

where the Defendant intitles himſelf to the Soil by the Plaintiff, or his Anceſtors, or as his Franktenement, this ought to be anſwer'd ſpecially, and ſhall not ſay generally, that De ſon tort Demeſne; quod nota. And after, per Brian, the Plea is good enough; for, by the Plea, it is proved that he took them before. Br. De ſon tort &c. pl. 22. cites 21 E. 4. 64.

10. In *Treſpaſs of Goods carried away*, the *Defendant ſaid, that the Place is his Franktenement, and he found the Goods Damage feaſant.* And per Cur. it is no Plea *without ſhewing the Certainty of the Land*, becauſe he has made to himſelf Title to the Goods, and therefore he ſhall ſhew the Certainty as well as if he had made Title to the Franktenement in Treſpaſs de Clauſo Fracto. Br. Pleadings, pl 77. cites 5 H. 7. 28. Br. Pleadings, pl. 133. cites S. C.

11. *But in Treſpaſs de Clauſo Fracto* the Defendant may ſay, that the Place where &c. is his Franktenement, without ſhewing the Certainty of the Land; becauſe *the Writ and the Plea are general*, and he does not make Title to the Land; quod nota, per tot. Cur. Br. Pleadings, pl. 77. cites 5 H. 7. 28. S. P. Br. Pleadings, pl. 133. cites S. C. But contra where he makes Title to the Land; for his Franktenement is no Title, becauſe it may be by Diſſeiſin; quod nota, per tot. Cur.

12. Treſpaſs Quare *in ſeperali Piſcaria* ſua piſcatus fuit. The *Defendant pleaded Franktenement*; and a good Plea, per Brian and Keble. But Wood contra. Quære if it had been *in Libera* Piſcaria ſua; for it ſeems that a Man may have Liberam Piſcariam in another's Soil; but ſeveral Piſcary ſhall be intended in his proper Soil. Br. Treſpaſs, pl. 426. cites 10 H. 7. 24.

13. Treſpaſs for *taking and carrying away his Trees.* The Defendant pleaded the common Bar, viz. That the Place where the Treſpaſs was ſuppoſed to be, is his (the Defendant's) Freehold, and ſo juſtifies as in his Freehold &c. But adjudg'd ill; for this is no Plea in Treſpaſs De Bonis aſportatis, but *peculiar only to* a Treſpaſs *Quare Clauſum fregit.* Quod nota. Carth. 176. Hill. 2 & 3 W. & M. B. R. Alſtone v. Hutchinſon.

14. In Treſpaſs for *breaking his Cloſe, and carrying away his Wood and Stones* &c. the Defendant *juſtified* &c. *that the Place where* &c. *is call'd R. Cloſe, and is his Freehold.* The Plaintiff *replied*, that it was *his Freehold, and that the Defendant, de Injuria ſua Propria, did break and enter* &c. *and carried away the Wood and Stones* &c. *and traverſed that it* was the Freehold of the Defendant. And upon Demurrer the Defendant had Judgment, becauſe the Plaintiff ought to have concluded his Replication to the Country, for there was no new Aſſignment; for this always alleges, that the Place mention'd therein is alias quam in Barra, ſo that the Place being agreed on both Sides to be the ſame, the Traverſe of the Freehold muſt be ill. Therefore the *Plaintiff ought to have concluded* his Replication thus, viz. *That it was his Freehold, and not the Freehold of the Defendant, & hoc petit quod inquiratur per Patriam.* 2 Lutw. 1399. Trin. 5 W. & M. Huſtler v. Raines.

15. There are 2 *Ways of pleading Liberum Tenementum*; the *one without any* Manner of *Certainty*, the *other with a Certainty.* 1ſt, *If* there be *any Certainty, as that the Place is Black-Acre*, Liberum Tenementum of him, then *the Way to reply is to make a new Aſſignment.* 2. *If* there be *no Certainty, the Way is to aſcertain the Place, and to make himſelf a Title to it in the Replication.* Arg. And per Cur. if a Man *declares Quare Clauſum generally in ſuch a Vill*, the *Defendant may plead Liberum Tenementum*; and if the Plaintiff traverſe it, it is at his Peril; for the Defendant, if he has any Part of his Land in the whole Town, ſhall juſtify it there; and therefore, in that Caſe, the better Way is to make a new Aſſignment. 6 Mod. 119. Hill. 2 Ann. B. R. in Caſe of Elwis v. Lombe.

See (C. b) pl. 10. 15.

(D. b) Pleadings ill. *Want of Certainty.*

S. P. Br. Pleadings, pl. 26. cites S. C.

1. TReſpaſs of Graſs cut. Per Newton Ch. J. if the *Defendant juſtifies, and intitles himſelf ſpecially, as by Deſcent, Feoffment* &c. he *ought to ſhew the Quantity of the Land*, as to ſay that the Place contains 20 Acres of Land &c. But *contra where he ſays, that the Place where &c. is his Franktenement.* Note the Diverſity. Br. Treſpaſs, pl. 153. cites 22 H. 6. 24.

In Treſpaſs, the Plaintiff declared Quare cum. It was moved in Arreſt of Judgment, but no Rule was made, the Court being of Opinion,

2. In Treſpaſs of an *Aſſault and Battery*, the Plaintiff declares, *quod cum* the Defendant Die & Anno &c. the aforeſaid Plaintiff verberavit & vulneravit &c. and upon that the Plaintiff recover'd. And now Error is brought, and aſſign'd in the Declaration; becauſe there is not any direct Affirmation, that the Defendant verberavit &c. but it is quod cum verberavit. The Prothonotaries being ask'd by the Court what the Courſe was, ſaid, that in C. B. it was *in Debt* with a Quod cum &c. The Court liked the Difference well; and ſaid certainly, that ſuch a Declaration *in Treſpaſs* cannot be good, ſo the Judgment was reverſed. Noy 58. Sheriff v. Diggs.

that though the *Cum* in the Count, *if it ſtood alone, might be bad*, yet the *Recital of the Original, which goes before, helps it.* Barnes's Notes in C. B. 174, 175. Eaſt. 8 G. 2. **Warren v. Lapdon.** And cites **Clarke v. Lucas**, Mich. 2 Geo. 2. which was removed into B. R. by Writ of Error, and remains there undetermin'd.

3. Treſpaſs Quare Clauſum fregit, & *ſpinas ſuas ad Valentiam ſuccidit.* After Verdict, upon Not Guilty, and found for the Plaintiff, it was moved in Arreſt of Judgment, that the Declaration was not good, becauſe he does *not ſhew the Quantity of the Loads*, or Load, and ſo it is uncertain; as in the Caſe, Cok. 5. fol. 34. **Playter's Caſe**, Treſpaſs Quare piſces ſuos cepit; and of that Opinion was the Court, but they would adviſe. Afterwards being moved again, in the End of the Term, many Precedents were ſhewn for the Maintainance thereof, wherefore it was adjudg'd for the Plaintiff. Cro. J. 435. pl. 3. Mich. 15 Jac. in B. R. Johns v. Wilſon.

The Reporter ſays, Quære, if the Action had been laid in the County of Cornwall, where it is uſual to carry Corn in the Straw upon Horſes,

4. In Treſpaſs inter alia, for taking and *carrying away* 40 *Loads of Corn in the Straw.* After Verdict for the Plaintiff it was moved, that the Declaration was uncertain; for the Plaintiff had declared for 40 Loads of Corn in the Straw, and it does *not appear whether* they be *Horſe-Loads or Cart-Loads*, or what other Loads of Corn they are. But Glyn Ch. J. anſwer'd, that it is well enough expreſs'd; for it being of Corn in the Straw, it ſhall be intended Cart-Loads, and therefore let the Plaintiff have his Judgment. Styl. 466. Mich. 1655. London v. Wilcocks.

whether the Declaration would have been good. Ibid.

5. Treſpaſs Quare Clauſum fregit, & *arbores ſuccidit ad Valentiam* decem Librarum. To which the Defendant demurr'd generally. The Plaintiff pray'd Judgment for breaking of his Cloſe; but as to the other, the Declaration was inſufficient, becauſe *not expreſs'd what kind of* Trees. 1 Vent. 53. Hill. 21 & 22 Car. 2. B. R. Tomlinſon v. Hunter.

6. Treſpaſs &c. *againſt P. and T. of breaking his Cloſe, chaſing and taking his Beaſts.* P. pleaded Not Guilty. *T. juſtified by a Warrant in Replevin, ſetting forth, that P. was poſſeſs'd of the Cattle, and that the Plaintiff took them unjuſtly, whereupon P. complain'd to the Sheriff, who made a Warrant to the Defendant to replevy the Cattle.* Upon Demurrer

it

it was objected, that it was *not ſaid that P. was poſſeſs'd of the Cattle ut de Bonis propriis.* 2dly, That *no Place was expreſs'd where the Complaint to the Sheriff, nor where the Warrant by him, was made.* 3dly, That he ought to have pleaded, that the Warrant was in Writing. But none of theſe Exceptions were reſolved, becauſe the Court agreed that the Declaration was ill, as to the Chaſing of the Beaſts, becauſe it did *not ſhew what Sort of Beaſts they were*; and ſo the Parties agreed to amend on both Sides. 2 Lutw. Rep. 1372. Hill. 3 & 4 Jac. 2. Dale v. Philipſon & al'.

7. Treſpaſs for *taking* 200 *Buſhels of Salt.* The Defendant *juſtified under the Statute* 10 *W.* 3. *for laying a Duty* on Salt, *and that it was ſhipp'd to be exported, and not weigh'd; and that he was an Officer* &c. *and ſeiſed it.* The Plaintiff *replied, de Injuria ſua propria abſque tali Cauſa.* Upon Demurrer, Holt Ch. J. ſaid, That where a Defendant juſtifies by Authority at Common Law, as a Conſtable by Arreſt for a Breach of the Peace, under Proceſs of the Admiralty &c. there de Injuria ſua propria &c. is a good Replication; and ſo 'tis where the Defendant juſtifies by Authority of an Act of Parliament, becauſe that being a General Law can be no Part of the Iſſue. And the Court held the Plea ill, becauſe the Defendant did *not ſhew what ſort of Salt* this was, *whether Bay*-Salt, *Pit*-Salt, *White*-Salt &c. for the Statute does not extend to all. 2 Salk. 628. pl. 3. Mich. 13 W. 3. Chance v. Weedon.

8. Treſpaſs &c. for *entring his Houſe, and taking ſeveral Keys for opening the Doors of the ſaid Houſe.* Upon Not Guilty pleaded, the Plaintiff had a Verdict. It was objected, that the taking of each Key was a diſtinct Treſpaſs, and might require ſeveral Anſwers, and that *the Kind and Number* ought to be aſcertain'd. But it was reſolved, this was ſufficiently *aſcertain'd by Reference to the Houſe.* 2 Salk. 643. pl. 15. Paſch. 8 Ann. B. R. Layton v. Grindall.

(E. b.) *Traverſe neceſſary* in what Caſes.

1. IN Treſpaſs of *Graſs carried away*, the Defendant *pleaded his Franktenement*, and ſo juſtified. The Plaintiff *replied, that long before the Defendant any Thing had in the Franktenement, one A. B. was ſeiſed in Fee, and leaſed to the Plaintiff for Years yet continuing*, by *which he enter'd, and was poſſeſs'd till the Defendant did the Treſpaſs*; and held good, without ſaying any thing more. D. 171. b. pl. 9. cites Fitzh. Tit. Replication and Rejoinder, Trin. 41 E. 3.

S. P. And the Defendant demurr'd, becauſe the Plaintiff neither confeſs'd or avoided the Franktenement in the Defendant. And adjudg'd the *Replication good in Treſpaſs upon Franktenement pleaded*; *but* if a *Feoffment* had been *pleaded in Bar*, it had been otherwiſe. Jo. 352. pl. 4. Mich. 10 Car. B. R. Key v. Cook.

5. In Treſpaſs *of Graſs cut*, which is local, a Man cannot *juſtify in another County, and traverſe the County in the Writ*, but ſhall plead Not Guilty; for if the *Jury finds him guilty* generally, and *expreſsly in another County*, the Verdict is void; and if he ſays Guilty *generally*, *Modo & Forma*, where it was in a Foreign County, *Attaint lies.* Br. Traverſe per &c. pl. 14. cites 9 H. 6. 62.

But in Treſpaſs tranſitory or moveable, as of *Goods carried away*, or of *Battery*, *which may commence in one Vill, and continue in another*, the Defendant may juſtify in another Vill in the ſame County, without traverſing the Vill in the Writ. Br. ibid

But if it be of *Treſpaſs local in D.* as of Trees or Graſs cut, and he *juſtifies in another Vill*, there he ought to traverſe the Vill in the Writ. Note the *Diverſity*. Br. Traverſe per &c. pl. 14. cites 9 H. 6. 62.

And in Replevin in D. he may ſay, that he took them in C. in another County, and traverſe that he did not take in D. and make Avowry to have Return &c. and this ſhall make Iſſue; per Martin, quod non negatur. Br. ibid.

3. In

3. In Treſpaſs the *Defendant ſaid, that the Plaintiff bail'd the Bowl to A. in Pledge for Debt, who bail'd it to the Defendant, who re-bail'd it to the Plaintiff*, which is the *ſame* Taking. The *Plaintiff ſaid, that R. gave it to him, and the Defendant took it, abſque hoc, that he bail'd to A.* and a good Plea, without traverſing the Bailment to the Defendant; for he has traverſed the Bailment in Pledge, which anſwers to all; quod nota, per Cur. Br. Treſpaſs, pl. 412. cites 10 H. 6. 25.

4. *Treſpaſs in D. of Trees cut.* It is no Plea, that *there are 2 D.'s, and none without Addition*; for if he be guilty in any of the 2, the Plaintiff ſhall recover; and if he *has Juſtification in any* of the 2, he may plead it, *abſque hoc, that he is guilty in the other.* So in Aſſiſe or Account; contra in all other Actions. Br. Brief, pl. 341. cites 3 E. 4. 26.——And ſee 2 E. 4. 10. not adjudg'd.——But 9 H. 6. 5. it is no Plea. Ibid.

* *As in Aſſiſe* againſt me, I may *ſay that E. was ſeiſed and infeoff'd me, and give Colour to the Plaintiff, without traverſing the Diſſeiſin*, becauſe the Writ is but a Suppoſal.

5. In Treſpaſs, if the *Defendant ſays that S. was ſeiſed, and infeoff'd him*, and gives *Colour* to the Plaintiff, and the *Plaintiff ſays that he himſelf was ſeiſed till diſſeiſed by the ſaid S. who infeoff'd the Defendant, and he re-enter'd, and the Treſpaſs meſne* &c. And the *Defendant ſays that a long Time before the Plaintiff any Thing had, the Father of S. was ſeiſed, and had Iſſue S. and died, and the Plaintiff enter'd, upon whom the ſaid S. entred and infeoff'd the Defendant*; this is no Plea, *without traverſing that S. did not diſſeiſe the Plaintiff*, becauſe the *Diſſeiſin is alleg'd by Matter in Fact*; but *otherwiſe* it is where the Diſſeiſin is alleg'd *by* * *Suppoſal.* Br. Traverſe per &c. pl. 109. cites 15 E. 4. 22. Per Catesby.

Br. Traverſe per &c. pl. 109. cites 15 E. 4. 22.

And if the Plaintiff in Treſpaſs Quare *clauſum ſuum in S. called D.* fregit &c. there *if the Defendant juſtifies in another Place*, Per Sterkey.

6. In Treſpaſs, the *Defendant juſtified, and gave the Place a Name*; the *Plaintiff ſaid that his Plaint is of a Treſpaſs done in another Place, and ſhew'd where* &c. *and the Name* &c. and becauſe he did not anſwer to it, demanded Judgment &c. and well without Traverſe, that he has commenc'd his Action of any Treſpaſs done in the Place where the Defendant has juſtified. Br. Treſpaſs, pl. 369. cites 22 E. 4. 50.

he ought to traverſe the Treſpaſs in the Place in the Declaration; And ſo ſee a *Diverſity where Name is given in the Declaration*, and *where not.* Br. Treſpaſs, pl. 369. cites 22 E. 4. 50.

S. C. cited in the Caſe of Leech v. Widgley, Lev. 283. Hill. 21 & 22 Car. 2. B. R. which was Treſpaſs for *chaſing* 40 of his *Sheep ita quod* they were damnified, and *one of them died*; the Defendant *juſtified Damage feaſant in his Franktenement*; the Plaintiff *replied, and claimed Common* in the Place where &c. the Defendant *rejoins and juſtified by Encloſure, leaving ſufficient Common* &c. And upon Demurrer it was inſiſted, that the Plea *not anſwering to the Dying of one of the Sheep*, was ill; for he ought to have travers'd the Chaſing upon which he died. But it was anſwered, this *coming only under the Ita quod, is only to aggravate the Damages*, and he needs not to traverſe it. Keeling Ch. J. held the Bar good for this Reaſon, and the other 3 held that it is *cur'd* at leaſt *by the Replication* over; and Judgment was given for the Defendant. Lev. 283. Hill. 21 & 22 Car. 2. B. R. Leech v. Midgley.——Vent. 54. S. C. by the Name of Leech v. Widſley, adjudged.——Raym. 185. Anon. S. C. adjudged.

7. Treſpaſs of *Chaſing his Cattle, ſo that they died of the Chaſing.* The Defendant *pleads, that the Place* where &c. *is holden of him by ſuch Services, and he diſtrain'd* thoſe Beaſts, *and impounded them in a Pound overt; and that they died there of Hunger in Default of the Plaintiff*, the which is the ſame Treſpaſs. And it was thereupon demurr'd, and without Argument adjudged for the Plaintiff; for when the Plaintiff alleged that they died of the Chaſing, and he pleads that they died of Hunger, that is not any Plea without a Traverſe that they did not die of the Chaſing. Cro. Eliz. 384. pl. 5. Paſch. 37 Eliz. Hill v. Prideaux.

8. In Treſpaſs of a *Battery in London*, the Defendant *pleaded that the Plaintiff aſſaulted him at D. in the County of S. and* if he had any Harm, it was *De ſon Aſſault Demeſne*, and in his own Defence, *abſque hoc that he was guilty in London.* Upon Demurrer it was adjudged no Plea, that both the Juſtification and Traverſe were not good; for a *Battery in his own*

own Defence is not local; and therefore he may juſtify in any Place, *and therefore* he *cannot plead it in another Place, and traverſe the Place alleg'd.* Cro. E. 842. pl. 21. Trin. 43 Eliz. C. B. Purſet v. Hutchins.

9. Treſpaſs of *Battery in ſuch a Pariſh, and Ward in London.* The Defendant *juſtifies in the County of Cambridge, and arreſting him there by Warrant from the Sheriff there, and traverſes the Battery in the Pariſh, and Ward in the County mentioned*; And for this Cauſe it was demurr'd, and adjudged for the Plaintiff that the Traverſe was ill to traverſe the Place, but he *ought to have travers'd the County.* Cro. Eliz. 860. pl. 31. Mich. 43 Eliz. in C. B. Johnſon v. Burton & Shut.

10. In Treſpaſs *Quare Oves &c.* generally, the *Defendant preſcribes for Ewes, and ſays they were Oves matrices.* The Plaintiff *replies* that they were *Oves verveces*; this is not good without a Traverſe, abſque hoc that they were Oves matrices; Per Richardſon and Crook. Het. 29. Trin. 3 Car. C. B. in Caſe of Johnſon v. Morris.

11. In Treſpaſs Vi & Armis of *breaking his Cloſe, and taking his Cattle*, the Defendant as to the Force and Arms pleads Non. culp. and as to the reſt *juſtifies that the Cattle went in for Default of the Plaintiff's Fence.* The Plaintiff *replies that they came into thro' another's Fence.* The Defendant demurs, becauſe the Plaintiff does *not aſſign where the Place of the other Cloſe lies, thro' which the Cattle came.* Plaintiff ſaid it is not neceſſary to ſhew where it lies; for they went not in where the Defendant has alleged, and ſo the Traverſe is well taken. Defendant anſwered that here is a new Aſſignment, which anſwers not the Treſpaſs for which the Action is brought; and becauſe it is a new Aſſignment, a new Anſwer muſt be given, and therefore Plaintiff muſt ſhew the Place where the new Aſſignment lies. Roll Ch. J. ſaid he pleads no more but that the Cattle came in at another Place than is pleaded, and he needs not ſhew the Place. Judgment for the Plaintiff Niſi. Sty. 357. Mich. 1652. Baker v. Andrews.

12. In Treſpaſs for Entry, and *Pulling down of Poſts of a* Fiſhery, the Defendant *pleads he was Lord of a Manor, wherein was a River of Avon, in which he had a Fiſhery; and becauſe the Plaintiff ſet up Poſts there, he pull'd them down*; for which Cauſe the *Plaintiff demurr'd, as amouuting only to the general Iſſue*, and ſo ill, *unleſs there had been a Traverſe, abſque hoc that he pull'd down the Poſts in the Plaintiff's Fiſhing*, to which the Court inclined, Judgment pro Plaintiff Niſi. 2 Keb. 57. pl. 23. Trin. 18 Car. 2. B. R. Hely v. Raymond.

13. When the Plaintiff in his *Declaration* has *aſſign'd a Day* of the Treſpaſs done, and the Defendant *juſtifies the Treſpaſs upon the ſame Day*, there the Defendant needs not traverſe the Day, becauſe the Day is agreed on both Sides. 2 Saund. 295. Hill. 22 & 23 Car. 2. Per Cur. in the Caſe of White v. Stubbs.

14. In Treſpaſs of breaking his Cloſe, and *carrying away his Goods*, the Defendant pleads Not guilty to the breaking of the Cloſe, and *juſtifies the taking of the Goods at a Time varying from that alleged* in the Declaration, and concludes Quæ eſt eadem tranſgreſſio; upon which it was demurr'd, becauſe he *did not traverſe the Time before and after it*; and it was adjudged for the Plaintiff. 1 Vent. 184. Hill. 23 & 24 Car. 2. in B. R. Smith v. Butterfield. 2 Keb. 878. pl. 50. S. C. adjudged.

15. In Treſpaſs *of taking his Goods*, the Defendant *juſtified by Recovery in an Inferior Court, and Execution thereupon by a Fieri facias, Quæ eſt eadem* captio. And upon Demurrer it was objected that the *taking was alleged on one Day, and the Defendant in his Juſtification varying from that Day*, ought to have travers'd any other taking, becauſe the ſame Goods may be taken at ſeveral Times, and that the Quæ eſt eadem is not ſufficient. But it was ſaid per Curiam, he having averr'd that it was Eadem Captio, *the Averment was ſufficient*; and the Parties by Conſent afterwards pleaded to Iſſue. 2 Jo. 146. Paſch. 33 Car. 2. B. R. Allen v. Chamming.

(F. b) Traverſe. *Good.* *In reſpect of the Thing.*

1. THE Uſe and Preſcription of *Common appurtenant* was put in Iſſue in Treſpaſs, and yet this *is in the Right*, and the *Action is in the Poſſeſſion.* Br. Preſcription, pl. 89. cites 22 Aſſ. 63. and 30 Aſſ. 42. and 40 E. 3. 31. and 22 H. 6. 51. and 7 E. 4. 26. accordingly, and yet 40 E. 3. 10. he was put out of this Plea. Ibid.

Br. De ſon tort &c. pl. 46. cites S. C. Contra 44 E. 3. 18. inaſmuch as the Defendant made Title to the Ward.

2. In Falſe Impriſonment, the Defendant juſtified to ſeiſe the Plaintiff *by Command of his Maſter, as Ward of the Lord of D. his Maſter, of whom the Father held in Chivalry*, and the Plaintiff was within Age, and retain'd him 6 Months, *and then came one J. next Heir, who was raviſh'd into Scotland in the Life of his Father, by which the Defendant waiv'd him*; Judgment ſi tort &c. Finch ſaid the Father held his Land of J. S. and not of the Maſter of the Defendant. And ſo De ſon tort Demeſne without ſuch Cauſe, and *was not ſuffer'd to traverſe the Tenure*, by which he ſaid that De ſon tort Demeſne &c. Br. Faux Impriſonment, pl. 13. cites 22 Aſſ. 85.

So in Treſpaſs *of a Horſe*, the *Defendant may ſay that the Plaintiff gave him the Horſe, by which he took it*, and the *Plaintiff may ſay that he was poſſeſs'd of 2 Horſes, and gave the one, and the Defendant took it, and alſo took the other, abſque hoc that he gave the Horſe of which the Action is brought*; Per Babb. and Paſton & non negatur, and it ſeems to be good; for where a Man has 2 Acres or Horſes, and leaſes or gives the one which is uncertain, there the Leſſee or Donee by his Entry or Taking makes it certain, and then if he meddles with the other he is a Treſpaſſor; but it was not adjudged. Br. Treſpaſs, pl. 381. cites 9 H. 6. 64.

3. Treſpaſs *in one Acre* of Land *in D.* The *Defendant juſtified by Leaſe of the Plaintiff of the ſame Acre*, where *in Truth the Leſſor had two Acres in the ſame Vill.* And the Opinion was, that it was dangerous for the Plaintiff to ſay that he did not leaſe this Acre, tho' the Treſpaſs was done in the other Acre; but the beſt Opinion was, that he ſhall be aided in this Form, viz. *to ſay that he was ſeiſed of 2 Acres, and leaſed the one, and the Defendant entred into it, and alſo into the other, and did the Treſpaſs, abſque hoc that he leaſed the Acre in which* the Treſpaſs is ſuppoſed. Br. Treſpaſs, pl. 381. cites 9 H. 6. 64.

4. Treſpaſs *againſt the Lord upon Tenure.* The Plaintiff may *traverſe the Tenure*, but *in Avowry the Seiſin.* Br. Treſpaſs, pl. 411. cites 10 H. 6. 3.

5. In Treſpaſs, the *Defendant pleaded his Franktenement*; the *Plaintiff ſaid that he was ſeiſed till by the Defendant diſſeiſed, by which he enter'd*, and the Treſpaſs which &c. the *Defendant ſaid by Proteſtation*, not confeſſing the Diſſeiſin, for Plea ſaid, that the Plaintiff did not re-enter; and the Opinion was, that it was a good Plea, and that the Regreſs is traverſable. Br. Treſpaſs, pl. 367. cites 22 E. 4. 21.

But if he pleads Accord, or pleads *Submiſſion, Arbitrement, and Satisfaction*, the Party may traverſe the Accord, Submiſſion, Arbitrement, or the Satisfaction. For when the *Party will allege the Circumſtances, and need not*, there this is traverſable; quod nota. Br. Traverſe per &c. pl. 179. cites 4 H. 7. 9.

6. *In Treſpaſs, if the Defendant pleads Satisfaction*, this is only traverſable; per Brian. Br. Traverſe, per &c. pl. 179. cites 4 H. 7. 9.

Brownl. 233. Banks v. Barker, Hill 12 Jac. S. C. but S. P. does not appear to be ſpoken to by the Court.

7. In Treſpaſs, the Defendant *juſtified under a Cuſtom of a Manor*; the Plaintiff *replied de Injuria ſua propria abſque tali Cauſa.* The Plaintiff *ſhould not have traverſed the Cauſe generally, but the Cuſtom*; but being only Matter of Form, 'tis help'd by the Statute of Jeofails, for *abſque tali cauſa contains the Cuſtom and more.* Hob. 76. pl. 97. Banks v. Parker.

(G. b) Traverſe *of the Command*. Good or neceſſary. In what Caſes.

1. IN Treſpaſs, if the *Defendant juſtifies by Command* of the Owner, the Command is traverſable. Br. Traverſe per &c. pl. 325. cites 14 H. 4. 32. 9 H. 6. 21 H. 6. 46. 22 H. 6. 34. 33 H. 6. 41, 42. 37 H. 6. 7. 13 H. 7. 13.

But if the Defendant *pleads that the Place where* &c. *is the Franktenement of A.* and he by his Commandment &c. The *Commandment is not traverſable, if the Plaintiff claims by a Stranger*; becauſe *the Franktenement* being in a Stranger *ought to be anſwer'd.* Arg. 6 Rep. 24. a. in Read's Caſe and ſeems admitted, cites Doctrina Placitandi, 352.

2. In Treſpaſs, if the *Defendant ſays that the Anceſtor of the Plaintiff held of J. N. by* Service of *Chivalry, and he by Command of J. took the Infant Plaintiff as Ward*; the Plaintiff ſhall not ſay that De ſon tort demeſne without ſuch Cauſe, but De ſon tort demeſne abſque hoc, that J. N. commanded; by which the Plaintiff ſaid accordingly, and ſo to Iſſue. Br. De ſon tort &c. pl. 42. cites 14 H. 4. 32 & 33 H. 6. 41. accordingly.

3. In Treſpaſs *of Barley, and a Horſe taken*; the *Defendant alleged Property in a Stranger*, and *that the Plaintiff took them and the Defendant by the Command of the Stranger re-took* &c. and the other ſaid, that De ſon tort demeſne without ſuch Cauſe &c. Br. De ſon tort &c. pl. 15. cites 19 H. 6. 65.

4. In Treſpaſs, the Defendant *juſtified by Command* of J. N. The Plaintiff *ſaid that De ſon tort demeſne abſque hoc that J. N. commanded him* Modo & Forma, and the others e contra. Br. De ſon tort &c. pl. 2. cites 33 H. 6. 41.

Br. De ſon tort &c. pl. 13. cites 8 H. 6. 34.

5. In Treſpaſs the *Defendant ſaid that the Franktenement is J. N's, and he, by his Comand, enter'd*; the *Plaintiff made Title by Leaſe of a Stranger, by which he was poſſeſſed till the Treſpaſs* abſque hoc, *that the Defendant enter'd by Command of J. N.* And a good Traverſe per Cur. Br. Traverſe per &c. pl. 137. cites 37 H. 6. 7.

Heath's Max. 121. cap. 5. cites S. C.

6. In Treſpaſs, when the *Command* is *the Effect of the Barr*, it is traverſable, and otherwiſe not. Br. Traverſe per &c. pl. 222. cites 7 E. 4. 2. per Markham Ch. J.

As in Treſpaſs in Land, the *Defendant ſaid that the Plaintiff before the Treſpaſs leaſed to R. at Will, and he by Command of R. enter'd and did the Treſpaſs*; and per Markham Ch. J. it is no Plea *without Privity*, by which he *ſaid, that he by Command &c. enter'd and did the Treſpaſs*; and no Danger of the Traverſe of the Command, for the Leaſe is the Effect and not the Command. Br. Traverſe per &c. pl. 222. cites 7 E. 4. 2.

7. In Treſpaſs for *Graſs cut*, the *Defendant juſtified as Servant of J. S. and by his Command for uſing the Common of the ſaid J. S.* and the *Plaintiff ſaid that the Defendant put in his proper Beaſts, whereof he brought his Action*; and a good Plea *without Traverſe*; for it may be that he put in the Beaſts of J. S. and alſo his own Beaſts, but the *Defendant may ſay that he put in the Beaſts of J. S. abſque hoc, that he put in his proper Beaſts*; Per tot. Cur. Br. Traverſe per &c. pl. 385. cites 11 H. 7. 9.

Heath's Max. 110. cap. 5. cites 11 H. 7. 9.

8. If Treſpaſs be brought *for Cattle taken* &c. and the Defendant *juſtifies as Bailiff to J. S. and by his Command that he diſtrain'd them Damage-Feaſant*; if the Owner did not Command him, he ſhall be a Treſpaſſer. The *ſame Law for a Diſtreſs for Rent Arrear*, for the Command is traverſable; Per Holt Ch. J. in delivering the Opinion of the Court. Ld. Raym. Rep. 309, 310. Hill. 9 Will. 3. in Caſe of Britton v. Cole.

See (Da. 2) pl. 4. Marg.

(H. b) Traverſe of the *Day or Time.* Good or neceſſary. In what Caſes.

1. IN *Falſe Impriſonment* ſuch a Day the Defendant *juſtified another day by Commiſſion to hear and determine Treſpaſſes* &c abſque hoc that he took at another Day, and the other e contra. Br. Traverſe per &c. pl. 115. cites 24 E. 3. 3.

2. Treſpaſs *of Beaſts of the Plow taken the firſt day of May*; the *Defendant juſtified at another day for Services due, and that there were no other Beaſts there*, and traverſed the *day*; and ill, for he ought to traverſe the *Time of the taking* only, and not the Day. Br. Traverſe per &c. pl. 312. cites 33 E. 3. and Fitzh. Brief 915.

3. Treſpaſs of Battery of his Servant the 11 Day of May; the Jury found the *Battery another day*; upon Not guilty pleaded, the Plaintiff recover'd. And ſo the *day not traverſable.* Br. Treſpaſs, pl. 191. cites 39 E. 3. 1.

4. Treſpaſs *by a Biſhop*; the *Defendant ſhew'd certain medling by him at the Time when the Temporalties were in the Hands of the Archbiſhop* of Canterbury, *abſque hoc, that he did any ſuch Act after* that the Temporalties came to the Hands of the Plaintiff, and the Plaintiff maintain'd as here, priſt; and yet the *Anſwer amounts only to the General Iſſue*, as it ſeems, Br. Treſpaſs, pl. 194. cites 39 E. 3. 19.

5. In Treſpaſs of *Aſſault the Monday, where in Truth it was the Saturday*, and he *pleaded Not guilty Modo & Forma*, and the Jury *finds the Truth*, the *Plaintiff ſhall recover*; and therefore the *Defendant ſaid, that ſuch another Day the Plaintiff made an Aſſault upon him, and the Ill which he had was De ſon Aſſault demeſne, and in his Defence, abſque hoc* that he was Guilty before or after the ſame Day that he juſtified; and to this he was compell'd by the Court, quod nota. Br. Traverſe per &c. pl. 75. cites 19 H. 6. 47.

For it was ſaid, that if a Man *juſtifies* in Treſpaſs *for Common between Lammas and Michaelmas*, he ought to traverſe *that he is not Guilty before nor after this Time of Commoning*; quod nota. Br. Traverſe per &c. pl. 16. cites 20 H. 6. 14, 15.

6. In Treſpaſs of *Aſſault and Battery the 10th Day of Auguſt Anno 17. H 6.* the *Defendant juſtified De ſon Aſſault demeſne the 14 Day of Jan. Anno 18 H. 6.* Abſque hoc *that he is Guilty the 10 Day of Aug. Anno 17.* &c. And per Newton and Paſton clearly, he ought to traverſe abſque hoc *that he is Guilty before or after the ſaid 14 Day of Jan.* for if he be found Guilty any other Day he ſhall be condemn'd; and Markham would not traverſe ſo, by which Yelverton demurred. Br. Traverſe per &c. pl. 16. cites 20 H 6. 14. 15.

7. Treſpaſs *of taking his Cow*; the *Defendant juſtified becauſe the Property was to H. R. who ſold it to him at S. in the County of C.* &c. The *Plaintiff ſaid, that the Sale to the Defendant was the third Day of October Anno 20. and before this*, that is to ſay *the 4 Day of Auguſt, in the Year aforeſaid, the ſaid H. R. ſold it to the Plaintiff at C. in the County of N.* And the *other ſaid, that he ſold it to him abſque hoc, that he ſold it to the Plaintiff before* that he ſold to the Defendant, and ſo to Iſſue; for Portington would not traverſe the Day but the Time. Br. Traverſe per &c. pl. 94. cites 21 H. 6. 41.

8. In Treſpaſs the *Defendant juſtifies the taking of Beaſts by Precept of Wytharnam to him directed ſuch a Day before Whitſuntide*; the *other ſaid De ſon tort demeſne abſque hoc, that he had Precept* to him directed *before Whitſuntide, whereas the day that the Plaintiff counted was the Monday before*

ſore Whitſuntide Anno 19 H. 6. Priſt. Danby ſaid he *took the Beaſts* of the Plaintiff *by Force of the Warrant before the ſaid Feaſt*; Priſt; Et ſic ad Patriam. Br. Traverſe per &c. pl. 103. cites 22 H. 6. 36.

9. Treſpaſs. *The Defendant juſtified, becauſe at another day after, the Place where &c was the Soil and Franktenement of J. N. who leaſed to him for* 10 *Years* &c. *and as to any Treſpaſs before Not guilty.* And in Treſpaſs Anno the 18. the Defendant juſtified by Deſcent from his Father the 19. and to any Treſpaſs before Not guilty. Br. Treſpaſs, pl. 160. cites 22 H. 6. 49.

10. In Treſpaſs, the Defendant *pleaded Award made at W. in the County of M. to pay* 10 *s. which he has paid*; the *Plaintiff ſaid that before this the Arbitrators awarded him to pay* 10 *s and a Horſe at D. in the County of C. and he has not paid the Horſe*; the *Defendant maintain'd his Bar abſque hoc that they did Award in the County of C. prout* &c. *before the Award made at W.* Priſt; and the others e contra; and ſo note the County and the Time traverſed. Br. Traverſe per &c. pl. 107. cites 22 H. 6. 52.

11. In Treſpaſs, note, always where a Man *traverſes the Time*, it is no Plea *without ſhewing the day certain.* Br. Traverſe per &c. pl. 165. cites 39 H. 6. * 45.

As in Treſpaſs of [Tearing] *an Obligation bail'd to the Defendant to keep and re deliver*; and he *ſays that it was bail'd to him to deliver over to W. N. which he has done*, abſque hoc *that he* tore *it before the Delivery to W. N.* this is no Plea, without ſhewing at what Day he delivered it to W. N. Quod nota per Cur. by which he ſhew'd the Day &c. and travers'd as above. Br. Traverſe per &c. pl. 165. cites 39 H. 6. 45.

* Miſprinted in all the Editions, and ſhould be 44. pl. 7.

12. Treſpaſs upon 5 *R.* 2 *by A. againſt B.* The *Defendant ſaid that before the Entry J. N. was ſeiſed and infeoffed the Defendant*, and gave *Colour* &c. The *Plaintiff ſaid that before J. N. any Thing had, he himſelf was ſeiſed in Fee till by B. diſſeiſed, who infeoffed the ſaid J. N. who infeoffed the Defendant, upon whom he enter'd and was ſeiſed till* the Treſpaſs. Littleton ſaid *a long Time before the Plaintiff any Thing had B. was ſeiſed and infeoff'd J. N. who infeoffed the Defendant, and the Plaintiff claiming as above, enter'd and was ſeiſed till B. enter'd upon and diſſeiſed him*, abſque hoc *that B. diſſeiſed the Plaintiff before the Feoffment made by B. to the ſaid J. N.* Priſt &c. and the others e contra; and a good Iſſue per tot. Cur. Brook ſays he wonders that the *Time* was traverſed as here; for he ſays it ſeems that the *Diſſeiſin* only ſhall be traverſed. Br. Traverſe per &c. pl. 204. cites 1 E. 4. 6.——And that ſo it was ſaid for Law in C. B. 6 E. 6. per Hale Juſtice and others, and that this Book is not Law. Ibid.

13. In *Falſe Impriſonment*, the *Defendant juſtified at another Day after, abſque hoc that he was guilty before* &c. And there per Danby, the *Plaintiff ought to reply that guilty the Day in the Declaration, priſt* &c. and yet if he be found guilty any Day that the Defendant has not juſtified, the Plaintiff ſhall not recover; but the Plaintiff *cannot reply that guilty Modo & Forma prout* &c. for *this goes as well to the Day that the Defendant has juſtified, as to other Days*, which is ill; quod Danby conceſſit. Br. Replication, pl. 40. cites 5 E. 4. 5.

14. Treſpaſs of *Aſſault the 1ſt of July, Anno* 2 *R.* 3. *Defendant ſaid that poſtea, viz.* 4 *Die Januarii in the ſame Year, the Plaintiff made an Aſſault upon the Defendant, and he beat him in his Defence, abſque hoc that he was guilty before or after the ſaid 4th Day* of January. The *Plaintiff ſaid that De ſon tort Demeſne abſque tali cauſa*; and it was ſaid that the Plaintiff *ought to reply that guilty Modo & Forma* &c. *But* he *may give other Day in Evidence.* Brook makes a Quære, and ſays *Mirum!* becauſe the Day only is now in Iſſue. Br. General Iſſue, pl. 92. cites 2 R. 3. 11.

And there it was ſaid that the Defendant in ſuch Caſe *pleaded Releaſe of the Plaintiff before the Day of the Battery ſuppoſed in the Declaration, abſque hoc that he was guilty after*, and the *Iſſue was joined upon the Releaſe*; Quod mirum eſt by the Reporter; *Quære* Legem; for it is only a Note. Ibid.

15. Falſe Impriſonment. The Plaintiff *ſuppoſed the Treſpaſs and Falſe Impriſonment to be* 10 *December* 29 *Eliz.* The Defendant *pleads that he by a Warrant of the Sheriff* &c. *did arreſt and impriſon him* 2 *&* 3*d Die Decemb. before, abſque hoc that he was guilty before or after* &c. The Plaintiff *replied he was guilty* &c. *after the* 3*d Day of Decemb. prout* in Narratione ſua ſpecificatur; it was found for the Plaintiff. It was moved that the Iſſue was not well join'd; for it is that he was guilty &c. after the 3d Day &c. but *ſays not*, and *before the Action brought*. But it was ruled to be well join'd; for when it is ſaid he was guilty after the 3d Day &c. prout &c. it is to be intended between the 3d Day and the Day of the which he counted. And the Plaintiff had Judgment. Cro. E. 95. pl. 6. Paſch. 30 Eliz. B. R. Richardſon v. Pricket.

So in Treſpaſs for *taking two Hats in Suſſex* 10 *Jan.* 35 *Car.* 2. The Defendant *juſtified for Stallage in a Fair by Preſcription at G. in Kent, on Sept.* 14. 35. *Car.* 2. &c. *quæ eſt eadem* tranſgreſſio &c. *and traverſed* that he was Guilty of the taking *any where out of the ſaid Fair*; and upon a Special Demurrer, for that the Plea did not anſwer the Declaration, it was inſiſted that the Traverſe was ill, becauſe the Defendant did *not traverſe the Time of the taking, as well as the Place*; but per Cur. the Concluſion quæ eſt eadem with a Traverſe of the Place, is good without a Traverſe of the Time. And Judgment for Defendant. 3 Lev. 227. Trin. 1 Jac. 2. C. B. Bodle v. Wilkins.

16. Treſpaſs was *alleged to be done* 7 *Maii*. The Defendant *juſtified on the* 10*th of May, and concluded his Plea* thus, *Quæ eſt eadem* Tranſgreſſio. And upon Demurrer this was held a good Plea by 3 Judges againſt Yelverton; for the preciſe Day need not be anſwer'd; *'tis ſufficient that the Juſtification be on another Day, ſo as there is an Averment that 'tis eadem* Tranſgreſſio. And Judgment Quod querens nil capiat &c. Bulſt. 138. Trin. 9 Jac. Vaſtenope v. Taylor.

2 Saund. 294. S. C. adjudg'd for the Plaintiff. —2 Keb. 735. pl. 28. S. C. adjudg'd accordingly.

17. Treſpaſs for *entring his Cloſe and taking his Goods* 9 *Oct.* 20 *Car.* 2. the Defendant *pleaded that R.* was ſeiſed in Fee, and 23 *July* 20 *Car.* 2. *demiſed the Place where to the Defendant, and that he* 16 *July demiſed to the Plaintiff for a Quarter of a Year, which ended* 16 *October* 20 *Car.* 2. *and becauſe the Goods were there after the Quarter of a Year ended, he took them Damage feaſant, abſque hoc that he took them* 9 *October, or on any Time within the Quarter of the Year.* The Plaintiff *replied De injuria ſua propria abſque tali cauſa*; upon which the Defendant demurr'd. And it was reſolv'd that the Replication De injuria &c. abſque tali cauſa was ill; for it may be that he took them before the Quarter of the Year, and before the Demiſe to the Defendant by R. by which Judgment was given for the Plaintiff. And it ſeems that the Traverſe ought to be Abſque hoc that the 9th October, or any Time before the 23d July, or during the Quarter of the Year &c. Lev. 307. Hill. 22 & 23 Car. 2. B. R. White v. Stubbs.

18. In Treſpaſs the Defendant *juſtified by a Precept out of a Hundred Court*, and *traverſed that he was guilty before the Delivery of the Precept, or after the Return*. And upon Demurrer it was *objected, that* this Traverſe is not good; *it ſhould have been before the Teſte, or after the Return* of the Precept; Sed non allocatur; for if the Traverſe is too narrow, 'tis to the Prejudice of the Defendant, and not of the Plaintiff. 2 Lev. 81. Hill. 24 & 25 Car. 2. B. R. Doe v. Parmiter.

19. In an Action of Treſpaſs &c. the Defendant *juſtifies by a Licence* &c. *and* in his Juſtification *agrees in Time with the Plaintiff's Declaration*. He *need not traverſe before and after*, and cites Hob. 104. But then the *Plaintiff may vary his Time*. Freem. Rep. 246. pl. 257. (bis) Hill. 1677. Anon.

20. In Treſpaſs, Aſſault, and Battery, the Defendant *pleaded a General Releaſe of all Actions* &c. from the Beginning of the World, *uſque ad Diem datus* of the ſaid Releaſe. And *it happen'd, that the Battery was done upon that very Day in which the Releaſe was dated*; ſo that it was held that this Action was not diſcharg'd, for the Releaſe did not include that Day. The Defendant *ſhould have traverſed all* &c. *after the Day of the*

the Date of the Releaſe. 4 Mod. 182. Paſch. 5 W. & M. in B. R. Dixon v. Terry.

21. In Treſpaſs laid to be *done 1ſt of Auguſt*, the Defendant *juſtifies for Right of Common after the Corn is cut, and that after it was cut he put in his Cattle, abſque hoc quod eſt culpabilis aliter vel alio modo.* And upon a Demurrer to this Plea it was adjudg'd ill, becauſe it *did not anſwer the Treſpaſs done 1 Auguſt, it having no Reference to that Time.* 3 Salk. 357. pl. 14. Paſch. 9 Will. 3. Anon.

22. In Treſpaſs of *Battery and Falſe Impriſonment*, the Defendant *juſtifies under a Capias, teſte the 27 Jan. and returnable 10th of April following*, and ſays, *that by Virtue thereof he took the Plaintiff the 9th of March, and diſcharg'd him the 10th; abſque hoc, that they were guilty at any Time before the Teſte, and after the Return of the Writ*; ſo that there is a Time not traverſed, in which the Defendants may be guilty, notwithſtanding any thing that appears to the contrary, viz. between the 10th of March, which was the Day of the Diſcharge of the Plaintiff, and the 10th of April, which was the Return-Day of the Writ. And they cited Carter 84. * **Atkins v. Cleaver.** And of this Opinion was the whole Court. Ld. Raym. 231. Trin. 9 W. 3. in Caſe of Truſcott v. Carpenter and Man.

* This Caſe was Mich. 18 Car. 2. in C B. but adjornatur. Cart. 86.

(I. b) Traverſe *of the Place neceſſary* in what Caſes.

1. IN Treſpaſs of *Battery at B.* the *Defendant ſaid, that the Plaintiff the ſame Day aſſaulted him at S. and the Ill which he had was De ſon Aſſault demeſne, and in his Defence*, abſque hoc, *that he aſſaulted him at B.* And the *Plaintiff ſaid, that De ſon tort demeſne, without ſuch Cauſe*; and well, per Cur. *without maintaining the Place*, becauſe B. and S. were *in one and the ſame County*, and the Treſpaſs tranſitory. Br. Traverſe per &c. pl. 38. cites 43 E. 3. 29. Heath's Max. 108. cap. 5. cites S. C.

2. *Contra* where the Place was *in another County, or* if it was of *Treſpaſs local*; per Cur. in the Abſence of Thorp. But ſome of the Perſons preſent ſaid, that he ought to have maintain'd his Writ. Br. Traverſe per &c. pl. 38. cites 43 E. 3. 29. Heath's Max. 108. cap. 5. cites S. C.

3. In Treſpaſs, *in Middleſex, of Goods carried away*, the Defendant *juſtified the Taking in London, by reaſon of a Gift*; and no Plea, without traverſing the taking in Middleſex. Br. Traverſe per &c. pl. 47. cites 11 H. 4. 3. In *Treſpaſs in Middleſex, of Goods* &c. the *Defendant may plead Gift in Eſſex*, by which he took them, and ſhall not traverſe; for *Gift* is ſufficient to take the Goods in any County. Br. Traverſe per &c. pl 71. cites 19 H. 6. 50. 71.——S. P. Ibid. pl. 127. cites 9 E. 4. 26.—S. P. Ibid. pl. 300. cites 9 E. 4. 49. 50——S. P. per Priſot. *Contra* of Delivery; for the Delivery cannot be but in one Place only. Br. Traverſe per &c. pl. 284. cites 34 H. 6. 5.

4. In Treſpaſs of *cutting Reeds in D.* it is no Plea, that the Place where &c. is *in S. and not in D.* but may juſtify in another Place by ſpecial Matter, abſque hoc that he is guilty in D. Br. Traverſe per &c. pl. 55. cites 9 H. 5. 9. Br. Treſpaſs, pl. 107. cites S. C.

5. In Treſpaſs local in D. the *Defendant juſtified in S. in the ſame County, and to the Treſpaſs in D. Not Guilty*; and well; for he ought to traverſe in *Treſpaſs local*, Contra in Treſpaſs *tranſitory*. Br. Traverſe per &c. pl. 291. cites 14 H. 6. 21.——and 8 H. 6. 36. In Treſpaſs *Tranſitory, as Battery, or Goods carried away, the Place ſhall not make Iſſue*, nor is it traverſable, no more than in Treſpaſs upon the Caſe of an Aſſumpſit, and thoſe may be continued. *Contra of Treſpaſs local, as Trees cut, and Graſs mow'd.* Note the Diverſity. Br. Traverſe per &c. pl. 283. cites M. 2. M. 1.

Treſpaſs of *Aſſault and Battery in London.* The Defendant *juſtified in the County of N.* by a Warrant from the Sheriff of N. upon a Latitat, Quæ eſt eadem Tranſgreſſio, abſque hoc that he was guilty in London, or elſe where extra Com' N. It was *demurr'd becauſe he juſtifies, and alſo traverſes.* But the Court held it well enough, becauſe the *Juſtification being in another County, the County where the Action is brought ought to be traverſed*, and the Plaintiff may maintain the Action and Iſſue if he will, or traverſe the Plea at his Election. Cro. J. 372. pl. 1. Trin. 13 Jac. B. R. Bateman v. Woodcock.——Roll Rep. 221. pl. 26. S. C. adjudg'd accordingly, tho' it was objected, that the Plea is double; for the Juſtification in N. Quæ eſt eadem Tranſgreſſio, had been ſufficient without more, and then the Traverſe makes it double, and ſaid he had a Report in Point adjudg'd accordingly. But the Court told him, that he could not take Advantage of this upon a General Demurrer.

6. In Treſpaſs *againſt J. N. of F.* it is no Plea, that he *was dwelling at B. the Day of the Writ*, unleſs he ſays *and not at F.* Quod nota. For the Negative makes the Iſſue. Br. Traverſe per &c. pl. 67. cites 19 H. 6. 1.

7. Bill of *Diſceit*, for that the *Defendant, Deputy of the Sheriff of B. imbeſill'd a Writ* of Habeas Corpus *in the County of Middleſex, and brought the Bill in Middleſex.* The *Defendant ſaid, that the High Sheriff of B. by J. N. his Under-Sheriff, commanded him at B. in the ſaid County of B. to retain it after the Delivery, and before the Subſtraction, and not to return it, by which he retain'd it, which is the ſame Subſtraction* &c. And by the beſt Opinion, becauſe he ſaid, that it is *the ſame Subſtraction*, which is *in another County*, and does not traverſe the Subſtraction in Middleſex alleg'd in the Bill, it is no Plea. Br. Traverſe per &c. pl. 71. cites 19 H. 6. 50. 71.

8. *So of Falſe Impriſonment in Middleſex*, and the *Defendant juſtifies in Eſſex*, he *ought to traverſe in Middleſex*; Per Markham. Br. Traverſe per &c. pl. 71. cites 19 H. 6. 50. 71.

In Treſpaſs *of Battery in C.* the *Defendant may juſtify in B. if it be in the ſame County*, without ſaying that the Aſſault continued, and without traverſing the Aſſault in C. Quod nota, which the Court granted. Br. Traverſe per &c. pl. 287. cites 35 H. 6. 50. 51.

9. *Treſpaſs of Battery and Impriſonment at W.* the *Defendant juſtified at S. becauſe the Defendant would have robb'd at S.* abſque hoc, *that he impriſon'd him at W.* And the Abſque hoc was outted; for he *may juſtify by this Matter in any Place in this County.* Br. Traverſe per &c. pl. 127. cites 9 E. 4. 26.

10. *But* if he juſtifies *by Franktenement in another Vill*, there ought to be a Sans ceo. Br. Traverſe per &c. pl. 127. cites 9 E. 4. 26.

11. Treſpaſs of *cutting and carrying away in C.* the Defendant *juſtified in B.* And becauſe he does not anſwer to the Treſpaſs, Judgment was given for the Plaintiff; for he ought to have traverſed Abſque hoc, that he is guilty in C. But *otherwiſe* it is *in* Treſpaſs of *Battery.* 2 Roll Rep. 495. Hill. 22 Jac. B. R. Oxford (Bp.) v. Adams.

(K. b) Traverſe of the Place. *Good* or not.

1. IN Treſpaſs of *Sheafs taken*, the *Defendant juſtified for Tithes*, and *the other the like, both as Parſons of 2 Pariſhes*; and the Iſſue was, *if the Place was in one Pariſh or the other.* Br. Traverſe per &c. pl. 340. cites 50 E. 3. 20.

Heath's Max. 108. cap. 5. cites S. C.

2. In Treſpaſs of Goods taken, the *Defendant ſaid that before the Plaintiff any Thing had, J. S. was poſſeſs'd &c. and bail'd to W. N. in another Place in the ſame County, who made the Defendant his Executor, and died, and the Defendant ſeiſed them as Executor in another Place in the ſame County* which the Plaintiff did not count of, *and the Plaintiff took them, and the Defendant*

Defendant re-took them, abſque hoc that he took them in the Place where the Plaintiff counted; Per Babb. Juſt. This is no Plea, where the * whole is in one and the ſame County. Contra if it was in diverſe Counties; for then you ſhall have the Traverſe, by which he omitted the Traverſe. Br. Traverſe per &c. pl. 62. cites 7 H. 6. 35.

* Orig. is (Tenant) in the large Edition, but the others are (tout.)

3. *Treſpaſs in D. in the County of Derby.* The *Defendants juſtified in T. in the County of Nottingham, abſque hoc that they are guilty in D. Modo & Forma.* And per Cur. Nothing was entered but Not guilty; for he cannot juſtify in another County, abſque hoc that he is guilty in the County named in the Writ; for in Treſpaſs in D. upon Not guilty, the *Jury may find him guilty in another Vill in the ſame County, but not in another County*; for this is a void Verdict. Br. Treſpaſs, pl. 19. cites 9 H. 6. 62.

4. Treſpaſs upon the Caſe, for that the *Defendant ſold to him certain Wood at N. for 20l. and ſhew'd a Portion of that which was good and merchantable, and warranted the reſt to be as well mark'd as the Portion was*, whereas the Remnant was defective, to the Damage of 20l. Newton ſaid he ſold to him certain Wood at B. and warranted this Wood good and merchantable, that is to ſay for ſuch a Sum and ſo many * Parcels as the Plaintiff had declared, which was good and merchantable, abſque hoc that he ſold to him at N. prout &c. and a good Plea per tot. Cur. Br. Traverſe per &c. pl. 150. cites 14 H. 6. 22.

* Orig. is (Veſſels) in all the Editions; but the Year-Book is (Parcels.)

5. Treſpaſs *of Impriſonment and Battery at B. in the County of H.* [till] he made Fine. Yelverton ſaid Actio non; for *as to the Vi & Armis Aſſault and Battery Not guilty*, and *to the Impriſonment that he ſued Attachment againſt the Plaintiff, directed to the Sheriff of London* to arreſt the Plaintiff, returnable ſuch a Day, *to anſwer him of a Treſpaſs &c. by which* A. B. *Miniſter of the Sheriff at B. in the Ward of B. in London*, by Virtue of the Attachment *arreſted the Plaintiff, and carried him to the Compter, and the Defendant came in Aid of him, abſque hoc that he is guilty of the Impriſonment at B. Modo & Forma, and* to the Fine *pleaded Not guilty.* Markham ſaid *Guilty at D. in the County of H. priſt* &c. and the others e contra. Quære of this Traverſe; for it ſeems that *it ought to be Aſque hoc that he is guilty in the County of H.* Br. Traverſe per &c. pl. 73. cites 19 H. 6. 35.

6. In Treſpaſs of *Goods taken at E.* Forteſcue pleaded Actio non; for *before the taking the Plaintiff himſelf delivered the Goods to the Defendant at C. in the County of Middleſex, to deliver to S. N. which he has done*, abſque hoc *that he is guilty of the taking at E.* & hoc &c. and demanded Judgment ſi Actio; and upon Argument it was held a good Plea per tot. Cur. Br. Traverſe per &c. pl. 74. cites 19 H. 6. 43.

S. P. Per Priſot; for there is no Meſne Inſtant. Br. Traverſe per &c. pl. 284. cites 34 H. 6. 5.

7. Treſpaſs of *Goods taken at E. in the County of York.* Forteſcue ſaid the Plaintiff *bail'd* to us *the ſame Goods at N. in the County of Middleſex to bail to J. S.* &c. abſque hoc *that he is guilty at E. in the County of York*, priſt &c. And the Opinion of the Court was, that it is a good Plea. Brook ſays, *Quære* if he ſhall not *traverſe the Taking* in the County of York; for the Place certain is not much to the Purpoſe. Br. Traverſe per &c. pl. 76. cites 19 H. 6. 48.

In Treſpaſs of *Battery* of his Servant *at B. in the County of E.* the *Defendant juſtified De ſon tort Demeſne at F. in the County of Middleſex*, abſque hoc *that he is guilty in the County of E. and not at B. in the County of E.* and good, and the other e contra; quod nota, the *County travers'd*, and *not the Place*; for if he be be guilty at any Place in this County, it is ſufficient for the Plaintiff. Br. Traverſe per &c. pl. 85. cites 21 H. 6. 8. 9.——Heath's Max. 108. cites S. C.——Br. Traverſe, pl. 293. cites S. C.

So in Treſpaſs of *cutting his Graſs at D. in the County of D.* the *Defendant juſtified at S. in the County of S. abſque hoc* that he is guilty at D. in the County of D. Et non Allocatur; for by the Opinion of the Court he *ought to traverſe the Treſpaſs in the County of D and not the Place*; by which he did accordingly, and a good Plea per Cur. Quod nota. Br. Traverſe per &c. pl. 102. cites 22 H. 6. 35.

In Treſpaſs the Plaintiff declared on a *Battery at D. in the County of Middleſex*, the Defendant *pleaded Son Aſſault at S. in the County of G. abſque hoc that he was guilty at D. in the County of Middleſex*, upon Demurrer it was inſiſted that the Traverſe was not good, and put a Difference between *Juſtification local and tranſitory.* And it was adjudged after many Motions, that the County was not traverſable, and ſo

Judgment was given for the Plaintiff, Gawdy J being of a contrary Opinion. 2 Le. 79. pl. 104. Paſch. 26 Eliz. B. R. Partridge v. Pool.——3 Le. 97. pl. 139. S. C. in the ſame Words.

8. Treſpaſs *in A. in the County of B.* the *Defendant juſtified by Precept of the Sheriff* &c. *at S. in another County*, abſque hoc *that he is guilty in the County of B.* and the *other ſaid that guilty at B.* priſt, and to this he was received; and yet if he be found guilty in any Place in the County of B. the Plaintiff ſhall recover, notwithſtanding the Rejoinder in B. but it ſeems that he ſhall ſay, Guilty in the County of B. prout &c. but quære inde. Br. Traverſe per &c. pl. 79. cites 19 H. 6. 57.

9. Treſpaſs of a *Cloſe broken, and Battery at N.* The *Defendant to the Cloſe broken juſtified in C. abſque hoc that he is guilty in N.* and well, becauſe it is *all in one and the ſame County*; for otherwiſe it ſeems that he ſhall ſay *Not guilty, if it was in another County*, as in 9 H. 6. *and to the Battery he juſtified in C. abſque hoc that he is guilty in N.* and the Traverſe was ouſted, becauſe it was a *Treſpaſs tranſitory*. Br. Traverſe per &c. pl. 90. cites 21 H. 6. 26.

10. Where the *Defendant in Treſpaſs of Corn intitles himſelf to the Tythes ſever'd* &c. *as Parſon of A. alleging that all the Vill of B. is in the Pariſh of A. and that thoſe Tythes grew in* B. and the *Plaintiff intitles himſelf by Sale of the Tythes by the Parſon of O. for 7 Years, and that they grew in a Place called P. in B.* Abſque hoc that all the Vill of B. is in the Pariſh of A. this is a good Traverſe by Award. Br. Traverſe per &c. pl. 95. cites 21 H. 6. 43.

11. In Treſpaſs of *Aſſault to his Servants at B.* it is held a good *Plea that the Servants were cutting the Graſs of the Defendant at C. by which he prohibited them, and laid his Hands upon them* and commanded them to go out of his Land, abſque hoc *that he aſſaulted them at B.* And yet *Contra* 'tis ſaid, *where the Defendant juſtifies by the Aſſault made by the Plaintiff himſelf to the Defendant. Note the Diverſity*; for *in the firſt Caſe the Juſtification ariſes by Reaſon of the Soil*, Contra in the ſecond Caſe, and therefore in the one Caſe the Place is traverſable, and in the other not. Br. Traverſe per &c. pl. 17. cites 27 H. 6. 9.

12. In Treſpaſs *of Beaſts wrongfully taken in D.* The *Defendant ſaid that he was ſeiſed of 2 Acres in S. and found them there Damage Feaſant, and he took them there*, abſque hoc *that he is Guilty in D.* And a good Plea *without traverſing all the County*, otherwiſe it is of things which may be continued, as Battery or Goods carried away. Br. Traverſe per &c. pl. 306. cites 11 E. 4. 9.

13. Treſpaſs *of Goods taken at D. in the County of Middleſex*, Defendant pleaded that *before the Treſpaſs ſuppoſed J. S. was poſſeſs'd thereof, and bail'd them to the Plaintiff in the County of E. for ſafe Keeping there, and after J. S. commanded the Defendant to take the Goods of the Plaintiff in the County of E. by which he took them at N. in the County of E. and delivered them to the ſaid J. S.* abſque hoc *that he took them at D. in the County of Middleſex*; and becauſe his Warrant was to take them in the County of E. therefore a good Plea for the Loſs of his Evidence, and ſhall not be compell'd to take the General Iſſue. Br. Traverſe per &c. pl. 278. cites 22 E. 4. 39.

14. In *Battery* &c. the Action was *laid in London*, when in Truth it was *done at Uxbridge*; the Defendant *pleaded that on ſuch a Day and Year the Plaintiff at A. in the County of H. made an Aſſault upon him and the Harm* &c. *abſque hoc that he is guilty in London.* The whole Court held it a good Plea. Goldsb. 2. pl. 5. Paſch. 28 Eliz. Webſter v. Paine.

15. Replevin. The Defendant *avows the taking in Wh. Acre Damage feaſant*; The Plaintiff *replies that they were taken in Bl. Acre, abſque hoc that they were Damage feaſant in Wh. Acre*; and it was thereupon demurr'd. The Court without Argument ruled it to be an ill Traverſe; for he *ought to have travers'd the Place of the Taking*, and not that they were

were Damage feaſant; and adjudged for the Avowant. Cro. E. 372. pl. 11. Hill. 37 Eliz, B. R. Watts v. Hagden.

16. In Treſpaſs *for killing his Dog at E.* the Defendant *juſtified in D.* within the ſame County *as Warrener there, and that the Dog was killing of Conies* as he had done before, abſque hoc &c. that he is guilty apud E. prout &c. And it was thereupon *demurr'd, becauſe he* traverſes the Place only &c. and *does not traverſe all other Places.* But all the Court held that the Traverſe was good when his Cauſe of *Juſtification is Local*, and that he needed not allege any more than that Place. Wherefore it accordingly was adjudg'd for the Defendant. Cro. J. 44, 45. pl. 13. Mich. 2 Jac. B. R. Wadhurſt v. Damme.

17. Treſpaſs of *Falſe Impriſonment* at C. The Defendant *juſtified as Steward of the Court of the Stanneries at A. by Proceſs of the Court there; abſque hoc, that he was guilty at any Place extra Juriſdiction' Curiæ Stannariæ; but neither juſtifies or traverſes the Impriſonment alleged at C.* which might be within the Juriſdiction, and was not anſwer'd to; and therefore Judgment was given againſt the Defendant for Default in the Plea, becauſe the Traverſe was not large enough. 2 Lutw. 1563. in the Appendix, in the Argument of Sir John Powell in the Caſe of **Gwinne v. Poole**, cites 1 Roll Rep. 264. Evely v. Sloley.

2 Bulſt. 326. Hill. 12 Jac. S. C. adjudg'd accordingly.—Roll Rep. 264. pl. 37. Mich. 13 Jac. B. R. adjudg'd accordingly.—Hob. 180. pl. 216. **Slowley v. Eveley**, S. C. in the Exchequer; but S. P. does not appear.——Cro. J. 439. pl. 11. Mich. 15 Jac. in the Exchequer, **Euſey v. Sloley**, S. C. but S. P. does not appear.

18. Treſpaſs of *breaking his Cloſe, and digging his Soil.* The Defendant *pleads, that the Place where is 2 Acres call'd Bl. Acre, which is his Freehold*, and ſo juſtifies. The Plaintiff *replies, that the Place call'd Bl. Acre is his Freehold, abſque hoc, that it is the Freehold of the Defendant.* The Defendant demurr'd, becauſe it is but a common or *blank Bar*, and is only to inforce the Plaintiff to aſſign his Treſpaſs in a Place certain, the Declaration being general, and ſo the Bar not traverſable; and of that Opinion were Doderidge and Chamberlain. But Houghton e contra, and the Plaintiff may aſſign a new Place, or traverſe this Bar at his Election; per quod adjornatur. Cro. J. 594. pl. 16. Mich. 18 Jac, B. R. Rickman v. Coxe.

19. In Treſpaſs for *breaking and entring his Cloſe call'd Horn-Hill in the Pariſh of R. and chaſing, taking, and impounding his Sheep there found* &c. The *Defendant as to all, beſides the Chaſing, Taking, and Impounding, pleads Not Guilty*; and *as to that*, he *juſtifies that he was ſeiſed in Fee of a Cloſe call'd Orchards in R. and took the Sheep there Damage feaſant* &c. *Abſque hoc, that he took and impounded them in the Cloſe aforeſaid call'd Horn-Hill, Modo & Forma*, as the Plaintiff declared. The Plaintiff demurr'd ſpecially, and adjudg'd for him, becauſe the Traverſe is ill, it being of Matter not alleg'd; for the Plaintiff does not ſay that the Defendant took the Sheep in the Cloſe call'd Horn-Hill, but ſays *(Ibidem inventas)* which (Ibidem) refers to the Pariſh, and not to the Cloſe; 1ſt, becauſe Horn-Hill was the Plaintiff's Soil, ſo that the Defendant could not impound the Plaintiff's Sheep in the Plaintiff's Soil. 2dly, *Ibidem* is always referr'd to the Vill, that the Venue may come from thence, which cannot come out of a Cloſe. But the Court thought this an idle Traverſe, and would have been Surpluſage on a General Demurrer; but being upon a Special Demurrer, it vitiates the Plea. Ld. Raym. Rep. 121. Mich. 8 W. 3. Nevil v. Packman.

2 Lutw. 1447. **Nevill v. Peckham**, S. C. with the Exceptions and Anſwers, and ſome Obſervations of the Reporter; but I do not obſerve any thing ſaid by the Court.

(L. b) Treſpaſs. *Prohibited or puniſh'd by Statute.*

1. 43 *Eliz.* cap. 7. ENacts, That *if any lewd Perſon ſhall cut, or unlawfully take away any Corn or Grain growing, or rob any Orchards or Gardens, or break or cut any Hedge, Pales, Rails, or Fence, or dig or pull up, or take up any Fruit-Tree or Trees in any Orchard, Garden, or elſewhere, to the Intent to take and carry away the ſame, or ſhall cut or ſpoil any Woods or Underwoods, Poles or Trees ſtanding (not being Felony) ſuch Offenders, their Procurers or Receivers, knowing the ſame, being convicted by Confeſſion, or one Witneſs, before one Juſtice of Peace, Mayor, or other Head Officer, ſhall make ſuch Satisfaction to the Party, and within ſuch Time as ſuch Juſtice or Head Officer ſhall appoint; and if ſuch Offender ſhall not be thought able or ſufficient to make Satisfaction as aforeſaid, then the ſaid Juſtice ſhall commit the Offender to the Conſtable to be whipp'd; and for every future Offence ſhall alſo receive the ſame Puniſhment of Whipping.*

And if any Conſtable do refuſe, by himſelf or ſome other, to execute the ſaid Puniſhment, he ſhall be committed to the Common Goal until the ſaid Offender be puniſhed as aforeſaid.

Provided that no Juſtice of Peace do execute this Statute for any Offence done to himſelf, unleſs he be aſſociated with one or more Juſtice of Peace not concerned in the Matter.

It was objected to a Conviction upon this Statute, 1ſt. That the *Defendant was ſtiled Gentleman*, and a Gentleman was not within the *Statute* which ſpeaks *of Vagabonds and ſuch baſe People, and inflicts a baſe Puniſhment*, viz Whipping, which the Law did never intend for a Gentleman. 2dly, That the Conviction is uncertain, for *want of ſhewing the number of Trees.* Per Curiam, As to the firſt, whether the Defendant be a Gentleman or not, is not material; for if a Man of Quality will do a baſe or a mean Thing, there is no Reaſon or Juſtice why he ſhould be exempted from the Puniſhment: The Quality of the Offender is rather an Aggravation than a leſſening of the Offence. To the ſecond, The Number as well as the Nature of the Trees ſhould be expreſſed, for this is like an Action of Treſpaſs in this reſpect, that the Plaintiff is to recover Damages, of which the Number and Nature of the Trees is to be the Meaſure; and if an Action of Treſpaſs ſhall hereafter be brought for theſe Trees, this Conviction ought to be a Plea in Bar. Salk. 181, 182. pl. 2. Trin. 2 Ann. B. R. the Queen v. Barnaby.

2. 21 *Jac.* 1. *cap.* 16. Enacts, that *in Caſes of involuntary Treſpaſs Tender of amends may be pleaded in Bar.* See Tender (S) and the Notes there.

As to what Puniſhments ſhall be inflicted, and what Coſts and Damages ſhall be recovered in Proſecutions and Actions of Treſpaſs, ſee Tit. **Damages and Coſts**, Tit. **Game** (A), and Tit. **Woods**.

For more of Treſpaſs in General, See **Actions**, **Common Diſtreſs**, **Nuſance**, and other proper Titles.